66835-8

66835-8

No. 66835-8

COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

JEFFREY ELDON KENDALL,

Appellant/Respondent,

v.

CAROLYN CHRISTINE KENDALL,

Respondent/Cross-Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 AUG 15 PM 2:

BRIEF OF APPELLANT

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ORIGINAL

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I INTRODUCTION

This is an appeal from a trial courts ruling on a petition to modify child support.

The parties' marriage was dissolved in April 2006. At that time the parties agreed the husband (Appellant) would pay child support of $767.00 for his two children based on an agreed gross income for the husband and wife of $7,500 each per month. The parties also agreed the husband would be proportionally responsible for up to $300.00 actual expenses incurred for the children's extracurricular activities. No payments were ever transferred based on the $300 extracurricular clause. The wife (Respondent) petitioned the court to modify the original child support order claiming the husband's income was $25,000.00 per month. The court rejected Respondent's position, but increased the husband's proportionate share of support based on a finding Appellant's income was $7,500 and applying the intervening statutory increases in the child support schedules. The court also increased Appellant's child support obligation by adding the monies due for extracurricular activities to the child support calculation, without requiring an accounting for monies actually spent on such activities as the signed negotiated parenting plan states.

I. ASSIGNMENTS OF ERROR

Assignment of Error Number 1. The court erred in increasing the amount due for child support effective August 1, 2009 when the statute implementing the child support schedules was effective on October 1, 2009 (CP 359-363).

Issue relating to Assignment of Error Number 1:

1. Can a court apply a statute increasing child support prior to the effective date of the statute?

Assignment of Error Number 2. The court erred in entering Findings and Conclusions 2.3 which reads as follows:

> The previous order was entered more than two years ago and there has been a change in the income of the parents. Support was pled as an issue in the parenting plan modification.

Issue relating to Assignment of Error Number 2: Can a court enter a finding there is a change in the income of the parents when the court has specifically found the Appellant's income did not increase

Assignment of Error Number 3. The court erred in finding the husband had gross income of $7,500 per month and net income of $5,670 per month. (CP 359-363) The court erred in entering Findings of Fact, paragraph 2.2:

> The child support worksheet which has been approved by the court has been initiated and filed separately, and is incorporated by reference. the Order of Child Support signed by the court on January 14, 2011, is incorporated by reference.

Issue relating to Assignment of Error Number 3: Can a court determine gross income where the only evidence presented is the husband's expenditures were paid from pre-existing assets? Can a court make a finding Appellant's financial declaration is not credible because there was no showing Appellant was going into debt?

Assignment of Error Number 4. The court erred in requiring the husband to pay for extracurricular activities as a basic child support obligation without a showing by the Respondent that any funds were due for such activities. (CP 359-363, CP 390-391)

Issue relating to Assignment of Error Number 4: Can a court modify a parenting plan to increase child support without a change in circumstances?

III. STATEMENT OF THE CASE

Factual background.

The parties to this appeal had their marriage dissolved by decree of dissolution entered on April 28, 2006. As part of the decree, Appellant was to pay $767.00 per month in child support for the two

children of the parties, based on his income of $7,500.00 per month. The amount due of $767.00 was calculated using the child support schedules then in effect. In addition to child support, paragraph 4.2 of the Final Order Parenting Plan contained the following language:

> If the mother wishes to schedule the children for an activity that will require the father to contribute financially, she will seek the father's agreement. If the father does not agree, but the proposed cost does not exceed his pro rata share of the $300 total per month for both children, than the mother may schedule the children. If the cost exceeds father's pro rata share of $300 per month, the mother may schedule the children. If the father's pro rata share would be great than his pro rata shore of $300, his total responsibility for extracurricular activities is capped at $300.00 per month. This provision does not entitled mother to schedule activities that impact the father's residential time without his written approval or ruling from the Court. This $300 shall be related solely to children's extracurricular activities.

(Supplemental CP ____)[1]

Implicit in this provision is the wife must actually incur these expenses. In July, 2009 the wife filed a petition to modify the parenting plan and child support. (CP 1-7) The issues relating to the parenting plan were resolved by agreement, leaving the child support issue to be determined by Trial by Affidavit. (CP 29)

[1] Supplemental Clerk's Papers index is not available at the time of filing brief.

The matter came on before Commissioner Lori Smith on January 14, 2011. (RP Commissioner Smith, p.1). Respondent took the position that the husband's income was approximately $25,000.00 per month based on the amounts of money flowing through his checking account. (CP 29-35) Appellant presented tax returns and a detailed explanation demonstrating all of the funds flowing through his checking accounts came from his assets rather than income (see Ex 1a and Ex 1b, which provide an analysis of the tax returns and bank statements. These exhibits were computed from Appellant's financial information, CP 610-655).[2] He presented documentation his current income was a maximum of $3,500.00 per month (CP 610-665). No attempt was made by Respondent or the Commissioner to impute income to Appellant.

Rather Commissioner Smith, without any analysis of the Appellant's financial materials, held since it appeared he had assets flowing through his checking account, and expenses of at least $7,500 per month, his income must be at least $7,500 per month, the amount previously agreed upon by the parties in 2006. (RP 36-38) She further held child support should be calculated based on the current version of

[2] The exhibits were not part of the trial records but are included here for the Court's convenience in reviewing Appellant's financial records.

RCW 26.19.020, effective August 1, 2009 rather than the effective date of the statute October 1, 2009. Commissioner Smith also modified paragraph 4.2 of the original order of child support. (CP 359-363) This was done to provide a method of accounting for the parties for extra curricular activities. It had the effect, however, of requiring Appellant to potentially pay the costs of extracurricular activities up front rather than reimbursing Respondent. It also allowed the Respondent to use the sum of $300 to increase Appellant's portion of the maximum child support payment of $2,330 to $1,223. If that sum was excluded and the parties' net incomes were used along with the medical expense of $77.00, the ratio of Appellant's to Respondent's income would be 54.8% (R) to 45.2% (A). Applied to a total child support obligation of $2,330, Appellant would pay $1,088 per month. Instead, the $300 sum was added to the total support obligation, credited to Respondent, thus increasing Appellant's total to $1,223 per month.

The Respondent appealed the Commissioner's ruling. (CP 364) The Motion for Revision was denied, except the trial court struck the accounting provision for the extracurricular activities. (CP 390-391) The effect of this was to increase Appellant's child support obligation by $145 per month without any requirement the money actually be spent by Respondent on any extracurricular activities. (CP 390-391)

IV. LEGAL ARGUMENT

A. ASSIGNMENT OF ERROR NUMBER 1.

1. Standard of Review. This issue is reviewable as a matter of law. Whether a statute applies to a particular factual situation is a question of law fully reviewed on appeal. Lobdell v. Sugar 'N Spice, Inc., 33 Wash.App. 881, 658 P.2d 1267 (1983).

2. Argument. The court order made the support increase effective as of August 1, 2009, the first month after the case was filed (CP 359-363). The effective date of RCW 26.19.020 which implemented the support schedules on which the current calculations was made was October 1, 2009. The court order making the increase effective August 1, 2009 was clearly erroneous as it relied on the new schedules for its support calculations. No other basis for increasing support effective August 1, 2009 appears on the record.

B. ASSIGNMENT OF ERROR NUMBERS 2 AND 3.

1. Standard of Review. The Court of Appeals reviews a trial court's decision to determine whether the findings are supported by substantial evidence and whether those findings supported the conclusions of law. Thompson v. Hanson, 142 Wash.App.53, 174 P.3d 120 (2007).

2. Argument. Respondent's motion to modify support was based entirely on a claim that Appellant must have more income then $7,500 per month because large sums of money were passing through his checking account. Appellant responded by providing tax returns, and detailed information from his other bank accounts, to demonstrate he was living primarily off assets he had accumulated. (CP 610-665) Income that is counted towards basic support calculation is described in RCW 26.19.071(3):

> (3) **Income sources included in gross monthly income.** Except as specifically excluded in subsection (4) of this section, monthly gross income shall include income from any source, including:
> (a) Salaries;
> (b) Wages;
> (c) Commissions;
> (d) Deferred compensation;
> (e) Overtime, except as excluded for income in subsection (4)(h) of this section;
> (f) Contract-related benefits;
> (g) Income from second jobs, except as excluded for income in subsection (4)(h) of this section;
> (h) Dividends;
> (i) Interest;
> (j) Trust income;
> (k) Severance pay;
> (l) Annuities;
> (m) Capital gains;
> (n) Pension retirement benefits;
> (o) Workers' compensation;
> (p) Unemployment benefits;
> (q) Maintenance actually received;
> (r) Bonuses;
> (s) Social security benefits;

> (t) Disability insurance benefits; and
> (u) Income from self-employment, rent, royalties, contracts, proprietorship of a business, or joint ownership of a partnership or closely held corporation.

This statute does not include depletion of preexisting assets as income. The net income listed on the Appellant's Financial Declaration of $2,044 is the only income figure before the court other than Appellant's Financial Declaration that he could make as much as $3,500 per month. The court rejected this figure stating as follows (RP Commissioner Smith, 37-38):

> So there is some question as to what his actual income is and how it's being reported and how it's being used. And I cannot accept his assertion with regard to that income. but I don't find that $25,000 as a gross income is appropriate either. I do believe that there were some funds flowing in and out of the U.S. Bank account that weren't all coming in as new income to the father that could be considered for purposes of child support.
>
> So we're stuck with what figure do we actually use. In 2006 when the $7500 was used, the net income was very close to what the father currently says his monthly expenses are. And that makes sense to this Court, that he is making money to cover his monthly expenses. I don't see a great increase with regard to this wealth necessarily. He is real estate healthy as opposed to cash healthy. But I do believe that there is income flowing in and out that he is using on a regular basis for purposes of his expenses in the amount of $7,500 gross, and that will be is gross income for purposes of determining child support.

In effect the court was imputing income to calculate child support. The standard for imputation of income is governed by RCW 26.19.071(6). It requires a finding of voluntary underemployment for the purpose of reducing a child support obligation. The court made no finding of voluntary underemployment nor was there any evidence of same. Respondent did not argue imputation as a basis for adjusting Appellant's support obligation.

In summary, Respondent provided no evidence of any income of Appellant other than his bank statements. These statements and tax returns only showed depletion of assets. The trial court abused its discretion in arbitrarily assigning an income of $7,500 per month for Appellant.

In In re the Marriage of Bucklin, 70 Wn. App. 837, 855 P.2d 1197 (1993), the husband was unable to verify his gross income by tax returns and pay stubs and failed to provide other sufficient verification of income. The court properly rejected his claim that his gross income decreased. Here all verification was provided. No evidence exists to show Appellant had any other income than the income disclosed. The trial court, while properly rejecting Respondent's claim for increase based on monies passing through a bank account, failed to take the

next appropriate step and make a finding based on current circumstances.

The court's findings state the basis for the modification was a change in the income of the parents. (Findings of Fact/Conclusions of Law, 2.3.) This finding is contrary to the court's pronouncement the Appellant's income was precisely the same as in 2006 and the Respondent's income had increased slightly. If anything this should have slightly lowered Appellant's share of the support obligation. The child support worksheet incorporated by reference in the Findings at paragraph 2.2 increases the support by apparently using the statutory schedule, RCW 26.14.020, effective October 2009. While a modification can be supported by a change in the schedule [RCW 26.09.170(7)(a)(ii)], the court made no finding to that effect.

Respondent never pled nor asserted in her trial brief the modification sought was based on a change in the child support schedule.

RCW 26.09.170(7)(b) states, "Either party may initiate the adjustment by filing a motion and child support worksheets." Having initiated the proceeding Respondent should be bound by the evidence presented. Appellant's gross income should be no more than $3,500

per month and the child support order should be recalculated based on this undisputed evidence.

C. ASSIGNMENT OF ERROR NUMBER 4.

1. Standard of Review. The original parenting plan contained a provision whereby Appellant would reimburse Respondent up to $300 per month for monies actually spent on extracurricular activities. This means in any given month this could be anywhere from zero to three hundred based on money actually spent. This sum was not used in the original calculation of child support.

2. Argument. In Respondent's original financial declaration accompanying the petition to modify, the worksheet calculating the support did not include this payment. (CP 11-16) This was appropriate, as the payment was contingent on future events, i.e. would Respondent actually spend money on extra curricular activities. Commissioner Smith, without any factual or legal basis, turned this contingent obligation into a fixed monthly obligation of a proportion of $300 by allowing Respondent to include this contingent payment as a special expense credit. By giving Respondent this credit it automatically increased Appellant's child support payment. To ameliorate this, the Commissioner included an accounting provision so that on a yearly basis this would be properly adjusted. While there

is no legal authority to do this, Appellant would not have been harmed, for in the relatively short run it would be adjusted. (RP 46) However, the trial court in the hearing on the Motion for Revision eliminated the accounting provision but allowed the $300 per month credit to Respondent without any showing any money will ever be spent on extracurricular activities. Its effect is to raise the child support payment due by Appellant from $1,088 to $1,233 per month. The calculation is as follows: the total support obligation is $2,330 for which the Appellant based on a $7,500 per month gross and a $5,670 per month net bears a 45.2% responsibility. In addition he owes 45.2% of the $77.00 per month medical premium. By adding $300.00 per month, as a fixed expense rather than a contingent expense, it increases the basic support by 45% of $300.00, or $145.00 per month. This becomes more egregious when one realizes the court made the order retroactive to August 1, 2009 without any showing by Respondent she paid a penny for extracurricular activities from August 1, 2009 to January 14, 2011. The court's order, in essence, modified the prior order without any evidence of change in circumstance.

The statutory basis for modification is found at RCW 26.09.170(5)(6)(7). None of those circumstances were present in the instant case. The change ordered here violates the support schedules

by requiring Appellant to pay disproportionally. Respondent is free to present Appellant proof of these expenses and be reimbursed. She should not be permitted, however, to change the basic support obligation without meeting the statutory criteria.

V. CONCLUSION

The trial court's order should be reversed with direction to:

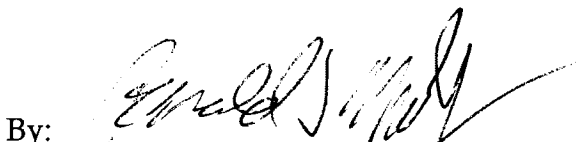
(a) Make any change in child support effective October 1, 2009;

(b) Recalculate child support based on a gross income of $3,500 per month for Appellant; and

(c) Eliminate the use of the extracurricular activities reimbursement in the child support calculation and then recalculate Appellant's support obligation.

RESPECTFULLY submitted this 15th day of August, 2011.

SINSHEIMER & MELTZER, INC., P.S.



By: _____
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Tax Return Income Analysis (exhibit #1a)

Kendall 05-3-01063-4

Line	Description	Petitioner 2,008	Petitioner 2,009	Petitioner Total	Petitioner Annual Avg	Jeffrey E Kendall 2,008	Jeffrey E Kendall 2,009	Jeffrey E Kendall Total	Jeffrey E Kendall Annual Avg
1	Wages	268,704	116,234	384,938	192,469	0	0	0	0
2	Interest	5,226	8,477	13,703	6,852	22,956	4,050	27,006	13,503
3	Dividends	81	186	267	134	284	602	886	443
4	Business Income (Loss)	0	0	0	0	(1,872)	(1,312)	(3,184)	(1,592)
5	Capital/Other Gain (Loss)	(286)	0	(286)	(143)	(242,190)	18,593	(223,597)	(111,799)
6	**Subtotal Adjusted Gross Income**	**273,725**	**124,897**	**398,622**	**199,311**	**(220,822)**	**21,933**	**(198,889)**	**(99,445)**
7	AGI Monthly Income	**22,810**	**10,408**	**16,609**	**16,609**	**(18,402)**	**1,828**	**(8,287)**	**(8,287)**
8									
9	Schedule E - Steel Icon LLC	0	0	0	0	(153,529)	(112,554)	(266,083)	(133,042)
10	Net Operating Loss Carryover	0	0	0	0	(226,519)	(226,519)	(453,038)	(226,519)
11	**Total Adjust Gross Income**	273,725	124,897	398,622	199,311	(600,870)	(317,140)	(918,010)	(459,005)
12									
13	Itemized Deductions								
14	Medical and Dental	0	0	0	0	4,891	849	5,740	2,870
15	Taxes/Property Paid	6,461	9,155	15,616	7,808	5,854	14,012	19,866	9,933
16	Interest/Mortgage Paid	5,840	4,717	10,557	5,279	0	24,335	24,335	12,168
17	Gifts to Charity	2,344	1,607	3,951	1,976	0	0	0	0
18	Job Expenses/MISC	0	0	0	0	1,375	8,700	10,075	5,038
19	**Total Itemized Deductions**	14,645	15,479	30,124	15,062	12,120	47,896	60,016	30,008
20									
21	Exemption	5,600	7,300	12,900	6,450	7,000	7,300	14,300	7,150
22	**Taxable Income**	253,480	102,118	355,598	177,799	(619,990)	(372,336)	(992,326)	(496,163)
23									
24	Tax	66,572	20,364	86,936	43,468	0	0	0	0
25	Alternative minimum tax	2,046	0	2,046	1,023	0	0	0	0
26	**Total Tax**	68,618	20,364	88,982	44,491	0	0	0	0
27									
32	**Net Annual Income**	**205,107**	**104,533**	**309,640**	**154,820**	**(600,870)**	**(317,140)**	**(918,010)**	**(459,005)**
33	**Net Monthly Income**	**17,092**	**8,711**	**12,902**	**12,902**	**(50,073)**	**(26,428)**	**(38,250)**	**(38,250)**
34									

1A

EXHIBIT

Tax Return Income Analysis (exhibit #1a)

35				
36	Net Annual Income (Jeff Kendall)	(600,870)	(317,140)	
37	+Withdrawals & distributions (Jeff Kendall K-1)	0	10,000	
38	+Depreciation (Steel Icon LLC)	304,173	212,009	
39	+NOL Carryover (Steel Icon LLC)	226,519	226,519	
40	-Principle payments (Steel Icon LLC)	94,686	106,812	
41	**Year End Cash Flow (Jeff Kendall)**	**(164,864)**	**24,576**	**(140,288)**
42	(relative to all income and tax deductible expenses/losses)			
43				
44	Note: All data from this accounting worksheet comes from both Petitioner and Respondent's tax returns previously submitted to court.			

EXHIBIT A

Mr. Kendall's Asset Depletion Analysis (exhibit #1b)

Kendall 05-3-01063-4

Line	USBank #4995 Primary Savings Statements	USBank #4995 Statement End Date	Transfers IN to #4995 from other accounts		Transfers OUT of #4995 to USBank checking #5471/2446 to be spent on bills		USBank #4995 Interest less Fee's	USBank #4995 Statement End Balance
1	4995	09/24/09						**77,419**
2	4995	10/26/09			27,000	-> 5471	32	50,450
3	4995	11/25/09	BofA	5,750	22,750	-> 5471	16	33,466
4	4995	12/23/09	Etrade	25,000	6,250	-> 5471	17	52,233
5	4995	01/27/10			12,750	-> 5471	20	39,503
6	4995	02/24/10			9,500	-> 5471	12	30,016
7	4995	03/23/10			13,500	-> 5471	7	16,522
8	4995	04/23/10	BofA/Closed	103,991	16,000	-> 5471	2	104,515
9	4995	05/25/10	Salary	22,000	33,600	-> 5471	69	92,984
10	4995	06/14/10			2,475	Bank Chk		90,508
11	4995	06/23/10			11,800	-> 5471	33	78,741
12	4995	07/26/10			15,800	-> 5471	32	62,973
13	4995	08/24/10			6,000	-> 5471	23	56,997
14	4995	09/24/10			20,000	-> 5471	14	37,011
15	4995	10/26/10			15,500	-> 5471	11	21,522
16	4995	11/24/10	Scottrade	75,000	25,000	-> 2446	4	**71,526**
17	Totals			**231,741**	**237,925**		**292**	
18								
19	Beginning Balance #4995							**77,419**
20	+ Total Interest less fee's column							**292**
21	+ Total Transfers from other savings/brokerage accounts to USBank #4995 savings							**231,741**
22	- Total Transfers from savings #4995 to USBank #5471 checking					**SAVINGS DEPLETION**		**-237,925**
23	= Ending balance #4995							**71,526**
24								
25								
26								
27								
28								
29								
30								
31								

EXHIBIT 18

No. 65462-4

COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

JEFFREY E. KENDALL

Appellant/Respondent

v.

CAROLYN CHRISTINE KENDALL

Respondent/Cross-Appellant

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PROOF OF SERVICE

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ORIGINAL

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

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

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

[ ] 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;

[X] 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;

[X] 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 15th day of August, 2011.

Marci Umatum