No. 44014-8-II

IN THE WASHINGTON STATE COURT OF APPEALS

DIVISION II

SCOTT C. KRIEGER

Appellant,

vs.

PERI LYNN KRIEGER

Respondent.

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APPEAL FROM THE SUPERIOR COURT

OF CLARK COUNTY

Cause No. 11-3-00274-5

OPENING BRIEF OF APPELLANT

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Table of Contents

TABLE OF AUTHORITIES iii

I. ASSIGNMENTS OF ERROR 1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

III. STATEMENT OF THE CASE 4

A. Procedural History 4

B. Facts 13

IV. ARGUMENT 18

V. CONCLUSION 31

TABLE OF AUTHORITIES

Cases

Atkinson v. Atkinson,
420 Pa.Super. 146, 152, 616 A.2d 22 (1992) 23
Blickenstaff,
71 Wash.App. at 493, 859 P.2d 646 22
Brody v. Brody,
16 Va.App. 647, 651, 432 S.E.2d 20 (1993) 23
In re Marriage of Brockopp,
78 Wash.App. 441, 445, 898 P.2d 849 (1995) 20
In re Marriage of James,
79 Wn.App 436, 440, 903 P.2d 470 (1995) 26
In Re Marriage of Mathews,
70 Wash.App 116, 127, 853 P.2d 462 (1993) 26
In re Marriage of Peterson,
80 Wash.App. 148, 153, 906 P.2d 1009 (1995) 21, 22
In re Marriage of Pollard,
99 Wn. App. 48, 991 P.2d 1201 (2000) 22

Statutes

RCW §26.09.170 (1) 24
RCW §26.09.170 (8)(b) 24
RCW §26.19.035 ..... 1, 2, 17
RCW §26.19.035 (2) 18
RCW §26.19.035 (3) 17
RCW §26.19.071(4) 1, 2, 18
RCW §26.19.071(6) 1, 3, 20
RCW 26.09.160(2)(b) 26
RCW 26.19.020; .035(1)(c); . 071(1) 20
RCW 26.19.071(6) 21, 22

Rules

RAP 18.1 (b) 2, 30

I. ASSIGNMENTS OF ERROR

1. THE TRIAL COURT ERRED IN DETERMINING THE AMOUNT OF SUPPORT PAYMENTS BECAUSE THE COURT DID NOT PROPERLY APPLY THE CHILD SUPPORT SCHEDULE REQUIRED BY RCW §26.19.035.

2. THE TRIAL COURT ERRED IN DETERMINING THE AMOUNT OF SUPPORT PAYMENTS BECAUSE THE COURT FAILED TO ACCOUNT FOR SCOTT'S OVERTIME INCOME AS REQUIRED BY RCW §26.19.071(4).

3. THE TRIAL COURT ERRED IN DETERMINING THE AMOUNT OF SUPPORT PAYMENTS WHEN THE COURT FAILED TO IMPUTE INCOME TO PERI DESPITE HER VOLUNTARY UNEMPLOYMENT AS REQUIRED BY RCW §26.19.071(6).

4. THE TRIAL COURT ERRED IN DENYING MODIFICATION OF THE ONEROUS SUPPORT REQUIREMENTS IN LIGHT OF CLEAR DOCUMENTATION THAT SCOTT'S INCOME HAD DECREASED SIGNIFICANTLY.

5. THE TRIAL COURTS FINDING OF CONTEMPT DESPITE AN ABSENCE OF BAD FAITH IS AN ABUSE OF DISCRETION.

6. THE TRIAL COURT'S RETROACTIVE IMPOSITION OF SUPPORT PAYMENTS FOR DECEMBER 2011 WHEN RESPONDENT HAD ALREADY PAID FOR FAMILY EXPENSES

IS PUNITIVE IN NATURE AND OUTSIDE THE POWERS DELEGATED TO THE FAMILY LAW COURT.

7. COSTS AND REASONABLE ATTORNEYS FEES ARE REQUESTED PURSUANT TO RAP 18.1(b)

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does an improper use of a Child Support Schedule Worksheet form without adherance to the rules and calculations associated with the worksheet satisfy the requirements of RCW §26.19.035 to use the worksheet?

2. Does the use of gross income figures without an accounting for overtime violate the requirements of RCW §26.19.071(4) to exclude overtime from support calculations?

3. Does the court's failure to impute any income to a spouse who is voluntarily unemployed violate the requirements of RCW §26.19.071(6) to impute income?

4. Does the court's denial of a request to modify support payments when a spouse's income changes by over 75% constitute an abuse of discretion?

5. Can a court find a person in contempt for failure to make support payments in the absence of a finding of bad faith?

6. Is it within the powers of a family law court with no jury to impose support obligations retroactively during a period when the obligor was living in the home and had already paid for all family expenses?

III. STATEMENT OF THE CASE

A. Procedural History

The parties, Scott Krieger (Scott) and Peri Lynn Krieger (Peri) were married on August 23, 1985. Peri filed for dissolution of the marriage on February 7, 2011. Peri and Scott continued to cohabitate until about January 20, 2012.

A Temporary Order of Child Support, dated Jan 18, 2012 established a child support payment of $2104 per month to be paid directly to Peri. Although the transcript (RP p. 19, ln 21 - p. 20, ln 2) indicates the judge intended the order to start "next year," orders (CP 38, p. 4) prepared by Peri's attorney and signed by the Commissioner indicate that child support will start retroactively in December for a period when Scott has already paid for all family expenses including all children's expenses and household expenses. Furthermore, this child support payment was not properly based on a Child Support Worksheet and was not based on Scott's actual income, which the court did not determine.

A Temporary Order, dated Jan. 18, 2012 established a spousal support payment of $6896 per month commencing on January 1, 2012 paid directly to Peri. The court increased the

support payment above what Peri requested to cover Peri's educational expenses. This order further orders division of liquid assets of $140,000 evenly between the parties.

In order to fulfill his obligations under the above-mentioned orders, Scott paid the following, as noted in a Responsive Declaration filed March 19, 2012 (CP 59) and substantiated with financial documents filed March 19, 2012 (CP 58):

1. I paid the Petitioner $1600 in cash in December 2011 as evidenced in Petitioner's Declaration of December 19, 2011 (CP 24. p. 4, ln 20).
2. I paid the Petitioner $1,000 by depositing $18,000 into our joint bank account on or about January 3, 2012, and withdrawing $17,000 from that account on or about January 4, 2012.
3. I paid the Petitioner another $1,000 by depositing $10,000 into our joint bank account on or about January 3, 2012, and withdrawing $9,000 from that account on the same day.
4. I paid the Petitioner $18,000 by making two deposits of $9,000 into our joint bank account on or about January 23, 2012.
5. Throughout this time period, although Petitioner and Respondent had access to the account, Respondent only transferred the above-described money into and out of the account and made no other transactions with that account.
6. From my account, in the name of "Krieger Intellectual Property," I paid the December mortgage payment in the amount of $3227.92; as I was one of four residents, including my spouse and two of my sons, in the home at that time, half of this payment ($1613.96) should be considered child support in December.
7. From my account, in the name of "Krieger Intellectual

Property," I paid the January mortgage payment in the amount of $3227.92; as I was one of four residents, including my spouse and two of my sons, in the home at that time until January 20th (2/3 of the month), 1/4 of 2/3 of this payment ($537.99) should be considered personal support, 1/4 of 2/3 of this payment ($537.99, one of four residents for the first 2/3 of the month) and 1/3 of 1/3 of this payment ($358.66, one of three residents for the last 1/3 of the month) should be considered spousal support, and 1/2 of 2/3 of this payment ($1075.97, two of four residents for the first 2/3 of the month) and 2/3 of 1/3 of this payment ($717.31, two of three residents for the last 1/3 of the month) should be considered child support in December, in summary - $896.65 in spousal support and $1793.28 in child support.

8. I paid $1630.66 for health insurance in the month of December, 1/3 of this payment is for coverage for the children and 1/3 is for coverage for the spouse; therefore, $543.55 should be considered as child support.

9. I paid $1630.66 for health insurance in the month of January, 1/3 of this payment is for coverage for the children and 1/3 is for coverage for the spouse; therefore, $543.55 is for child support and $543.55 is for spousal support.

This complex accounting is necessitated by the court's retroactive enactment of child support for a month in which Scott was living in the home and paying all the bills and by the fact that Scott had already paid some bills for January at the time the order was filed. Scott is forced to detail all expenses paid in support of Peri and their children while living in the home due to this unusual and confusing order.

Peri filed for contempt on March 8, 2012 (CP 52). Scott paid Peri the $70K asset distribution on March 13, 2102 (CP 58, 59). A hearing was held on March 21st and Scott was held in contempt for unexplained reasons. The Commissioner's hearing notes filed on March 21, 2012 seem to indicate that respondent was found to be behind on a support payment in the amount of $2177 in February, but also indicate that "there is a dispute and undetermined amount of an overpayment." The court also seems to mischaracterize a $10,000 check deposited in the parties' joint account as a tax refund when a tax return had not even been filed at that time. The check also seems to have some effect on the contempt finding despite a lack of determination as to the nature of the check.

Scott filed a Motion for Reconsideration (CP 66) on April 20, 2012 and a declaration (CP 70) on May 3, 2012 and accompanying financial documents (CP 65) on April 20, 2012. In this declaration and financial documentation, Scott further detailed payments made to Peri in fulfillment of the temporary orders. The documents detail the following payments:

a. I paid $1600 in cash to Petitioner in December 2011 - see Petitioner's Declaration of 12/19/11.

b. December mortgage payment of $3,191.30; [see Sealed Financial Source Documents submitted on March 19, 2012 (SFSD-03/19), page 4 including cover sheet, line item 10 of bank statement].

c. $1630.66 for health insurance in the month of December, [SFSD-03/19, page 4 incl. cover sheet, line item 15 of bank statement for Respondent's account].

d. I paid $187.29 to Verizon Wireless for family cell phone services on December 6, 2011 [SFSD-03/19, page 3 incl. cover sheet, line item 6 of bank statement for Respondent's account].

e. I paid $243.15 to Comcast for household phone, internet and cable TV service on December 15, 2011 [SFSD-03/19, page 3 incl. cover sheet, line item 9 of bank statement for Respondent].

f. I paid $228.19 to NW Natural Gas for household utilities on December 28, 2011 [SFSD-03/19, page 4 incl. cover sheet, line item 12 of bank statement for Respondent's account].

g. I paid $635.02 to Toyota Motors Credit Corp. on December 23, 2011 as a vehicle payment for a vehicle used to transport my children [SFSD-03/19, page 4 incl. cover sheet, line item 6].

h. During the month of December 2011, I paid Costco a total of $561.81 for household expenses qualifying as child support [SFSD-

03/19, pages 3 & 4 incl. cover sheet, various line items].

i. Petitioner used our joint account to purchase $346.59 in groceries from Winco using funds supplied by Respondent [SFSD-03/19, page 5 incl. cover sheet, line item 2 of bank statement for Respondent/Petitioner joint account] and [see Sealed Financial Source Documents submitted on April 20, 2012 (SFSD-04/20), page 2 incl. cover sheet, line items 17 & 20; page 3, line item 4 of bank statement for Respondent/Petitioner Joint account].

j. During the month of December 2011, Petitioner used our joint account to purchase $466.85 in groceries, gas and household items from Costco using funds supplied by Respondent and qualifying as child support [SFSD-03/19, page 5 incl. cover sheet, line items 3 & 4 of bank statement for Respondent/Petitioner joint account] and [SFSD-04/20, page 2 incl. cover sheet, line items 10 & 19 of bank statement for Respondent/Petitioner Joint account].

k. During the month of December 2011, Petitioner used our joint account to pay for car insurance in the amount of $350.25 which qualifies as child support [see SFSD-04/20, page 2 incl. cover sheet, line item 2 of bank statement for Respondent/Petitioner Joint account].

l. On December 30, 2011 the joint account had a balance of

$1609.84, which had been previously deposited by Respondent and made available to Petitioner thereby qualifying as a support payment to Petitioner [SFSD-03/19, page 5 incl. cover sheet, balance on 12/30 at line item 6 of bank statement for Respondent/Petitioner joint account].

A hearing on the Motion for Reconsideration was held on May 16, 2012 at which time the Commissioner gave Scott credit for more of Scotts payments. The order dated May 16, 2012 (CP 74) acknowledges credit for payments made on Peri's Visa card by Scott and Peri's tuition payment made by Scott as well as the January mortgage payment made by Scott. However, all of Scott's payments were not credited. The Commissioner did acknowledge that the check for $10,000 was not an issue before the court and would be handled later in property distribution.

Due to a continued lack of recognition of Scott's payments on behalf of Peri and their children, the courts confusing orders and Peri's continued bad faith denial of obvious payments, Scott filed for Revision on May 24, 2012 (CP 75) and a hearing was held on June 8, 2012 at which Judge Rulli credited Scott with further payments

including health insurance and health care payments totaling $1550, but did not withdraw the holding of contempt despite obvious bad faith on the part of Peri. Surprisingly, despite Judge Rulli's extensive credits for health insurance payments and costs noted in the transcript of the hearing (RP P. 75, ln. 23 - P. 77, ln. 5) and the court's hearing notes, the order signed by Judge Rulli and filed by Peri's attorney on June 20, 2012 (CP 85) simply states that the motion for revision was denied.

Also, remarkable is the fact that the court has recognized some payments by Scott to the parties' joint account, and withdrawn by Peri to her own account, as support payments, but refuses to recognize other payments made in the same manner. This inconsistent treatment of payments made in this manner makes an "accurate" accounting of payments impossible and leaves Scott with unintentional "delinquent" payments when a transfer is not recognized.

Due to financial hardship, Scott filed to modify the temporary orders on June 7, 2012 (CP 81) and a hearing was held on June 20, 2012 at which the motion was denied despite a showing of financial documents (CP 79) documenting Scott's average, pre-tax

net monthly business income of approximately $6500 and average monthly disposable income of just $900 (actually $1300 due to an error in calculation of "son's missionary expenses"). Scott stopped paying support payments after May of 2012 due to a continued decrease in income and obvious inability to pay.

Peri filed again for contempt on August 1, 2012 (CP 88). Scott submitted financial documents (CP 92) documenting the inability to pay support and job application documentation showing a search for a new job. A hearing was held on August 22, 2012 at which the Commissioner held Scott in contempt with no explanation of how the court found Scott had an ability to comply with obligations under temporary orders or a specific finding of bad faith as documented in orders dated August 29, 2012 (CP 95). A Motion for Revision (CP 97) was filed on Sept. 7, 2012, was heard on Sept. 21, 2012, but was denied as untimely. Accordingly, Scott filed a Notice of Appeal (CP 107) on Sept. 28, 2012 to appeal the August 29, 2012 contempt order and the erroneous orders on which it is based.

B. Facts

Scott is a self-employed, solo-practice patent attorney with one primary client that accounted for about 95% of his income as documented by invoices and receipts (CP 79, pp. 1 - pp. 40; 91, p. 2 92). Scott's primary client has scaled back work considerably due to financial problems and management changes.

Scott's 2010 Federal Income Tax Return (CP 29) indicates a taxable income of about $20K per month for 2010 (CP 29, p. 3, item 43), however business documents summarized in the 2012 spreadsheet (CP 91, p. 2) show an average net business income of $5,800 for the first half of 2012 with income decreasing rapidly in 2012.

This spreadsheet summarizing the many invoices and receipts was submitted as page 2 of CP 91. The primary client now provides about one-tenth of the work previously provided as evidenced by U.S. Patent Office records (CP 30) and invoices (CP 79).

Scott provided a list maintained by the US Patent & Trademark Office (USPTO) in a Second Responsive Declaration of Respondent filed on December 27, 2011 (CP 30, pp. 10-15) listing

Scott's current and past cases filed in the USPTO. The first column of this document lists application numbers and the sixth column lists the filing date. Application numbers that begin with 60/ are provisional and are not processed. The list shows a steady decline in new cases filed by Scott from a high of 58 in 2005, 20 in 2006, 13 in 2007, 11 in 2008, 3 in 2009, 2 in 2010 and none for subsequent years. Once a patent application is filed, the USPTO typically takes 2-4 years to respond to the application (CP 30, pp. 1-3). At that point, a patent attorney argues the patentability of the invention through responses to rejections which typically take place every 6-12 months until a patent issues or the application is abandoned. Each application typically has 2-3 responses after the initial filing and stays pending for 3-5 years.

As evidenced by the USPTO listing, Scott's work has consisted primarily of responses to previously-filed applications since some time in 2008 as shown by new filing stats in the Patent Office Docket (CP 30) and invoices (CP79, pp. 1 - pp. 40). Scott has stayed busy with these responses, but as applications are issued, the cases are closed and no further work is needed. Eventually, there is no more work if no new cases are filed for a period of time.

Once an application is filed, the USPTO controls the timing of the response work. Scott has no control over whether a response will be filed or not. The client's own in-house patent counsel and the USPTO control all aspects of the work. Scott has no control over whether or when a response will be filed or not filed. Consequently, Scott's income has declined considerably in 2012 by simple attrition of the workload outside of Scott's control. The primary client has stated that they will file no new patent applications via Scott's firm, but has refused to put that statement in writing. Scott continues to do the small trickle of response work that remains active (CP 30, 79, 91, 92).

Patent attorneys face a unique dilemma when changing clientele due to a conflict-of-interest standard not shared by other attorneys. A patent attorney is precluded from performing work for two clients who file patents on the same or closely-related technology. This conflict arises from the patent attorney's duty of confidentiality to a first client and a conflicting duty of candor to disclose "information material to patentability" under 37 CFR §1.56 to the patent office and consequently the public. The patent attorney must keep a client's inventions confidential, but must disclose those same inventions to the patent office if filing a similar

patent for another client. Both requirements cannot be met when both clients have inventions that are substantially similar.

Accordingly, a patent attorney must terminate a relationship with one client before accepting another client developing the same technology. Unfortunately, a patent attorney develops expertise in a specific area of technology and becomes most valuable to a client in that specific area. When work from one client diminishes below a certain level, a patent attorney must make a decision as to whether the client is worth keeping or if he should cut them loose and pursue other potential clients in the same field of endeavor.

It should also be noted that a patent attorney becomes a specialist in the field of technology in which the attorney works. When a patent attorney does work for the same client for over 12 years, he becomes a niche specialist with expertise suited only to clients in that particular niche.

Consequently, Scott has waited until work has slowed to the point where the previously-significant client is no longer worth the inconvenience of precluding work from other similar clients. Scott has been looking for alternative clients and alternative jobs since it became apparent that declining workload from his current primary

client would be permanent. However, no new clients have been found so Scott has searched for a new job since at least May 2012. Scott has submitted documentation (CP 92) of job applications submitted in June and thereafter. Scott has applied for jobs as in-house counsel and in law firms (CP 92). Scott diligently searches weekly for new job opportunities, but due to the niche specialty inherent in this type of work and the faltering economy, few opportunities have been found. Scott has applied for all job openings for which he is qualified.

IV. ARGUMENT

1. THE TRIAL COURT ERRED IN DETERMINING THE AMOUNT OF SUPPORT PAYMENTS BECAUSE THE COURT DID NOT PROPERLY APPLY THE CHILD SUPPORT SCHEDULE REQUIRED BY RCW §26.19.035.

RCW §26.19.035 denotes standards for the application of the Child Support Schedule (CSS) and states that the CSS shall be applied in all proceedings in which child support is determined or modified.

However, the court did not properly use the CSS in child support determinations. RCW §26.19.035 (3) states that the CSS worksheets shall be completed and filed in every proceeding in which child support is determined. A CSS worksheet was submitted January 18, 2012 (CP 38), but the worksheet was intentionally phonied up by Peri's attorney with false numbers so that Peri would have no support obligation. Significantly, no income was imputed to Peri and no maintenance was attributed as being paid from Scott to Peri. The father's income was erroneously entered as $9000 per month. A number that was not determined by the court as representing Scott's income, but rather a total support payment to be paid to Peri. The mother's received

maintenance was falsified as zero. Scott received no credit for health insurance payments and household assets were not listed. Essentially, the worksheet calculations were completely ignored and the worksheet was used as scratch paper to falsify favorable numbers for Peri in clear violation of the statute. The form is completed under penalty of perjury.

RCW §26.19.035 (2) states that any deviation from the presumptive or advisory amounts shall be supported by a written finding of fact. There are no written findings of fact to justify the trial courts unusual misuse of the worksheet.

2. THE TRIAL COURT ERRED IN DETERMINING THE AMOUNT OF SUPPORT PAYMENTS BECAUSE THE COURT FAILED TO ACCOUNT FOR SCOTT'S OVERTIME INCOME AS REQUIRED BY RCW §26.19.071(4). (Assignments of Error 1-x)

RCW §26.19.071(4)(i) states that income sources based on overtime worked to provide for a current family's needs should be excluded from the gross monthly income calculation when the court finds the income will cease when the party has paid off his or her debts.

Scott has stated that, during the past years on which the trial court appears to have based its child support calculations, he worked 12-16 hours a day, 7 days a week for many months. (CP 30, p.2, ln. 2). Peri's attorney has conceded this fact in arguments in the trial court. (RP p. 2, ln.16). Despite this inordinate amount of overtime, the trial court failed to reduce Scott's imputed income to account for the overtime used to support the then-current family's needs.

The court seemed to perform some sort of "estimation" of Scott's income, the court seemed to find an average of past years (RP p. 13, lns. 10-12) at $260K annually, but made no adjustment for the excessive overtime.

This matter should be remanded to the trial court for a determination of Scott's income taking into consideration the substantial overtime worked during the period used to inform the income determination. Additionally or alternatively, the trial court may now use more complete and current financial information, such as the numerous financial documents filed prior to this appeal (CP 79), to determine the child and spousal support based on actual

income. The amounts calculated in this determination should then be applied retroactively to past support obligations.

3. THE TRIAL COURT ERRED IN DETERMINING THE AMOUNT OF SUPPORT PAYMENTS WHEN THE COURT FAILED TO IMPUTE INCOME TO PERI DESPITE HER VOLUNTARY UNEMPLOYMENT AS REQUIRED BY RCW §26.19.071(6). (Assignments of Error 1-x)

The amount of support imposed by the trial court contributes directly to the finding of contempt and is appealable as an error contributing to the contempt.

The Legislature directs that the child support obligation should be "equitably apportioned between the parents." RCW 26.19.001. In determining child support, the trial court should apply the uniform child support schedule, basing the support obligation on the combined monthly incomes of *both* parents. RCW 26.19.020; .035(1)(c); . 071(1); *In re Marriage of Brockopp,* 78 Wash.App. 441, 445, 898 P.2d 849 (1995). Voluntary unemployment or underemployment will not allow a parent to avoid his or her financial obligation to the children who are the subjects of the support order. *In re Marriage of Shellenberger,* 80 Wash.App. 71, 81, 906 P.2d 968 (1995). When assessing the income and

resources of each household, the court must impute income to a parent when that parent is voluntarily unemployed or voluntarily underemployed. RCW 26.19.071(6). The court determines whether to impute income by evaluating the parent's work history, education, health, age and any other relevant factor. RCW 26.19.071(6); *In re Marriage of Peterson,* 80 Wash.App. 148, 153, 906 P.2d 1009 (1995), *review denied,* 129 Wash.2d 1014, 917 P.2d 575 (1996). If the court decides the parent is "gainfully employed on a full-time basis," but also underemployed, the court makes a further determination whether the parent is purposely underemployed to reduce his or her support obligation. RCW 26.19.071(6); *In re Marriage of Peterson,* 80 Wash.App. 148, 153, 906 P.2d 1009 (1995), *review denied,* 129 Wash.2d 1014, 917 P.2d 575 (1996).

In the current case, Peri is a stay-at-home mother who has chosen to avoid any employment at all. However, the trial court has imputed no income at all to her despite a clear statutory obligation. Peri is clearly voluntarily unemployed.

In *In re Marriage of Pollard, 99 Wn. App. 48, 991 P.2d 1201 (2000),* the wife "working as a mother in the home full time raising children"

and "motivated by her desire to raise the two young children" was held to be voluntarily unemployed. Voluntary means the result of free choice; intentional rather than accidental. *Blickenstaff,* 71 Wash.App. at 493, 859 P.2d 646. In Pollard, the court held that "while laudable, these actions cannot adversely affect her obligation to the two older children she had with Mr. Pollard." As noted in *Atkinson v. Atkinson,* 420 Pa.Super. 146, 152, 616 A.2d 22 (1992) (Del Sole, J., dissenting), "[b]y choosing not to allow a parent to escape child support obligations [991 P.2d 1205] because of the existence of a new family we are recognizing the needs of children to the love, support, and sacrifice of both parents." If the shoe were on the other foot, and a noncustodial father sought to reduce his child support obligation because he chose to stay home with his children from a new marriage, most courts would impute income to such a voluntarily unemployed or underemployed parent. *See, e.g., Brody v. Brody,* 16 Va.App. 647, 651, 432 S.E.2d 20 (1993) ("If the roles in this case had been reversed, and the father chose to leave his job and stay home to care for the children of another marriage,

we would not, without more, uphold an elimination of his obligation to support his other children. The mother should be held to a like standard.").

As the *Pollard* court found in a strikingly similar situation, the trial court abused its discretion failing to impute income to Peri, who was voluntarily unemployed.

Scott requests remand of the case to determine appropriate child support in light of Peri's imputed income.

4. THE TRIAL COURT ERRED IN DENYING MODIFICATION OF THE ONEROUS SUPPORT REQUIREMENTS IN LIGHT OF CLEAR DOCUMENTATION THAT SCOTT'S INCOME HAD DECREASED SIGNIFICANTLY.

RCW §26.09.170 (1) states that the provisions of any decree respecting maintenance or support may be modified upon a showing of a substantial change of circumstances. RCW §26.09.170 (8)(b) may be informative in determining whether a change is substantial. This section states the department of social or health services may file an action to modify an order if the child

support is at least twenty-five percent above or below an appropriate amount. RCW § (10)(b) states that a temporary order may be revoked or modified.

The court appears to have based support payments in the temporary orders on an imputed income of Respondent of about $260,000 annually (RP, P. 13, ln. 10 - ln. 21). Respondent documented his income for the first four months of 2012 in a declaration filed on June 7, 2012 (CP 81, P. 5, see table) in which Respondent's average monthly after-tax income was noted as $4723.56, which corresponds to an annual income of $56,682. Respondent's annual income changed by approximately $200,000 per year - a decrease of approximately 78%. Clearly, Respondent's income changed substantially and affected Respondent's ability to pay the support payments based on the previously imputed, substantially greater amount. Nevertheless, Respondent continued to pay the ordered support by drawing on savings until assets were depleted and compliance was impossible.

The court's decision to ignore Respondent's substantial income changes and deny modification of the temporary orders placed Respondent in a position in which it was impossible to

comply with the temporary orders. At this point compliance was impossible and, therefore, non-compliance was unintentional.

5. THE TRIAL COURTS FINDING OF CONTEMPT DESPITE AN ABSENCE OF BAD FAITH IS AN ABUSE OF DISCRETION.

A trial court's finding of contempt may be reversed upon a finding of abuse of discretion, which may be found when exercised on untenable grounds or for untenable reasons. *In Re Marriage of Mathews*, 70 Wash.App 116, 127, 853 P.2d 462 (1993). RCW 26.09.160(2)(b) states that a court shall find a party in contempt when "the court finds after hearing that the parent, in bad faith, has not complied with the order." A finding of bad faith or intentional misconduct is a predicate for a contempt judgment. *In re Marriage of James*, 79 Wn.App 436, 440, 903 P.2d 470 (1995). Accordingly, a lack of compliance *without* accompanied bad faith does not constitute contempt.

Respondent has submitted, in sealed financial source documents, to the court documentation in the form of check stubs for all income since January 2012. Respondent has submitted, in sealed financial source documents, documentation of all significant

expenses, including business expenses in the form of official receipts. Figures for these income and expense documents are summarized in a spreadsheet submitted via declaration dated August 20, 2012. There is one error in the spreadsheet in that the row entitled "Son's Missionary Expenses" incorrectly shows a $400 payment from January to April. However, this error only occurs during months in which support payments were made, does not affect net business income or net after tax income and has only a minor affect on average disposable income. It should be clear that Respondent cannot pay court-ordered support payments of almost $11K per month when Respondent's after-tax income is only about $4K. Respondent has also submitted documentation of an active job search. Documentation of three job applications were included in sealed financial source documents dated August 20, 2012. Respondent has also showed that he incurred almost $30,000 in credit card debt this year while trying to comply with court-ordered payments.

Despite all these efforts by Respondent, the trial court seems to find contempt due to the fact that Respondent used to make almost $300K per year. The trial court seems to infer that the loss of a job is bad faith, despite the complete lack of any evidence

that the job loss was willful. In fact, the inference of intentional misconduct defies any rationality. Why would Respondent quit such a lucrative job in order to avoid support payments? The inference that this job loss was willful is unfounded. It should be noted that Respondent is a sole practitioner, intellectual property lawyer who prepares and prosecutes patent applications. These patent applications are filed and the patent office responds to the filing in 3-5 years. Once the applications are filed, Respondent has no control over the response time. Accordingly, Respondent's docket is set by actions that occur years before the current date. The reduction in workload and income that occurred around January was fixed by events that occurred years before and was in no way willful on the part of Respondent. It should be further noted that Respondent's primary client is Sharp Electronics who invested heavily in a large screen LCD panel factory in recent years. Demand for these products never materialized and the company has taken huge losses. Earlier this year, a multi-billion dollar deal with FoxConn China fell apart and just last week, Sharp's stock was rated as junk. This should be further evidence that the lack of work was and is unintentional. Respondent has asked Sharp for a letter

indicating the reasons for their cuts in work assignments to outside counsel, but they have refused to put anything in writing.

Respondent has petitioned the trial court to modify the support requirements on July 7, 2012. However, this motion was denied based on the same flawed logic used to find contempt. That is, that Respondent has, against his own interests and against all evidence, intentionally quit his job to spite his estranged wife, Peri.

6. THE TRIAL COURT'S RETROACTIVE IMPOSITION OF SUPPORT PAYMENTS FOR DECEMBER 2011 WHEN RESPONDENT HAD ALREADY PAID FOR FAMILY EXPENSES IS PUNITIVE IN NATURE AND OUTSIDE THE POWERS DELEGATED TO THE FAMILY LAW COURT.

Since Scott had already paid for all family expenses during the month of December 2011, the court's imposition of a requirement to again pay child and spousal support for that month is not remedial, but is instead punitive. Punitive orders require a jury trial and are, therefore, beyond the powers of the family law commissioner.

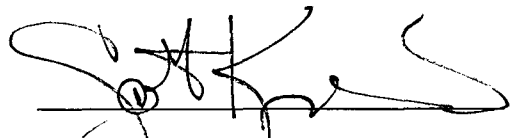
7. COSTS AND REASONABLE ATTORNEYS FEES ARE REQUESTED PURSUANT TO RAP 18.1(b)

Due to the trial court's many errors described herein and Scott's entitlement to a reversal of the finding of contempt, Scott is entitled to an award of attorney's fees and costs. Accordingly, Scott requests that this Court award Scott his attorney's fees and costs on appeal, and direct the trial court, on remand, to award Scott reasonable attorney's fees and costs.

V. CONCLUSION

The trial court's finding of contempt is a clear abuse of discretion. Numerous mistakes were made in calculating maintenance and child support amounts. Further errors were made in determining whether payments had been made. Additionally, contempt was erroneously attributed despite a lack of willful or intentional non-compliance. Support calculations and attributions must be remanded to the trial court for correction in compliance with statutory constraints. Credit should be given to Scott for all fund transfers to Peri. The finding of contempt should be reversed as Scott had no means to comply with the temporary orders after savings ran out.

RESPECTFULLY submitted this 24th day of May, 2013.



Scott C. Krieger
Pro Se Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct.

That on May 24, 2013, I arranged for service of the foregoing Appellant's Opening Brief
as follows:

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Dated at Vancouver, WA this 24th day of May, 2013

Scott C. Krieger