

66835-8

66835-8

No. 66835-8

COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

JEFFREY ELTON KENDALL,

Appellant,

v.

CAROLYN CHRISTINE KENDALL,

Respondent.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 DEC 12 PM 1:03

APPELLANT'S REPLY BRIEF

Ronald J. Meltzer, WSBA No. 1203
W. John Sinsheimer, WSBA No. 2193
Attorneys for Appellant/Respondent

SINSHEIMER & MELTZER, INC., P.S.
1001 Fourth Avenue, Suite 2120
Seattle, WA 98154
Telephone: 206-340-4700

ORIGINAL

TABLE OF CONTENTS

I. **STATEMENT OF FACTS**1

II. **ARGUMENT**2

 A. **THE COURT HAD NO REASONABLE BASIS FOR FINDING THAT JEFFREY KENDALL’S MONTHLY INCOME WAS \$7,500**2

 B. **THE INCREASE, IF ANY, SHOULD BE RETROACTIVE ONLY TO THE DATE THE STATUTORY CHANGE INCREASING CHILD SUPPORT GUIDELINES TOOK EFFECT, NOT TO THE DATE THE PETITION WAS FILED**7

III. **RESPONSE TO MOTION FOR ATTORNEY’S FEES**.....8

IV. **CONCLUSION**9

TABLE OF AUTHORITIES

WASHINGTON CASES

Cena v. Department of Labor & Industries
121 Wn.App 915, 91 P.3d 903 (2004) 7

Chapman v. Perera
41 Wn.App 444, 704 P.2d 1224 (1985) 8

Eddie v. Eddie
1 Wn.App 444, 462 P.2d 562 (1969) 8

In re Marriage of Ayyad
110 Wn.App 462, 38 P.3d 1033 (2002) 5

In re Marriage of Blickenstaff
71 Wn.App 489, 859 P.2d 646 (1993) 5

In re Marriage of Bucklin
70 Wn.App 837, 855 P.2d 1197 (1993) 4

In re Marriage of Holmes
128 Wn.App 727, 117 P.3d 370 (2005) 7

In re Marriage of King
66 Wn.App 134, 831 P.2d 1094 (1992) 8,9

STATUTES

RCW 26.19.071 4

I. STATEMENT OF FACTS

Christine has gone to some lengths to portray Jeffrey as a man of hidden wealth, living a lavish lifestyle. This could not be further from the truth.

Jeffrey is an employee of a family real estate business inherited from Jeffrey's mother. He and his brother run the business, but it is also owned in part by his father and his three sisters. The business does not have extensive real estate holdings. It owns three pre-1970 apartment buildings which require a lot of maintenance, most of which is performed by Jeffrey and his brother personally. The 1031 exchange Christine refers to actually involved an exchange of property for an annuity for Jeffrey's two sons with a 25 year term. There was no elaborate tax scheme. Jeffrey's sole income is the modest salary he receives from the LLC. Otherwise, all of his expenses are covered by depletion of his assets. The transfers of these assets were clearly shown in Jeffrey's financial analysis.

He owns one club membership in a neighborhood pool. He owns one vehicle, a 2008 Honda truck. The home he lives in was inherited from his mother. He has tried unsuccessfully to pay down the mortgage to enable a refinance. Again all of these payments came from the depletion of assets. (CP 610-665)

He has no pension or retirement fund.

Christine, on the other hand, has worked at Costco for more than 25 years. Her average wages, as disclosed on her tax returns, exceed \$190,000. She has failed to disclose her bonuses, stock options, and her substantial retirement and pension plans. She drives a brand-new \$75,000 Audi.

The court, nevertheless, saw fit to increase Jeffrey's support obligation, despite the evidence that Jeffrey has been depleting assets to meet his basic expenses. (RP 37-38)

II. ARGUMENT

A. THE COURT HAD NO REASONABLE BASIS FOR FINDING THAT JEFFREY KENDALL'S MONTHLY INCOME WAS \$7,500.

The respondent, Carolyn Christine Kendall ("Christine"), argues the court reasonably attributed \$7,500 monthly income to Jeffrey because that was his income in 2006 at the time the original order was entered and that he now had expenses of \$5,670 a month.

Jeffrey provided tax returns, bank statements, and detailed financial information demonstrating that he was depleting assets in order to meet his monthly expenses. His actual income from all sources was shown to be only around \$1,956 a month.

The court nevertheless found Jeffrey's claim of reduced income was "not credible," apparently swayed by the fact that Jeffrey continued to meet his monthly expenses of approximately \$7,500. The court gave no other specific reason for disbelieving Jeffrey.

The court's refusal to find that Jeffrey's circumstances had changed was not a reasonable exercise of discretion given the current economic climate. Jeffrey is in the apartment management and maintenance business. His income from that business has always been capped at \$3,500 by the LLC Agreement. Much of Jeffrey's income from the 2005 divorce was based on mutual cash and stock interest and dividend income. Those holdings were split with the divorce, with Christine taking most of the cash. With the real estate collapse Jeffrey is now upside down in two of his properties and substantial equity loss in the others.

In finding as it did, the court not only disregarded the evidence before it, but also disregarded what had happened in the world since 2006.

The court acknowledged that it believed Jeffrey's income was something between the approximately \$2,000 shown by the evidence and the amounts being transferred between his bank, but stated it had no way of determining a precise figure. The court settled on \$7,500 as

Jeffrey's monthly income, principally because those were Jeffrey's expenses. Expenses, however, are not the same as income. The court also looked to Jeffrey's income in 2006. However, the past is not the present. Neither Jeffrey's expenses nor his past earnings are a proper basis for determining income in this case.

Nor did the court impute income to Jeffrey because of "underemployment" as it might have done under RCW 26.19.071.

Rather, the court guessed at Jeffrey's income. This is an abuse of discretion

"The court may not essentially guess at a parent's income. To do so is to exercise the court's discretion in an untenable and manifestly unreasonable manner. *In re Marriage of Bucklin*, 70 Wn.App 837, 855 P.2d 1197 (1993).

Unlike *Bucklin supra*, Jeffrey provided all the verification required by the statute, and then some, to establish his income. The court just chose to disbelieve it.

Christine urges the court to consider Jeffrey's alleged wealth in setting the child support obligation. Leaving aside the issue of whether that wealth has been established in any meaningful way, there is no authority for considering wealth, as opposed to income, in setting the child support obligation

Christine, for instance, argues the court could consider property which was the subject of a tax-free exchange as income, citing *In re Marriage of Ayyad*, 110 Wn.App 462, 38 P.3d 1033 (2002). That case is not apposite.

The *Ayyad* case involved the exercise of a stock option which resulted in a gain. However, exercised stock options, as the court pointed out, are generally treated as income under IRS rules, and had been reported as such on the husband's tax returns.

This is not true of tax free exchanges. The IRS does not treat such exchanges as income, nor should the court. Ordinarily, the values of assets or wealth are not considered in setting a child support obligation.

She also cites *In re Marriage of Blickenstaff*, 71 Wn.App 489, 859 P.2d 646 (1993), in which the court ordered an incarcerated parent to pay a support obligation out of his pension fund. That case, however, is limited to the very narrow circumstance of an incarcerated parent. By statute and case law, the court noted, an incarcerated parent may not be regarded as voluntarily underemployed and have income imputed for purposes of calculating a child support obligation. However, the court should consider whether the parent has other

resources out of which he can meet the child support obligation during the period of incarceration.

The ruling is limited to that narrow circumstance and does not stand for a general proposition that the court can always look at resources or wealth in determining the support obligation.

There is an excellent reason the legislature directed that income be considered rather than wealth in determining the support obligation. It would present the courts with a near impossible task to assess wealth and determine just how much of wealth should go to support children in every motion for modification.

We do not have a situation here where there is any evidence that the children's needs are not being met. They have a comfortable lifestyle and participate in many extracurricular activities

It should be noted that Christine has a high paying, stable job. Her income increased by nearly 20% since 2006 and, unlike Jeffrey, her income is not subject to the vicissitudes of the economy.

Under these circumstances, there was no authority, either in statute or case law, for essentially requiring Jeffrey to liquidate depreciated assets in a highly depressed market in order to meet an increased support obligation.

B. THE INCREASE, IF ANY, SHOULD BE RETROACTIVE ONLY TO THE DATE THE STATUTORY CHANGE INCREASING CHILD-SUPPORT GUIDELINES TOOK EFFECT, NOT TO THE DATE THE PETITION WAS FILED.

Christine argues the court may make the modification effective on the filing date of the petition, the date of the Order or any time in between, citing *In re Marriage of Holmes*, 128 Wn.App 727, 38 P.3d 1033 (2002).

Holmes did not deal with the retroactivity of a statute increasing the basic support obligation, but only with the extent of the Court's discretion in support modifications. Generally, a statute is not applied retroactively *Cena v. Department of Labor and Industries*, 121 Wn.App 915, 91 P.3d 903 (2004).

The *Cena* case is instructive. It involved the retroactive application of a statute which had the effect of increasing workers compensation awards. The court held that a worker who filed for benefits before the effective date of the statute was not entitled to retroactive application of the new standard.

Similarly here, the court cannot apply the new child support guidelines retroactively to increase Jeffrey's support obligation for a

period prior to the effective date of the statute. That amounts to retroactive application of the statute.

III. RESPONSE TO MOTION FOR ATTORNEYS FEES

Christine requests attorney's fees based on Jeffrey's alleged intransigence and her own inability to pay.

Generally in considering whether to award attorney's fees on appeal of domestic relations matters, the court will consider the arguable merits of the appeal and the respective financial circumstances of the parties. *In re Marriage of King*, 66 Wn.App 134, 831 P.2d 1094 (1992).

The court may also consider the intransigence of the appealing party, but only, it would seem when that intransigence relates to conduct during the appeal, or the filing of the appeal itself.

In *Edie v. Edie*, 1 Wn.App 440, 462 P.2d 562 (1969) for instance, the appeal not only had little merit, but the appealing party's tampering with trial exhibits caused extra work for the respondent's counsel.

In *Chapman v. Perera*, 41 Wn.App 444, 704 P.2d 1224 (1995), the appealing spouse's filing of numerous post-appeal motions which were without merit, similarly increased the length and cost of the appeal.

In *King, supra*, the appeal was found to be frivolous.

In this case, Christine alleges no demonstration of any intransigence, relating to the appeal itself, which is been straightforward. Christine cites only alleged intransigence at the time of trial. There is no case holding that this alone will justify an award of attorney fees on appeal.

Nor has Christine demonstrated the other factors the court is to consider. This appeal plainly has arguable merit and Christine has made no showing, beyond her bare allegation of financial hardship in paying what should be relatively modest attorney fees on appeal.

IV. CONCLUSION

Relief should be granted as requested in Appellant's opening brief and the Motion for Attorney's Fees should be denied.

RESPECTFULLY submitted this 12th day of December, 2011.

SINSHEIMER & MELTZER, INC., P.S.

By: 
Ronald J. Meltzer, WSBA No. 1203
W. John Sinsheimer, WSBA No. 2193
Attorneys for Appellant/Respondent

No. 65462-4

COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

JEFFREY E. KENDALL

Appellant

v.

CAROLYN CHRISTINE KENDALL

Respondent

PROOF OF SERVICE

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 DEC 12 PM 4:03

Ronald J. Meltzer, WSBA No. 1203
W. John Sinsheimer, WSBA No. 2193
Attorney for Respondents

SINSHEIMER & MELTZER, INC., P.S.
1001 Fourth Avenue, Suite 2120
Seattle, WA 98154
Telephone: 206-340-4700

ORIGINAL

I hereby certify that I served the following documents upon the interested party listed below:

1. Appellant's Reply Brief
2. Proof of Service.

Terry Zundel
Zundel Law Offices
1000 2nd Ave., Suite 1420
Seattle, WA 98104
Email: terry@zundellaw.com

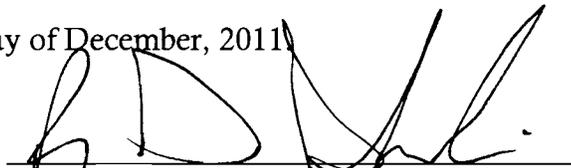
Patricia Novotny
3418 NE 65th St., Suite A
Seattle, WA 98115
Email: novotnylaw@comcast.net

By causing a full, true and correct copy to be delivered by ABC LEGAL MESSENGER to the party at the address listed above, which is the last-known address for the attorney, on the date set forth below;

By causing a full, true and correct copy to be delivered by ELECTRONIC MAIL to the party at the email address listed above, which is the last known email address for the party, on the date set forth below;

By causing a full, true and correct copy to be MAILED in a sealed, postage-paid envelope, addressed as shown above, which is the last known address for each party, and deposited with the U.S. Postal Service on the date set forth below;

SIGNED this 12th day of December, 2011



Ryan Dekowski