

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

No. 43060-6-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

JENNIFER ANE CRANE (fka BROWN),
Respondent

v.

TERRY LEE BROWN, SR.,
Appellant

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The trial court erred by averaging all Mr. Brown's overtime hours worked in the past seven years and including them in the child support calculation despite evidence that the overtime hours available to Mr. Brown had been drastically reduced over the last three years and would continue to be at a reduced amount in the future.

Final Order of Child Support, 1/27/12 (CP 415-434)
1/6/12 Verbatim Report of Proceeding (VRP) 37-38 (oral finding)

2. The trial court erred when it denied entering a judgment for reimbursement of daycare expenses paid by Mr. Brown but not actually used as required by RCW 26.19.080.

Final Order of Child Support, 12/21/11 (CP 352-387)
Final Order of Child Support, 1/27/12 (CP 415-434)
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3. The trial court erred by including all Mr. Brown's Veterans' Administration disability pay in his income for purposes of calculating child support while declining to include mandatory elements of Ms. Crane's income which results in the child support payment being inequitably apportioned between the parties.

Final Order of Child Support, 1/27/12 (CP 415-434)
11/29/11 VRP 3-4

4. The trial court erred when it entered judgment against Mr. Brown for attorney's fees in the amount of \$4,500.00 based solely on the respondent's oral representation to the court that these fees were actually incurred and without the court properly considering RCW 26.09.140.

Final Order of Child Support, 12/21/11 (CP 352-387)
Final Order of Child Support, 1/27/12 (CP 415-434)
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1/6/12 VRP 38 (oral finding)

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by improperly including average hours of overtime pay for the past seven years in a final order of child support despite evidence that available overtime hours were drastically reduced in the last three years and would continue at a substantially reduced level into the future?
Assignment of Error 1.
2. Did the trial court err by declining to enter judgment against the respondent for childcare expenses paid by Mr. Brown but which were not actually incurred?
Assignments of Error 2.
3. Did the trial court err by including all of Mr. Brown's Veterans' Administration payments in his income for purposes of calculating child support while declining to include Ms. Crane's complete income which results in the child support obligation being inequitably apportioned between the parties?
Assignments of Error 3.
4. Did the trial court err by awarding attorney's fees to the respondent based solely on the respondent's oral representation to the court about fees incurred and not properly considering the statute?
Assignment of Error 4.

STATEMENT OF THE CASE

A Final Order of Child Support resulting from a modification proceeding underlies this appeal. At issue is the trial court's final order including 258 hours of overtime pay per a year based upon the average yearly total overtime hours from the prior seven years, the denial of judgment for daycare expenses not actually incurred, and an award of attorney's fees to the respondent based solely on the respondent's attorney's oral representations to the court.

Factual background

Terry Lee Brown and Jennifer Crane were married in 1997 and divorced in 2004. CP 54. During the course of the marriage the parties conceived two children, Lane and Hadley Brown. CP 54. The parties filed for dissolution of marriage on December 17, 2002 and a decree of dissolution along with a final order of child support was entered on October 22, 2004 resulting in a transfer payment of \$900.00 from Mr. Brown to Ms. Crane. CP 55. Mr. Brown was not ordered to pay any additional amounts due to the fact that daycare expenses were incorporated into the 2004 transfer payment. CP 55.

The respondent petitioned the court on June 14, 2007 for a minor modification of the parenting plan along with a modification of child support. Pursuant to the modification of the parenting plan, child support

was adjusted to \$1078.74 on December 7, 2007. CP 15-29. At the time of the modification Judge Serko included language in the parenting plan stating "Vicki Brown shall provide day cares serves for the children at this time. Mother has sole decision making authority to change this." CP 14.

On July 25, 2011 Mr. Brown filed the petition to modify support and seek reimbursement of childcare expenses not actually incurred. CP 30-32. Following extensive discovery by the respondent the matter came before a pro-tem commissioner who issued an oral ruling. The commissioner denied a judgment for childcare reimbursement holding that Judge Serko put the discretion of all daycare issues with the mom. 11/29/11 VRP 2. The commissioner set Mr. Brown's base pay at \$5,588.30 and added on \$177 for longevity pay and \$500 out of his approximately \$1,500.00 of Veterans' Administration pay received every month. 11/29/11 VRP 3. The commissioner excluded all overtime as being too speculative. 11/29/11 VRP 4. Lastly, the commissioner awarded \$4,500.00 for attorney's fees to the respondent without any attorney's fees affidavit or any other sworn statement. 11/29/11 VRP 4.

On December 23, 2011 Mr. Brown filed for revision of the commissioner's ruling and Ms. Crane filed for revision December 27, 2012. CP 388. Mr. Brown brought the court to the attention that the respondent testified that every daycare payment made was by check.

1/6/12 VRP 4-5. However, the respondent was not able to produce check stubs or other proof of payment for \$15,918.00 worth of alleged daycare expenses. 1/6/12 VRP 7-8; CP 207-208. The trial court affirmed the commissioner's ruling holding that Judge Serko had placed sole discretion of all daycare decisions with the respondent. 1/6/12 VRP 38.

The trial court revised the commissioner's ruling to include \$764.00 a month of "average overtime" pay. 1/6/12 VRP 38; CP 415-434. The court reached this number by taking the yearly amount of overtime earned during each of the past seven years of employment and finding an average yearly number of hours and then dividing that over twelve months. The trial court offered no reasoning as to why the total average overtime was being adopted despite evidence that Mr. Brown had not received overtime in such an amount for years and Mr. Brown's employer had filed a sworn statement stating that due to a new union contract overtime hours available to Mr. Brown would be substantially reduced. CP 213.

Lastly, Mr. Brown sought revision of the award of attorney's fees with no fee affidavit or other declaration submitted to show reasonableness on behalf of the respondent. The only reasoning the trial court offered was that "It's clear that Ms. Crane has a need for attorney's fees and Mr. Brown has the ability to pay." 1/6/12 VRP 38; CP 415. The

trial court did not require the respondent to show that the fees were reasonable or even actually incurred.

Mr. Brown now appeals.

Procedural Background

The Appellant filed a petition for modification of child support on July 25, 2011. CP 30. After extensive discovery the matter came before Pro Tem Commissioner David Johnson on November 23, 2011. 11/23/11 VRP. The Commissioner took the matter under advisement and issued his oral ruling on November 29, 2011. 11/29/11 VRP. The parties presented final papers to the Commissioner on December 15, 2011. 12/15/11 VRP. The appellant filed a motion for revision on December 23, 2011 and the respondent filed a cross motion for revision on December 27, 2011. CP 388; 1/6/12 VRP 1. The motions came before the trial court on January 6 2012. 1/6/12 VRP. The court entered a final order of child support on January 27, 2012. CP 415.

ARGUMENT

- I. THE TRIAL COURT ERRED BY INCLUDING THE AVERAGE OF SEVEN YEARS OF OVERTIME HOURS IN THE ORDER OF CHILD SUPPORT DESPITE EVIDENCE THAT THE AMOUNT OF OVERTIME HOURS AVAILABLE TO MR. BROWN HAD BEEN SUBSTANTIALLY REDUCED.**

Standard of Review Pertaining to Modification of Child Support.

The Court of Appeals reviews a modification of child support for abuse of discretion where the challenging party must demonstrate that the trial court's decision is manifestly unreasonable, based on untenable grounds, or granted for untenable reasons. *In re Marriage of Peterson*, 80 Wn. App. 148, 152, 906 P.2d 1009 (1995). In addition, substantial evidence must support the trial court's findings of fact. *Peterson*, 80 Wn. App. at 153. A court abuses its discretion by making a decision based on findings of fact that are not supported by the record. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

The Trial Court Improperly Calculated the Overtime Hours Available to Mr. Brown.

Overtime is presumptively included for purposes of awarding child support; however, a court may exclude overtime pay if it finds that it is a nonrecurring source of income. RCW 26.19.075(1)(b). This determination must be based on a review of the income received in the previous two calendar years. RCW 26.19.075(1)(b). Deviations from the standard calculation of child support are matters within the discretion of the trial court. *In re Marriage of Wayt*, 63 Wn. App. 510, 512-13, 820 P.2d 519 (1991). In exercising its discretion, the court must enter written findings

and conclusions stating its reasons for deviation or denial of deviation.

State ex rel. Stout v. Stout, 89 Wn. App. 118, 123, 948 P.2d 851 (1997).

In re Marriage of Newell, 117 Wn. App. 711, 719 (2003).

It is important to note that the court made no findings as to why it was including 258 hours a year of overtime pay in the income calculations when the unchallenged evidence presented to the court demonstrated that Mr. Brown's overtime hours had drastically been reduced since 2008. CP 213. Ms. Brown argued that the period from 2005 until present showed average overtime hours in the amount of 258 a year. 1/6/12 VRP 20-21. However an average of the 3 most current years show an average of approximately only 60 hours a year of overtime available to Mr. Brown with Mr. Brown receiving no hours of overtime for the period of January to August 2011. CP 213.

The court has abused its discretion by placing substantial weight on income available to Mr. Brown approximately 7 years ago while ignoring evidence of current income. The sworn statement provided by the South Pierce Fire and Rescue chief stating that staffing practices have changed dramatically due to budget concerns and a new union contract further supports the decrease in overtime pay available to Mr. Brown. CP 213.

Lastly, it should be noted that the decrease in overtime hours occurred even prior to Mr. Brown's workplace injury. CP 213; CP 91-184. Mr.

Brown was injured on the job on 11.5.09; however his overtime for 2009 with ten full months of uncompromised work ability was only approximately 120 hours, well below the number of hours adopted by the court. CP 91-184. Given the economic hardship that many municipalities are currently facing, it should come as no surprise that in an effort to reduce staffing costs the fire district has reduced available overtime pay. Strangely the court did not include any of the respondent's overtime pay in her income. Therefore, the court has abused its discretion by adopting an amount for overtime pay that is not supported by the record and not a reoccurring source of income.

The court likewise did not grant a deviation for the number of overnights the petitioner has with the children. The children reside with the petitioner approximately 129 overnights a year and as such the court should have granted a deviation based on the number of overnights.

II. THE TRIAL COURT ERRED BY DENYING REIMBURSEMENT TO MR. BROWN FOR DAYCARE EXPENSES NOT ACTUALLY INCURRED.

RCW § 26.19.080 provides in part:

(3) Day care and special child rearing expenses, such as tuition and long-distance transportation costs to and from the parents for visitation purposes, are not included in the economic table. These expenses shall be

shared by the parents in the same proportion as the basic child support obligation. If an obligor pays court or administratively ordered day care or special child rearing expenses that are not actually incurred, the obligee must reimburse the obligor for the overpayment if the overpayment amounts to at least twenty percent of the obligor's annual day care or special child rearing expenses.

Under RCW 26.19.080(3), day care and special child rearing expenses are to be shared by the parents in the same proportion as the basic child support obligation. If, however, a parent pays these expenses but they were not “actually incurred” by the other parent, “the obligee must reimburse the obligor for the overpayment if the overpayment amounts to at least twenty percent of the obligor's annual day care or special child rearing expenses.” RCW 26.19.080(3). The obligor may institute an action for offset or reimbursement. *In re Marriage of Fairchild*, 148 Wn. App. 828, 831-832 (2009).

Adequate proof of incurred expenses is necessary to prevent “‘a windfall.’” *Dong Wan Kim v. O'Sullivan*, 133 Wn. App. 557, 564, 137 P.3d 61 (2006). The appellant is not aware of any Washington law addressing the necessary proof to establish “actually incurred” expenses under RCW 26.19.080(3).

By comparison, adequate proof to order restitution for future expenses requires more than a victim's estimate of a future expense. *State v. Vinyard*, 50 Wn. App. 888, 892, 751 P.2d 339 (1988). Likewise, damages must be supported by competent evidence in the record. To be competent, the evidence or proof of damages must be established by a reasonable basis and it must not subject the trier of fact to mere conjecture. *ESCA Corp. v. KPMG Peat Marwick*, 86 Wn. App. 628, 639, 939 P.2d 1228 (1997), *aff'd*, 135 Wn.2d 820, 959 P.2d 651 (1998). The proof of damages must not be speculative or self-serving. *Id.* Furthermore, proof of special damages requires a “witness who evidences sufficient knowledge and experience respecting the type of service rendered and the reasonable value thereof.” *Kennedy v. Monroe*, 15 Wn. App. 39, 49, 547 P.2d 899 (1976). *In re Marriage of Fairchild*, 148 Wn. App. 828, 832 (Wash. Ct. App. 2009).

The trial court declined to review the commissioner’s denial of judgment for daycare expenses not actually incurred simply holding that “The child support or daycare, Judge Serko was very clear about the daycare. I’m not changing Judge Serko’s order. That’s why Commissioner Johnson denied the reimbursement.” 1/6/12 VRP 38. However, the final parenting plan entered by Judge Serko on December 7, 2007 does not remove the statutory requirements that the court shall order

reimbursement for any childcare expenses not actually incurred. In relevance the 2007 order reads “Vicki Brown shall provide day cares services for the children at this time. Mother has sole decision making authority to change this.” CP 14.

Judge Serko vested with Ms. Brown the sole decision making authority as to who shall provide daycare to the children. This does not allow Ms. Brown to continue daycare for an unreasonable length of time or collect daycare expenses that are not actually incurred. The provision simply gives decision-making authority to Ms. Crane to select the daycare provider.

Mr. Brown is concerned that the money paid towards daycare expenses was not actually used for said expenses. Mr. Brown learned through discovery that the daycare provider was a close friend of Ms. Crane. CP 207. Furthermore, Mr. Brown was troubled by the fact that the daycare provider was providing care for all three of Ms. Crane’s children, the youngest not being his biological child, and the total amount paid to the provider was largely the amount set forth in the child support worksheets. CP 207. Mr. Brown learned through the discovery process that his biological children often did not even receive any supervision while at “daycare.” CP 208. Mr. Brown questioned whether daycare for his children was even necessary as both children were extremely mature

for their ages and programs through such organizations as the American Red Cross provide training opportunities for children 12 years old to provide daycare for their younger siblings. CP 208. Therefore Ms. Crane has collected daycare expenses not actually incurred.

Here, Ms. Brown was only able to produce evidence that approximately 58% of the total alleged expenses were actually incurred for daycare services even though all expenses were paid by check within the last seven years. However, as noted, the trial court declined to even review this evidence and based its denial of reimbursement entirely on the language of the previous parenting plan entered by Judge Serko. 1/6/12 VRP 38. Therefore, the trial court incorrectly relied on the 2007 parenting plan to deny Mr. Brown reimbursement for daycare expenses not actually incurred.

III. THE TRIAL COURT ERRED BY INCLUDING ALL MR. BROWN'S DISCRETIONARY VETERANS ADMINISTRATION INCOME IN HIS INCOME FOR CHILD SUPPORT PURPOSES.

RCW 26.19.045 provides in part "Veterans' disability pensions or regular compensation for disability incurred in or aggravated by service in the United States armed forces paid by the veterans' administration shall be disclosed to the court. The court may consider either type of compensation as disposable income for purposes of calculating the child

support obligation.” This provision clearly gives the court the discretion as to whether or not disability benefits received from the Veterans’ Administration should be considered when calculating income for determining a party’s child support obligation.

Since the legislature has carefully opted to say that the court “may” include disability benefits as a source of income instead of “shall,” it is clear that there are circumstances where including the benefits as income would cut against the legislature’s intent. The overarching intent of the child support statute is to provide child support orders that are “adequate to meet a child’s basic needs and provide additional child support commensurate with the parents’ income, resources, and standard of living.” RCW 26.19.001. Here there is no dispute that Mr. Brown has a strong income through his fulltime employment as a firefighter. Mr. Brown’s base income provides the necessary financial means to meet the legislative intent. The legislature likely gave the courts the discretion to include disability pay for situations where one parent is fully disabled and has no other source of income to base child support off of, the situation in the present case is clearly a situation where including disability pay as income is not appropriate.

It is clear that the court’s discretion to include disability benefits as income must be looked at in light of the legislative intent and finding as to

child support. The legislature states in part “The legislature also intends that the child support obligation should be equitably apportioned between the parties.” RCW 26.19.001. Here the trial court failed to equitably apportion the child support obligation between the parties.

The trial court included all of Mr. Brown’s discretionary sources of income and at the same time declined to include any of Ms. Crane’s discretionary sources of income. CP 415-434. The trial court offered no findings as to substantiate its ruling. 1/6/12 VRP 37. Ms. Crane sold a home that netted her over \$100,000 and likewise received \$22,000 from several lawsuits she filed. CP 209. Ms. Crane does not deny that she received these funds and as such they were income to her that should have been included for the purpose of calculating child support obligations. Therefore the court inequitably apportioned the child support obligation between the parties by including all of Mr. Brown’s discretionary income while declining to include income available to Ms. Crane.

IV. THE TRIAL COURT ERRED BY AWARDING A JUDGMENT FOR ATTORNEY’S FEES BASED SOLELY ON RESPONDENT’S ORAL STATEMENTS TO THE COURT AND WITHOUT PROPER CONSIDERATION TO STATUTE.

Standard of Review Pertaining to Attorney’s Fees Award.

Attorney’s fees may be awarded only when authorized by a contract, statute, or recognized ground in equity. *Bowles v. Dep’t of Ret.*

Sys., 121 Wn.2d 52, 70, 847 P.2d 440 (1993). RCW 26.09.140 provides for an award of reasonable attorney fees “from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter...”

A trial court's decision to award fees under this provision is reviewed for abuse of discretion. *In re Marriage of Crosetto*, 82 Wn. App. 545, 563, 918 P.2d 954 (1996). In considering the parties' financial resources, a court must balance the needs of one party against the other party's ability to pay. *In re Marriage of Trichak*, 72 Wn. App. 21, 26, 863 P.2d 585 (1993). The court must determine the financial resources of both parties. *Spreen v. Spreen*, 107 Wn.App. 341, 28 P.3d 769 (2001).

An Oral Statement to the Trial Court Regarding Fees Incurred Fails to Give Mr. Brown an Opportunity to Challenge the Reasonableness and Necessity of the Fees.

Here there was no evidence to support the amount of fees incurred to the court nor were there any findings as to need and ability to pay. The court simply relied on the statement of counsel asserting that the respondent had incurred considerable attorney fees as a result of this action despite the fact that Mr. Brown brought the court's attention to the fact that there was no affidavit of attorney's fees filed nor any declaration

of Mr. Crane in support of her request for same and as such Mr. Brown did not have an opportunity to challenge whether the attorney's fees were reasonable and necessary. 1/6/12 VRP 9-11. The court committed error by failing to properly consider the factors set forth in RCW 26.09.140 when awarding attorney's fees in this matter.

CONCLUSION

The trial court lacked substantial evidence to conclude that Mr. Brown would continue to average 258 hours of overtime pay a year for the foreseeable future. The trial court improperly averaged overtime hours for the past seven years, resulting in a figure for overtime pay that does not accurately reflect Mr. Brown's financial situation.

Furthermore, the trial erred by inequitably apportioning the child support obligations between the parties by including all of Mr. Brown's discretionary income and declining to include income available to Ms. Crane.

In addition, the trial court erred by not granting a judgment for daycare expenses paid by Mr. Brown but not actually incurred. Mr. Brown demonstrated to the trial court that all daycare expenses were paid by personal check; however, the respondent was not able to produce documentation of approximately \$15,918 in alleged expenditures.

Therefore, the appellant is entitled a judgment for his share of daycare expenses not actually incurred.

Lastly, the trial court improperly relied solely on the respondent's oral statement to the court to determine a judgment for attorney's fees. Mr. Brown had no ability to challenge any of these alleged expenses and whether or not they were reasonable and necessary.

For the reasons set forth above and upon the authorities cited, the Appellant respectfully requests that this Court reverse and remand to the trial court.

DATED this 22 day of June 2012.

RESPECTFULLY SUBMITTED,



Andrew Helland, WSBA #43181
Attorney for Terry Brown, Appellant

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Declaration of Transmittal

STATE OF WASHINGTON

Under penalty of perjury under the laws of the State of Washington

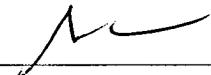
BY _____
DEPUTY

I affirm the following to be true:

On this date I transmitted the original document to the Washington State Court of Appeals, Division II, by personal service and delivered a copy of this document via personal service to the following:

Law Office of McGavick Graves for Barbara Jo Sylvester
1102 Broadway, Suite 500
Tacoma, WA. 98402

Signed at Tacoma, Washington on this 22 day of June 2012.



Robert Helland