

NO. 66953-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
 DIVISION 1

JOSEPH T. KELLY, father

Appellant,

v.

STATE OF WASHINGTON ON BEHALF OF KYLE P. KELLY, child

AND KRISTEN A. HATTON, mother

Respondent,

APPEAL FROM SUPERIOR COURT OF KING COUNTY
 HONORABLE JAQUELINE JESKE, COMMISSIONER
 KING COUNTY SUPERIOR COURT CASE # 95-5-01302-4 SEA

BRIEF OF APPELLANT

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FILED
 COURT OF APPEALS DIV 1
 STATE OF WASHINGTON
 2011 SEP 13 AM 10:46

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I. ASSIGNMENTS OF ERROR

A. ASSIGNMENT OF ERROR NUMBER 1: The trial court erred in its finding that the father did not properly document his normal business expenses and, thus, any and all business expenses, whether documented or not, should not be used. The trial court made every prejudiced effort to disallow any and all business expenses and professional fees no matter how clearly documented those expenses were. The review judge upheld the trial court's decision to arbitrarily disallow all normal business expenses and professional fees to a self-employed person as "discretionary" when they are, in fact, required to be applied to the support calculation by Washington State Law RCW 26.19.071. It was clear the father was self-employed and was neither unemployed nor underemployed to purposely reduce the parent's child support obligation. Additionally, in the Order Denying Motion for Revision, The trial court shows abuse of discretion by stating, "Business expenses, while justified for accounting or IRS purposes are nonetheless discretionary in determining income of a

party for purposes of child support.” This is simply not the law as written in RCW 26.19.071.

B. ASSIGNMENT OF ERROR NUMBER 2: The trial court erred in its calculation of gross income by dividing the father’s income by 8.5months versus 11 months. Income information was supplied through November, 2010 and the father’s gross income should have been divided by 11 months. The father did not make any additional income for those additional 2.5 months.

C. ASSIGNMENT OF ERROR NUMBER 3: The trial court erred by allowing the mother’s full retirement contribution as a deduction even though the respondent mother had clearly taken out a loan against her retirement account which will have to be paid back and negates part or all of the retirement contribution.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

A. Did the trial court show prejudice by ignoring the substantial financial documentation and evidence of both normal business expenses and required professional fees of Mr. Kelly that is found in the record and supplemented in his motion for revision/reconsideration with the Superior Court?

- B. Was Mr. Kelly unemployed or underemployed to purposely reduce his child support obligation?
- C. Was Ms. Hatton's income "under-calculated" and did her loan against her 401k negate her contribution to that account?
- D. Should the Commissioner have divided the gross income of Mr. Kelly by 11 months instead of 8.5 months as that was the YTD income as of December, 1st, 2009?

III. STATEMENT OF THE CASE

Mr. Kelly and Ms. Hatton were never married and had a son, Kyle Patrick Kelly, in 1993. In 2006 Ms. Hatton served Mr. Kelly with a motion to recover back child support as well as establish a new child support order. Mr. Kelly paid Ms. Hatton \$80,000 in back child support in 2007 as well as \$8,500 in attorney fees in 2007.

Also in 2007 Mr. Kelly was working in the Real Estate and Mortgage industry in Spokane, WA which is where he moved in September of 2006. Previously, he had worked in the Real Estate and Mortgage industry in Seattle, WA. Mr. Kelly has worked in this industry since 2000. Ms. Hatton had worked and continues to work at Microsoft Corp. in Redmond, WA.

Mr. Kelly has, and continues to be, self-employed in a decimated industry and his income is based on 100% commissions. He draws no salary and simply makes what commissions he can earn upon closing of a transaction regardless of how much he works. Quite often he has worked on various transactions for months that never ended up closing at no fault of his. For these efforts he receives no compensation. His company, Soleil Real Estate is a small real estate company based in Spokane, WA. He has been licensed in both Real Estate and Mortgages and must maintain and pay for his mandatory continuing education, State of WA licensing fees, National Mortgage licensing fees, National Association of Realtor fees, WA Realtor fees local MLS fees. As well, Mr. Kelly must pay for all his business expenses in order to generate any revenue that can be considered income. He must pay for his office, utilities, office supplies, internet, computers, etc.

Ms. Hatton was, and continues to be, on a full salary with full benefits at Microsoft Corporation.

Prior February, 2011 Mr. Kelly was paying \$800 per month in child support as well as additional ancillary expenses. This support obligation was based on income Mr. Kelly derived from the peak of the Real Estate and Mortgage markets in 2006 in Seattle, WA. The \$800 support obligation at that time determined Mr. Kelly's new support obligation and included \$4,000 per

month normal business expense deductions that was never challenged nor questioned by Ms. Hatton.

In March of 2009, Mr. Kelly requested that he and Ms. Hatton exchange financial information. Circumstances in the Real Estate and Mortgage industries had changed dramatically and after 2 years of paying \$800 per month support obligation Mr. Kelly requested relief and an adjustment of support. Ms. Hatton, through her attorney, ignored Mr. Kelly's request.

In October 2009, Mr. Kelly determined Ms. Hatton would not comply with the support order to exchange financial paperwork and he submitted all his financial information to DCS and requested modification of child support. DCS began the long process of determining/modifying child support. In November, 2009 Kyle decided to live with Mr. Kelly in Spokane, WA. On December 15, 2009 DCS determined Ms. Hatton owed a support obligation to Mr. Kelly of \$782.00. DCS had determined Mr. Kelly's share of the support obligation to be \$197 per month. Ms. Hatton appealed that decision to an Administrative Law Judge in Vancouver, WA and the support obligation to Mr. Kelly was reduced from \$782.00 to \$588.00. Mr. Kelly appealed that decision to Spokane County Superior Court and on July 22, 2011 it was ordered that the case be remanded back to the ALJ for a new hearing. Kelly v. Hatton/DSHS, Order, #11-2-00688-8, Spokane Sup. Ct., (2011) Spokane Superior Court Judge Annette Plese determined in that case that...

“There were insufficient findings by the administrative law judge to support the decision to impute income based on criteria under RCW 26.19.071. There is also new evidence that was not available at the time of the hearing that is relevant to the issue and in the interests of justice. It is ordered: The administrative decision is reversed and the case is remanded for a new hearing to include new evidence relevant to the proceedings.”

The new ALJ hearing has not been set as of this date.

IV. ARGUMENT

This case is predominantly about the understanding and application of RCW 26.19.071 (6) and RCW 26.19.071 (1)(5)(h)(d) and how it applies to a self-employed person who has been working full-time in the same industry doing the same job for over 10 years. This is a clear error of law and would have constituted an abuse of discretion. Discretion is abused when it is exercised on untenable grounds for untenable reasons.

In the Commissioner’s hearing for adjustment of child support on January 26, 2011, Mr. Kelly supplied appropriate documentation and evidence of income and normal business expenses for the Commissioner to be able to determine that Mr.

Kelly had justifiable and normal business expenses. Mr. Kelly added evidence clarifying his normal business expenses in his motions for revision and reconsideration as allowed by the court. There is substantial evidence in the record sufficient to persuade a fair-minded person of the truth of the declared premise. In this case it is clear the Commissioner made every attempt to not examine the full body of evidence. Although substantial and perhaps burdensome by the sheer volume of evidence (several hundred pages), there is enough to determine accurately Mr. Kelly's true net support obligation while factoring in his basic and documented normal business expenses and professional fees. The Commissioner ruled with prejudice that Mr. Kelly should simply have a higher income and, on review/reconsideration, the Judge did not look at the evidence or the law as written in RCW 26.19.071 and denied the Motion for Revision.

Mr. Kelly does not have an issue with the "gross income" established by the trial court as it is accurate enough for the purpose of establishing a "starting point" in determining Mr. Kelly's "net income." In re Marriage of: Kristie Flinders Saperstein, Respondent, and Paul Saperstein, Appellant, No. 36869-9-I (Wash Ct. App., Jan. 27, 1997) the court agreed to reverse and remand on the issue of the commissioner failing to deduct business expenses from his income.

The issue at hand is that Mr. Kelly has been employed in the same industry doing the same job for 10 years. He is clearly self-employed and makes his living

as a 100% commissioned person and needs to utilize his business expenses in order to generate revenue.

In the Sealed Financial Documents there is letter discussing options for Mr. Kelly's upcoming foreclosure yet the Commissioner continues to chide Mr. Kelly and agree with Ms. Banks that there is no evidence supporting his claim he is losing his house. As well, there are complete bank statements showing no payments to Bank of America (which were normally in excess of \$4,500/month). The Commissioner readily accepts Ms. Hatton's household expenses of over \$10,000 (on household income of over \$144,000) but cannot and WILL NOT make an attempt to accept Mr. Kelly's household expenses while he supports his wife and 5 children. The fact of the matter is that in 2008 Mr. Kelly was given a one-time gift from his parents of approximately \$80,000 from the sale of a family lake residence in Idaho. It is well-documented on his tax return. It is these funds that he had to convert to cash, keep in a safe from the IRS and live off of for over 2 years to supplement the income deficiency. This is the explanation the Commissioner would not allow nor would accept even though it is in the record and it is clearly plausible. This one-time gift cannot be counted as income per RCW 26.19.071 (4) and did not have any interest.

The record is clear that Mr. Kelly provided adequate evidence to substantiate his Normal Business Expenses. It is also clear Ms. Hatton never challenged any of his business expenses. It was at the sole discretion of the

Commissioner to ignore the laws as written. This is a very dangerous precedent as any Commissioner would be allowed to look at any Business Expense no matter how well-documented and determine that expense as “discretionary.” As well, the Commissioner states (Page 27, line 4) that:

“...so that’s your gross. You can have the tax deduction and FICA, and I’m not providing for business expenses.”

In re Marriage of Roth, 2008 Wash App. Lexis 1145 (Wash Ct. App., April 17, 2008), the Appeals Court, Div. III opinion states (paragraph 10):

“Here, the court set Mr. Roth’s monthly gross income at \$8,333 and his net income at \$5,985, deducting nothing for normal business expenses despite the unchallenged expenses shown in his 2004 and 2005 tax returns....it appears the superior court failed to follow the legislatively mandated procedures of RCW 26.19.071 in establishing Mr. Roth’s net income. Therefore, we remand for fact finding of Mr. Roth’s “net income.”

This case is one of many which found that the trial court erred by not allowing a clearly self-employed person to deduct normal business expenses no matter how well documented. In this case it was only documented in Mr. Roth’s tax returns. Mr. Kelly has provided tax returns, bank statements, cancelled checks, receipts and much more to, without a shadow of a doubt, establish his unchallenged (no disagreement) Normal Business Expenses.

On the support worksheet signed by all parties and in the record it shows Mr. Kelly with a Total Gross Monthly Income of \$4,226.00. There is no “imputed” income. As such, there is no reason Mr. Kelly should be denied the deductions of Normal Business Expenses and Mandatory Professional Dues.

The 2 additional errors by the Commissioner are secondary in nature but should be addressed and ruled on to promote accuracy and fairness under the law.

With regards to the assignment of error number 2, Mr. Kelly’s 2010 W2 was provided in his Motion for Reconsideration to Judge Doerty. This document shows the same income at year’s end as it did in the paystub used by Commissioner Jeske. In fairness no additional income was earned after the paystub was submitted and the gross income as was submitted at the end of November, 2010 should have been divided by 11 months (12 months would be more accurate but Mr. Kelly recognizes the documents was submitted earlier). This would put Mr. Kelly’s gross income for these purposes at \$3266 per month. That is the support worksheet gross income Mr. Kelly is requesting.

In assignment of error number 3, the Commissioner missed the fact that Ms. Hatton had taken out a loan against her 401(k). On Ms. Hatton’s bi-weekly paystub dated December 22, 2010 it shows she is paying \$54.62 in interest on this loan every 2 weeks. That is \$109.22 in interest payment every month. It is not fair for Ms. Hatton to get the benefit of a major deduction to her income for the purposes of calculating child support obligations when she is turning right around

and taking a loan out against her retirement. Mr. Kelly asks that the Appeals court exclude Ms. Hatton's retirement deduction as it is deceptive and dishonest.

V. CONCLUSION

Mr. Kelly should have his child support obligation adjusted to use his gross income of \$3266. Per the laws of Washington State and with respect to judicial fairness Mr. Kelly should also be granted the Normal Business Expense deduction of \$1868 and Professional Dues deduction of \$375. Ms. Hatton's retirement deduction should be vacated.

Additionally, based on Appeals Court I precedent in *Absher Constr. Co. v. Kent School Dist.*, 79 Wn. App. 841, 917 P.2d 1086 (1995), Mr. Kelly should be awarded \$4,800 for the preparation and related work. In that case, the per curiam opinion was that non-lawyer time spent in preparing briefs and related work was compensable in a fee reward. Mr. Kelly has spent an extraordinary amount of time and effort to defend himself against prejudice and present his case based on the record and the law.

As well, Mr. Kelly should be awarded \$695 for Clerk's document purchase, \$163 for transcription of the case, \$283 for filing the case and \$925 for travel to Seattle from Spokane on 2 occasions for this case. This Appeal would

have been avoided had Ms. Hatton agreed to mediate and act in good faith. In sum, Mr. Kelly asks the court to award him a total of \$6,866.

Mr. Kelly is asking the Appeals Court I to rule in his favor by applying the Law to the Commissioner's ruling and granting him relief based on that decision by adjusting his monthly child support obligation to the state mandated minimum of \$50 retro-active to March, 2010.

Respectfully submitted this 23rd day of August, 2011.

A handwritten signature in cursive script that reads "Joseph Kelly". The signature is written in black ink and is positioned above a horizontal line.

Joseph Kelly, Pro Se