

FILED

OCT 29 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

NO. 308316-III

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OF THE STATE OF WASHINGTON

IN RE THE MARRIAGE OF:

DEBRA R. GORE,
Respondent

and

JOHN E. JONES,
Appellant

BRIEF OF APPELLANT

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I. INTRODUCTION

This is a child support modification case. The appellant, John Edward (“Ed”) Jones, is a contract emergency room physician at Deaconess Hospital in Spokane, Washington, being paid by ECI, LLC (“ECI”), and at Colville Medical Center in Colville, Washington. The respondent, Debra R. Gore, is a part-time physician at Group Health Permanente, P.C. in Spokane, Washington. The parties have three children, twins Noah and Jack, and Margaret. At the time of the hearing the twins were 12 and Margaret was 4. For convenience throughout this Brief of Appellant, Dr. Jones will be referred to as “Jones” and Dr. Gore will be referred to as “Gore.”

In his Notice of Appeal, one of the items stated as being appealed was item number 3, “Order on Revision/Stricken dated April 26, 2012.” Respondent withdraws his appeal of the revision order and abandons his appeal on the revision issue. With respect to all other issues as decided by the court commissioner, however, the appeal proceeds.

Because three different verbatim reports of proceedings were filed, the first (1-25-12) will be referred to as “RPOA” for “oral argument,” and the second (1-26-12), as “RPOR” for “oral ruling.” The third regarding revision, (4-26-12) will not be cited here.

II. ASSIGNMENTS OF ERROR

Assignments of Error

No. 1: The trial court erred by entering its Washington State Child Support Schedule Worksheets on March 1, 2012, because it incorrectly calculated the gross incomes of each of the parties, and all subsequent calculations based on wrong gross incomes are also wrong.

No. 2: The trial court erred by entering its Findings/Conclusions on Petition for Modification of Child Support on March 1, 2012 by making the findings which it did in paragraph 2.2 approving the child support worksheet which was initialed and filed separately, and in its calculation of the underpayment of child support due to the erroneous numbers used in the calculation on the worksheet.

No. 3: The trial court erred by entering its Order on Modification of Child Support on March 1, 2012 by ordering the entry of the Order of Child Support signed on that date and the Child Support Worksheet as stated above.

No. 4: The trial court erred in entering its Final Order of Child Support on March 1, 2012 by incorporating the same Worksheet and Findings/Conclusions; by setting forth erroneous incomes for each of the

parties, which are based on erroneous gross income on the Child Support Worksheet for each of the parties; by miscalculating the under-payment of child support in paragraph 3.5; in miscalculating the standard calculation in paragraph 3.6; and by attributing to each of the parties percentages based upon erroneous child support calculations in paragraphs 3.15 and 3.19 of the Order.

No. 5: The trial court erred in entering its Washington State Child Support Schedule Worksheets using the monthly deduction from gross income at line 2.h., Normal Business Expenses, using the figure of \$800.00.

Issues Pertaining to Assignments of Error

No. 1: Gore works for a medical group as a physician, and receives her compensation in two ways: (1) part in payments of money to her; and (2) part as several employer-paid benefits such as her pension and various insurance coverages. Must a child support court include the employer-paid employee benefits in the employee's gross income? (Assignments of Error No. 1, 2, 3, and 4).

No.2: By express contractual terms and in fact, Gore worked a part-time physician's position, working at seventy percent of full-time. Should full-time compensation be imputed to Gore? (Assignments of Error No. 1,

2, 3, and 4).

No. 3: Jones's employment with his employer as a hospital emergency room physician is deemed by his primary employer to be a full-time employment position, although he works fewer than forty hours per week. Industry standards also recognize that emergency room physicians work full-time at less than forty hours per week. Jones lives in Spokane and also travels to work at a second emergency room job in Colville, Washington. Was it reversible error for the trial court to hold that Jones did not work full-time? (Assignments of Error No. 1, 2, 3, and 4).

No. 4: Jones filed an exhibit showing his Deaconess Hospital employer's account of his compensation for a twelve-month period. The trial court took the annual amount and divided it by *eleven* to arrive at Jones's monthly gross income from the Deaconess position. Should not the trial court have divided the annual salary by twelve in order to correctly arrive at monthly gross earnings from ECI? (Assignments of Error No. 1, 2, 3, and 4).

No. 5: Jones filed a proposed child support worksheet under penalty of perjury stating his normal business expenses. The trial court reduced this amount without evidence in the record to support her reasoning. Should the

trial court have used the figure of \$1,256.00 per month as provided by Jones, when there was no evidence in the record contradicting this evidence? (Assignments of Error No. 5).

III. STATEMENT OF THE CASE

Procedural Posture

The parties were divorced in Spokane County Superior Court on February 25, 2009. CP 21 - 24. Child Support Worksheets were entered at that time. CP 1 - 6. Gore, as petitioner in the trial court, filed a petition for modification of child support on May 23, 2011. CP 37 - 38.

The child support modification hearing was held on January 25, 2012. RPOA 1. The case was presented on declarations and oral argument with no live testimony, RPOA 1 - 25. The following day the court commissioner gave her oral ruling. RPOR 1 - 15., CP 408 - 422. Dissatisfied with the result, Jones moved for reconsideration on March 12, 2012, which was ten court days after the March 1, 2012 ruling, March 10 and 11 being Saturday and Sunday, respectively. Commissioner Jolicoeur denied Jones's Motion for Reconsideration by a letter and an Order on March 29, 2012, CP 285 - 287.

Jones made a Motion to Revise Commissioner's Ruling on April 9,

2012, CP 288 - 294. This Motion was denied as being untimely by the Superior Court Judge, Honorable Michael P. Price, on April 26, 2012, CP 301 - 302. This order is no longer being appealed.

On April 30, 2012, Jones filed his Notice of Appeal to the Court of Appeals, Division III. CP 304 - 327. April 28 was a Saturday and April 29 was a Sunday.

Statement of Facts Relevant to the Issues

At the time of the hearing on this matter, the trial court had before it unambiguous evidence about the income of Gore. The court had before it Gore's 2011 Total Compensation Detail which can be seen at CP 70 - 71. Instead the trial court used Gore's alleged cash income as taken from her 2010 Form W-2, CP 390. In using the 2010 W-2, the trial court took an approximate figure from line 1, "Wages, Tips, Other Compensation", instead of line 5, "Medicare Wages and Tips." The line 5 figure, \$175,000.85, divided by twelve, is \$14,583.40. Dividing the line 1 figure (actually, 158,004) by twelve, she came up with the gross income for Gore of \$13,167.00. RP 6 and CP 319, (\$10.00 difference from the final worksheets and Order of Child Support, CP 319 and 310 respectively).

The court and parties recognized that Gore is employed at seventy

percent of full-time (also called 0.7 FTE), RPOR 2, CP 409, but failed to find that she was voluntarily under-employed, RPOR 4, CP 411. The commissioner said she could not “treat one parent differently than the other” (RPOR 3), that doing the calculations may be “mind boggling” (*Id.*4), and that she did not have “the confidence” to do the math. *Id.* See also CP 410 - 411. Nowhere in the record did the trial court adopt the uncontroverted figures appearing on Gore’s total compensation detail, CP 70 - 71.

The trial court treated both parties’ employments as if they were the same in terms of full-time/part-time analysis. *Id.*

Gore enjoys a number of employment benefits - retirement contributions, seven different insurance payments on her and the children’s behalf, and extras such as continuing medical education. CP 70 - 71. These amount to non-cash payment to Gore in the form of benefits by Group Health totaling \$40,193.19 annually, or \$3,349.43 per month. *Id.*

Jones’s employment at Deaconess Hospital for ECI was full-time as acknowledged by the commissioner (RPOR 3, CP 410), and as explicitly shown in the record, CP 122 - 126. See also CP 224, taken from a 2011 national survey by ACEP/Daniel Stern and Associates for emergency

medical staff. Of the seventy-eight percent of responses applicable, sixty-five of those responses, or eighty-three percent, show that emergency hospital doctors work between thirty and thirty-five hours per week as “Full-Time Status.” However, Jones’s hours were cut back by his employer, CP 144, in an email to him from his supervisor. As a result, he took on employment at Colville Medical Center to make up for the lost hours at Deaconess. CP 137 - 138. The reduction in Jones’s hours is reflected in a Deaconess Medical Center Hours History Report, CP 131. Also, the Valley Hospital contract mentioned in the email, CP 144, never materialized. CP 146.

Unlike the benefits package afforded to Gore, Jones’s employment carries almost no benefits. He pays his own self-employment tax. CP 93. He pays the full cost of his own malpractice insurance. CP 149. He pays his own medical and dental insurance. *Id.* He makes both the employer and the employee contributions to his 401K retirement plan. *Id.* There were no items in evidence, in any documents besides argumentative counter-declarations, which contradicted Jones’s evidence in this paragraph. All of these facts and figures were derived from exhibits on file before the court commissioner at the trial court. CP 92 - 114, CP 149.

As the commissioner did recognize, Jones's self-employment social security contributions are higher than persons otherwise working as employees, at 10.4 percent. RPOR 5.

One of several financial documents (Sealed) which Jones submitted to the court was his ECI, LLP partner account statement for twelve months of income, from December 2010 through November 2011, CP 230. This was the most precise evidence which the court had before it regarding Jones's actual gross income from Deaconess/ECI for twelve months just preceding the hearing. His gross income for those twelve months was \$246,430.00. In her ruling, RPOR 4, CP 411, the trial court stated at lines 16 through 20:

“So when I reviewed the information provided to me and I think it's called ECI, but basically it's the Deaconess job, year-to-date 11-30, he had a total of 24,600, no, excuse me, \$246,430.00 *divided by eleven* comes up to 22,403.00 a month gross. . . .” (Emphasis supplied).

In his proposed Washington State Child Support Schedule Worksheets, CP 158 - 163, at 163, Jones itemized his monthly business expenses. These figures, given as a declaration under penalty of perjury, CP 163, totaled a sum of \$1,256.75. In her ruling at RPOR 5 - 6, CP 412 - 413, the trial court decided to use the figure of \$800.00 per month as

Jones's business expenses, stating that business expenses were "a little dicey," and that other tax provisions may apply which might somehow change the deduction she should give him for his business expenses. She concludes by saying "He says it's a total of \$1256.00 a month, I'm going to use for purposes of my child support of 800.00 a month. . ." RPOR 6, CP 413.

IV. ARGUMENT

A. Standard of Review

Generally, factual determinations made by the trial court are reviewed for whether the findings are supported by substantial evidence. However, the court also reviews whether the trial court has made an error of law that may be corrected upon appeal. *In re Marriage of Stern*, 68 Wn. App. 922, 929, 846 P.2d 1387 (1993). (Hereinafter *Stern II*). See, Kenneth W. Weber, Washington Practice Volume 20, Family and Community Property Law, Section 38.27; Washington Family Law Deskbook, 2d Ed., Volume III, Section 65.4(1).

Sometimes the courts will say that with its broad discretion in support matters, the Court of Appeals will review the trial court decision for abuse of discretion. *In re Marriage Pollard*, 99 Wn. App. 48, 52, 991 P.2d

121 (2000).

Errors of law are reviewed *de novo* to determine the correct legal standard. *In re Marriage of Wehr*, 165 Wn. App. 610, 613, 267 P.3d 1045 (2011). Likewise, construction of a statute is a question of law reviewed *de novo*, *Anthiss v. Copland*, 173 Wn.2d 752, 755, 270 P. 3d 574 (2012); and when interpreting a statute a court must discern and implement the legislature's intent. *Id.* at 756. Where the plain language of a statute is unambiguous and legislative intent is apparent, courts will not construe the statute otherwise. *Id.* Plain meaning may be gleaned from all that the legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. *Id.*

As stated in *Sacco v. Sacco*, 114 Wn.2d 1, 3 - 4, 784 P.2d 1266 (1990), in establishing the child support schedule of RCW 26.19, the legislature indicated the calculation of support must clearly be made in its child support decision.

When no evidence is presented on an issue, the trial court errs by making findings and drawing conclusions on that issue. *In re Marriage of Stern (I)*, 57 Wn. App. 707, 717 - 718, 789 P.2d 807, *review denied*, 115 Wn.2d 1013, 797 P.2d 513 (1990).

When a trial court weighs competing documentary evidence to make credibility determinations regarding bad faith or credibility, the appellate court reviews the findings for substantial evidence. *In re Marriage of Rideout*, 150 Wn.2d 337, 351 - 52, 77 P. 3d 1174 (2003).

Finally, resort may need to be made to the rule which holds that when a trial court makes no specific findings of fact in writing regarding points raised by a party, the lack of specific findings of fact is not fatal because an appellate court may look to the oral opinion of the trial court to determine the basis for its resolution of the issue. *In re the Marriage of Booth and Griffin*, 114 Wn.2d 772, 791 P.2d 519 (1990).

B. Argument: Issues Pertaining to Assignments of Error

In its statement of legislative intent, the Washington Legislature states:

“The legislature also intends that the child support obligation should be equitably apportioned between the parents.” RCW 26.19.001.

Jones contends that due to the several errors in calculations in this case, the trial court has not equitably apportioned the child support obligation between the parents.

As noted in *Marriage of Booth, supra*, after quoting the above

statute, the court repeated the statutory injunctions that child support shall be determined and ordered according to the child support schedule adopted pursuant to Chapter 26.19, *Id.*

The term “child support schedule” is defined as “the standards, economic table, worksheets, and instructions,” as defined in this chapter [Ch. 26.19]. RCW 26.19.011(2).

RCW 26.19.035 sets forth at length, the “standards for application of the child support schedule.” Needless to say, the child support schedule is mandatorily applied throughout the state, in all judicial proceedings, in all modification proceedings in which child support is modified, in setting temporary and permanent support, and must be supported by written findings of fact, completed worksheets, and court review. *Id.*

1. A Child Support Court Must Include All
Employer-Paid Employee Benefits In The
Employee’s Gross Income

Despite repeated filings of Gore’s “Total Compensation Statement” and 2011 “Total Compensation Detail,” CP 70 - 71 and CP 195, and her Employment Agreement with Group Health, CP 243 - 248, and reference to those again on motion for

reconsideration, CP 273, the trial court essentially refused to follow the plain language of the law. The language of the law is RCW 26.19.071 (3), subsections (a) through (u). In this case of particular note are subsections (a), salaries, (d) *deferred compensation*, (f) *contract-related benefits*, and (r) bonuses. The several other subsections of the statute are not implicated in this appeal.

The trial court at least addressed salaries and bonuses in its review of the annual earnings of the parties. However, it made serious omissions. Most egregious, the trial court did not count as income to Gore those matters specifically required to be counted by RCW 26.19.071(3)(d) and (f).

Gore received in 2011 deferred compensation in the amount of \$17,210.91. CP 71. Gore's employer also paid various insurance benefits including medical for her and the children, dental for her and the children, basic life for her, group disability, individual disability, long-term traditional plan, and identity theft. These amounts, also appearing in the right and column under "Annual Employer Costs" total \$14,857.80. Additional compensation paid by Gore's employer consists of allotments for continuing medical

education (CME) of \$2,100.00 and \$700.00 as a supplement; a cash balance carried of \$4,764.48; and association dues of \$560.00. These additional amounts total \$8,124.48.

Gore received an adjusted base salary of \$143,425.52 for her seventy percent of full-time employment, in addition to these enumerated employer-paid benefits. The grand total, using the benefits shown at CP 70 - 71 at \$40,193.19, is \$183,614.75.

Quite simply, Gore's gross monthly income from her actual seventy percent full-time employment was \$15,301.23. In accordance with RCW 26.19.071(3), this was the figure which the court should have put in the first section of the worksheets, paragraph 1(a) and (e) expressed in monthly amounts broken down by salary and employment benefits (Other Income). To fail to do so not only ignored the evidence in the file, but was an abuse of discretion as a clear violation of law.

The following principles established by case law are important to a determination in this matter:

A parent's actual income may not be calculated in disregard of the evidence in the record. *State ex rel. Stout v. Stout*, 89 Wn.

App. 118, 125, 948 P. 2d 851 (1997); *In re Marriage of Bucklin*, 70

Wn. App. 837, 841, 855 P.2d 1197 (1993).

Failure to consider all sources of income is reversible error.

Marriage of Bucklin, supra, at 840. See, also, *In re Marriage of LaDouceur*, 58 Wn. App. 12, 791 P.2d 253 (1990)

2. Full-Time Compensation Must Be Imputed to Gore

RCW 26.19.071(6) provides in pertinent part:

“Imputation of Income. The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily under-employed. The court shall determine whether the parent is voluntarily under-employed . . . based upon that parent’s work history, education, health, and age, or any other relevant factors. A court shall not impute income to a parent who is gainfully employed on a full-time basis, unless the court finds that the parent is voluntarily under-employed and finds that the parent is purposely under-employed to reduce the parent’s child support obligation. Income shall not be imputed to an unemployable parent. . .”

The statute goes on to prioritize the manner in which to arrive at imputed income only “[i]n the absence of records of a parent’s actual earnings. . .” Here, the trial court had Gore’s actual earnings at 0.7 FTE.

Imputation is mandatory under the above-quoted statute, by

the use of the term “[t]he court shall impute” See, *In re Marriage of Goodell*, 130 Wn. App. 381, 390, 122 P.3d 929 (2005); *In re Marriage of Clarke*, 112 Wn. App. 370, 48 P. 3d 1032 (2002); *In re Marriage of Pollard*, 99 Wn. App. 48, 52, 991 P.2d 1201 (2000).

Imputed income should not exceed the level at which the parent is capable and qualified. *In re Marriage of Shellenberger*, 80 Wn. App. 71, 81, 906 P. 2d 968 (1995).

Voluntary unemployment (and by implication underemployment) has been defined as “unemployment that is brought about by one’s own free choice and is intentional rather than accidental . . .” *In re Marriage of Brockopp*, 78 Wn. App. 441, 446, n.5, 898 P.2d 849 (1995).

This Court’s decision in *Pollard*, *supra*, is instructive in several respects. First, although it seems to contradict the standard of review set forth in the *Stern* case cited in the Standard of Review section above, a reading of the case shows that this Court analyzed the evidence on essentially a substantial evidence basis. See *Pollard* at the last paragraph on page 53 and on page 54, parsing

the evidence and concluding that the fact that a mother stays home with her children no more justifies not imputing income to her than it would for a father who chooses to stay home with his family. *Id.*

Second, it plainly holds that staying home with or for children is not “gainful employment” *Id.* At 53.

Hospital nurses work less than a forty-hour week, yet they are treated as full-time employees for all purposes, but a nurse who works only half-time was found to have been voluntarily under-employed and could have obtained full-time employment as a nurse. Therefore, imputing income to her was not an abuse of discretion. *In re Marriage of Wright*, 78 Wn. App. 230, 234, 896 P.2d 735 (1995).

In the case at bar, Gore has never given any substantial reason for not working full-time. See CP 394, explaining that Dr. Gore has voluntarily expanded her work hours to .7 FTE. from .6 FTE.

Clearly the criteria for imputation of income are fulfilled by taking a look at Gore’s profile. Her work history is as a family physician for several years with Group Health Permanente. Her

education is as a medical doctor with a specialization in family practice. Her health is excellent, and at the time of the hearing her age was 46. The youngest child, Margaret, was about to enter kindergarten, CP 394, which would of course free up parenting time during the day completely. The parties had a “nanny” to take care of the children in any event. RPOR 10 - 11, CP 417 - 418. All in all, there was absolutely no reason for Gore to work less than full-time. Clearly the motivation was, at least in part, to reduce the calculation of her amount of child support on the child support worksheet. This obviously had the effect of increasing Jones’s child support payment. The law does not allow for this conduct.

3. The Trial Court Abused its Discretion By
Not Finding Jones To Be Employed Full-
Time

As recited in the facts above, Jones’s employer considered his employment full-time, and the industry standard for emergency room staff considers as little as thirty hours per week as full-time. Where as here, his hours were reduced by his employer, he filled the gap by obtaining secondary employment at the Colville Medical

Center. His work there consists of at least two twelve-hour shifts per month at the emergency room, and that time does not include his travel time to and from Spokane, and time taken for meals and the like in connection with this Colville employment.

Despite these uncontroverted facts, the trial court chose to treat the parties as essentially on an equal footing with respect to their employment times. RPOR 3 - 4, CP 410 - 411. This finding flies directly in the face of the facts. First of all, it is not necessary to work forty hours per week to be gainfully employed full-time for purposes of child support. *In re Marriage of Schumacher*, 100 Wn. App. 208, 214 - 15, 997 P.2d 399 (2000). It is common knowledge, for example, that hospital nurses work less than a forty-hour week, yet they are treated as full-time employees for all purposes. However, a nurse who works only half-time was found to have been voluntarily under-employed and could have obtained full-time employment as a nurse. Therefore, imputing income to her was not an abuse of discretion. *In re Marriage of Wright, supra*, at 234. Here, Jones is clearly working full-time as intended and in fact, and it was an abuse of discretion for the trial court to equivocate on the

full-time/part-time issue before it. Jones works full-time, Gore works part-time. There is no parallel between their employments. He works the stressful, high-intensity job of an emergency room physician; she works as a relatively low-key family practitioner (not to denigrate what she does, but simply to point out the contrast). CP 149.

4. The Trial Court Miscalculated Jones's Gross Monthly Income From ECI By A Mathematical Error

This argument centers completely on the ECI partner account summary of Jones's twelve-month income shown at CP 230. The trial court divided a twelve-month figure (from December 2010 through November 2011) by the wrong number, eleven. The twelve-month figure of \$246,430.00 should have been divided by twelve, which would render the correct monthly income from ECI to Jones of \$20,535.83 per month.

5. Jones's Itemization Of Normal Business Expenses Should Have Been Accepted In the Absence of Any Evidence To the Contrary, And

Not by Estimate

Jones's monthly business expenses are itemized on page five of his proposed Washington State Child Support Worksheets filed November 15, 2011, CP 162. There was no evidence in the record to controvene these figures which were asserted under penalty of perjury. Yet the trial court again, with an inexplicable attempt at reasoning, decided that the figures on the worksheet line 2.h. should be \$800.00 instead of \$1,256.76.

As noted previously, it is impermissible to calculate actual income - in this case - net income - in disregard of the evidence in the record or by speculation. *State ex rel. Stout, supra*, 89 Wn. App. 118, 125.

Because of the certainty established by Jones's declaration, the trial court abused its discretion by reducing his business expenses.

6. The Correct Calculation

Jones has identified all of the accurate figures in this Brief to be applied to the Washington State Child Support Worksheets using the correct amounts for gross income and net income, and for

normal business expenses. On remand, the trial court should not change the pension contributions or the percentages used for calculation of Federal income taxes, but would need to change the amounts of deductions for Social Security and Medicare using the correct gross incomes, as indicated in this Brief.

V. CONCLUSION

In this case, it appears that the volume of evidence presented may have confused the trial court. The trial court failed to grasp the facts that were before it, and thus arrived at calculations and conclusions which were significantly in error.

For these reasons, Dr. Ed Jones respectfully requests this Court to reverse the trial court decision, and remand with instructions to enter new child support worksheets which contain the correct figures as shown above. We request that the remand instruct the trial court that it should recalculate the amount of under- paid child support dating from the effective date of August 1, 2011, and give Jones credit for both the “over-payment” of “under-paid” child support, and for the over-payment of child support payments since he began making them on August 1, 2012 in accordance with the order of child support, paragraph 3.9, CP 312. This

credit/reimbursement to Jones is specifically authorized in *Stern II*, 68 Wn.

App. at 929 - 933.

Each party earns a substantial income, and each party should pay his and her own costs and attorney's fees.

Respectfully submitted this 29th day of October, 2012.


PETER S. LINEBERGER
Attorney for Appellant
Bar No.: 24104

CERTIFICATE OF SERVICE

I hereby certify that on the 29 day of October, 2012, a true and correct cop of a Brief of Appellant, in the above-entitled matter was delivered via facsimile transmission and by regular messenger service in the City of Spokane, to the following:

Spencer W. Harrington
Attorney at Law
1517 W. Broadway Avenue
Spokane, WA 99201


TAM HENRY
Legal Assistant to Peter S. Lineberger