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No. 67825-6-I, 67921-0

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION ONE

TAMI SUE REMICK,

Appellant,

v.

ENOCH THIJS REMICK,

Respondent,

ON APPEAL FROM
KING COUNTY SUPERIOR COURT
(The Honorable Bruce Hilyer)

TAMI REMICK'S REPLY BRIEF

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I. ARGUMENT IN REPLY

A. The Trial Court Exceeded Its Authority In Making The Child Support Awarded Not Modifiable until 2015 Because This Provision is Contrary to Statute.

The trial court erred when it prohibited the review and adjustments of child support until March of 2015.¹ Doing so was contrary to RCW 26.09.100(2) that allows child support orders only to “require periodic adjustments or modifications of support *more frequently* than the time periods established pursuant to RCW 26.09.170.” (Emphasis added).² RCW 26.09.170(7)(a) allows child support to be adjusted every 24 months to reflect the parties’ current income. Reading these two statutes together, it is clear a court has discretion to allow periodic adjustments more frequently than every 24 months, but not less frequently.

The “*Periodic Adjustments*” provision in the Child Support Order violates these two statutory provisions by requiring periodic adjustments less frequently than every 24 months. It states “[c]hild support shall be adjusted periodically as follows: *Beginning* March, 2015 the child support *shall* be reviewed.”³ This provision uses the mandatory language “shall” and requires periodic adjustments to begin March 2015.

¹ CP 19.

² 20 Wash. Prac., Fam. And Community Prop. L. § 37.10. (“An exception allows periodic adjustments or modifications more frequently than the time periods specified by RCWA 26.09.170)

³ CP 19. Emphasis added.

Enoch's reading does not give effect to this provision's ordinary and plain meaning because it ignores the word "Beginning." This provision states that periodic adjustments shall *begin* March 2015. That means there shall be no periodic adjustments prior to March 2015. Enoch's reading treats the word "Beginning" as mere surplusage. Because the trial court specified a date for periodic adjustment to begin that was 3 ½ years after the Child Support Order was entered it is less frequent than the periodic adjustments allowed in RCW 26.09.170(7)(a) and conflicts with RCW 26.09.100(2). It was error to include this provision.

This issue is academic because Enoch concedes, as he must, in his Response Brief, that the trial court did not intend to preclude statutory child support adjustments⁴ It is curious that opposing counsel did not simply stipulate to an agreed order that allows periodic adjustments pursuant to statutes and to strike the word "Beginning" in the "periodic Adjustments" provision in the trial court's Child Support Order. If opposing counsel sends over such a stipulation, the undersigned would be happy to sign it and get this Court's permission to have it entered by the trial court.

⁴ Br. of Resp't at 15.

B. Tami Corrected Any Invited Error Regarding the Maintenance Provision in the Decree.

Similar to the periodic adjustment argument, Enoch necessarily concedes it was error for the trial court to make the maintenance provision non-modifiable because there was no written separation contract between the parties. His sole defense in his Response Brief is that Tami invited the error and cannot, therefore, complain about it on appeal.⁵

Review is not precluded by the invited error doctrine in this case because Tami corrected the error in the record prior to the court entering the erroneous maintenance provision in the Dissolution Decree. When a party corrects an earlier error, the invited error doctrine does not apply and the appellate court will review the assigned error.⁶ Here, Tami explicitly corrected the invited error in her reply to her notice of presentation. In her Reply, Tami created a table showing all her objections to Enoch's proposed final documents. When it came to the Decree, she specifically cited §3.7 and stated the provision that "Maintenance shall be non-modifiable in amount or duration" was not permissible because such a provision is "allowed only by the parties' agreement, not by court after

⁵ Br. of Resp't at 28-31.

⁶ *State v. Studd*, 137 Wn.2d 533, 552, 973 P.2d 1049, 1058 (1999) (Defendant's whose requests were denied for curative instructions for the erroneous self-defense instruction did not invite the trial court's error, and thus, they were entitled to new trials;) and *State v. Corn*, 95 Wn. App. 41, 975 P.2d 520 (1999) (doctrine of invited error not applicable where statements of trial counsel put the trial court on notice of the problems).

trial” and specifically cited “*In re Marriage of Short*, 71 Wn. App. 426, 859 P.2d 636 (1993), aff’d in part and rev on other grounds, 125 Wn.2d 865, 890 P.2d 12 (1995).”⁷ This was more than sufficient to put the trial court on notice about the error in the proposed dissolution decrees prior to it entering the final Dissolution Decree in this case. As such, the invited error doctrine does not properly preclude this Court from reviewing this patent and admitted error.

Enoch’s argument to limit the trial court’s authority upon remand is contrary to the law. “[W]henver a nonmodifiable [sic] maintenance award provision is stricken from a decree of dissolution, the amount and duration of the maintenance award must be reconsidered.”⁸ Contrary to the explicit language in *Short*, Enoch argues that the only instruction that should be given to the trial court is to strike the non-modifiable language from the Dissolution Decree and that the trial court should not be allowed the discretion to review the maintenance amount, frequency or duration.⁹ Because Enoch’s argument is contrary to the Washington Supreme Court’s pronouncement in *Short*, it should be rejected by this Court, and this Court should reverse the trial court and “remand the case to the [trial court] to strike the nonmodifiable [sic] maintenance award provision from

⁷ CP 208.

⁸ *In re Marriage of Short*, 125 Wn. 2d 865, 876, 890 P.2d 12, 17 (1995).

⁹ Br. of Resp’t at 30-31.

the decree of dissolution and to reconsider the amount and duration of the maintenance award” as appellate courts have consistently done in the past when they invalidate maintenance provisions.¹⁰

C. The Trial Court Erred In Entering A Child Support Order That Refers To Child Support – Which Was Intended To Be Tax Free To The Recipient – As Undifferentiated Family Support For Both The Recipient And The Children.

The court erred when it ordered Enoch to pay Tami “undifferentiated support.” Both parties agree that the trial court intended for Tami to receive a tax-free payment stream with a \$6,000 per month floor for the first year after the final documents were entered.¹¹ Again, Tami is willing to sign a stipulation providing that the \$6,000 per month payment stream is considered child support and not undifferentiated support for her and the children and then to have this Court relinquish jurisdiction to the trial court to enter that stipulation and make it a court order to end this controversy.

Despite the parties’ agreement on what the trial court intended, it did not accomplish that result. “[I]n the case of ... undifferentiated support for *a wife and children*, all of the support is taxable to the wife and deductible by the husband.”¹² Here, both the Child Support Order and the

¹⁰ *In re Marriage of Short*, 125 Wash. 2d 865, 876, 890 P.2d 12, 17 (1995).

¹¹ Br. of Resp’t at 7.

¹² *CIR v. Lester*, 366 U.S. 299, 303, 81 S.Ct. 1343, 6 L.Ed.2d 306 (1961); and *Bay v. C.I.R.*, 68 T.C.M. (CCH) 396 (T.C. 1994)

Dissolution Decree explicitly stated that the monthly payments from Enoch to Tami in the first year were for *both Tami's and the children's support*. Neither document allocated a specific amount or percentage attributable to just the children's support.¹³ Finally, the Dissolution Decree's provision for undifferentiated support is under the section entitled "Maintenance."¹⁴

Enoch's argument that the documents clearly intended for the entire payment stream to be considered child support and, therefore, not taxable to Tami misses the ambiguity that existed in the initial Dissolution Decree and Child Support Order. While Enoch is correct that the Dissolution Decree did state that the entire support amount for Tami and the children was to be considered child support for tax planning purposes,¹⁵ that still does not address that both the Dissolution Decree and Child Support Order also explicitly stated the payment stream in year one was for both Tami and the children. At best, the initial documents were ambiguous or unclear as to whether the payment stream was child support

¹³ CP 11 (Decree) "undifferentiated support *for the wife and children* in the amount of 50% gross salary including RBI but not less than \$6,000.00 through August 31st, 2012." CP 16 (Child Support Order) undifferentiated family support *for the wife and children* equal to 50% of Enoch's net income including RBI but not less than \$6,000.00 per month. During the first 12 months. (emphasis added).

¹⁴ CP 86.

¹⁵ CP 11 (emphasis added).

D. The Trial Court Erred In Calculating Child Support.

If this Court adopts Enoch's argument that the trial court intended the income stream in the first year to be child support solely for the children and, therefore, not taxable to Tami, then the trial court erred in including the child support in Tami's income. RCW 26.19.071(3) does not include child support as income. As Tami stated in her opening brief, child support is received in her capacity as a custodian and is not money to which Tami has any right.¹⁸ It cannot, therefore, be Tami's income for child support purposes.

Despite this, it is clear the trial court included the first year's entire payment stream as income to Tami for child support purposes. The Child Support Order, §3.3 states Tami's income was $\frac{1}{2}$ Enoch's net income including his RBI Bonus.¹⁹ It does not set forth an amount.

The trial court also improperly allowed Enoch to deduct the first year's payment from his gross income. The Child Support Order, §3.2 states Enoch's income was only "one-half monthly net income." It does not set forth an amount. Seemingly, it did not include Enoch's stock awards, employee stock purchase plan rights or his lucrative CBI income.

This error carried over into the trial court's apportioning the children's special expenses. "Day care and special child rearing expenses,

¹⁸ *Fuqua v. Fuqua*, 88 Wn. 2d 100, 105, 558 P.2d 801, 804 (1977).

¹⁹ CP 99-100.

such as tuition and long-distance transportation costs to and from the parents for visitation purposes, are not included in the economic table. These expenses shall be shared by the parents in the same proportion as the basic child support obligation.”²⁰ The trial court, believing each party had the same income, erred when it failed to appropriately apportion special child expenses. In the Child Support Order, §§3.15 and 3.19, it equally divided the children’s special expenses for the first year.²¹

Casey does not negate the necessity that the special expenses allocation must be reversed. *Casey* stated that “in a proper case, [RCW 26.19.080] permits the court to depart from the usual practice of allocating special child rearing expenses, ... in the same proportion as the putative basic support.”²² In *Casey*, the trial court made a correct income determination and an intentional deviation from the required apportionment based upon a deviation. Here, the trial court based its deviation from the proper apportionment not on a correct income calculation and conscious decision to deviate, but seemingly upon a misguided belief as to what was the correct income for each party.

This error was only compounded because the trial court failed to attach a child support worksheet for the first year making review nearly

²⁰ RCW 26.19.080.

²¹ CP at 18 and 21.

²² *In re Marriage of Casey*, 88 Wn. App. 662, 667-68, 967 P.2d 982, 984 (1997).

impossible. Child support worksheets are required to be attached to the child support order.²³ Enoch concedes that the child support worksheet for the first year was not attached to the child support order.²⁴

Enoch's only argument to obviate this error is to suggest that it is moot because it relates only to the first year, which has expired. Obviously, if the Child Support Order was reversed and the parties' respective incomes and percentages of special expenses properly determined, then it would still provide relief to Tami. The issue is, therefore, not moot.

Finally, the issue of maintenance actually paid, as decided by Division Two, is ripe for this Court to differentiate or discuss to provide valuable input to practitioners in Division One.

E. The Trial Court Erred In Failing To Include Respondent's Recurring CBI Bonus Income And The Recurring Stock Award Contract Related Benefits As Income To Respondent In The Child Support Worksheets.

RCW 26.19.071(3)(r) provides that bonus income shall be included in the calculation of gross monthly income. If the bonus income is nonrecurring, there is a basis to deviate from the standard calculation.²⁵

²³ RCW 26.09.035(3).

²⁴ Br. of Resp't at 13-14.

²⁵ RCW 26.19.075(1)(b).

“Deviations for nonrecurring income shall be based on a review of the nonrecurring income received in the previous *two* calendar years.”²⁶

Enoch fails to argue that the inclusion of the CBI bonus in the calculation of Enoch’s income would be error. In lieu of legal argument, he argues in equity with a “she’s taken more than she deserves” analysis.

The Washington State Child Support Schedule Definitions and Standards document – which the trial court failed to attach to the Decree of Dissolution along with the worksheet for the first year of the dissolution – states clearly that “Monthly gross income shall include income from any source ... [including] contract-related benefits ... except as excluded by RCW 26.19.071(4)(h)...”²⁷ The only excludable source of income as allowed by statute are of food stamps.²⁸

Enoch’s contract-related benefits and compensation fall into four separate categories: (i) his base salary; (ii) his RBI bonus, a production based bonus granted to Enoch as an advance and then reconciled periodically throughout the year; (iii) his CBI bonus, a discretionary bonus; and (iv) stock awards which vest throughout the term of his employment.

²⁶ RCW 26.19.075(1)(b) (emphasis added).

²⁷ http://www.dshs.wa.gov/pdf/esa/dcs/wscss_pamphlet.pdf, pg. 1.

²⁸ RCW 26.19.071(4)h.

The CBI bonus was recurring. The Washington State Child Support Schedule Definitions and Standards document allows for a deviation in the case of non-recurring income. “[N]onrecurring income shall be based on a review of the nonrecurring income received in the previous two calendar years.”²⁹ Enoch received a CBI bonus in the two years prior to the completion of the child support worksheet.³⁰ As such, the CBI bonus was not nonrecurring.

Deviations from the standard calculation of child support are matters within the discretion of the trial court.³¹ In exercising its discretion, the court must enter written findings and conclusions stating its reasons for deviation or denial of deviation.³² Only then could the trial court properly exclude Enoch’s CBI bonus from the calculation of Enoch’s income. Here, there were no such written findings entered regarding the CBI bonus being nonrecurring. The only reason or deviation was for tax planning purposes,³³ and that was only for the first year of undifferentiated support. There was no tax planning purposes for years 2, 3 and 4. There are no written findings to support any deviation for years 2, 3 or 4.

²⁹ http://www.dshs.wa.gov/pdf/esa/dcs/wcss_pamphlet.pdf, pg. 3.

³⁰ RP 617:1 – 622:25.

³¹ *In re Marriage of Wayt*, 63 Wn. App. 510, 512-13, 820 P.2d 519 (1991).

³² *State ex rel. Stout v. Stout*, 89 Wn. App. 118, 123, 948 P.2d 851 (1997).

³³ CP 17.

Enoch's argument that the trial court deviated upward does not affect Tami's arguments. While it may be true that the court deviated upward in year one, this does not resolve the issue. The trial court must first correctly determine the child support standard calculation before considering a deviation.³⁴ Here, the errors Tami assigned to the child support calculations related to determining the standard calculation. Because the trial court must first make a correct standard calculation before it even considers a deviation, the fact it may have deviated is of no consequence.

For all the foregoing reasons, this Court should reverse the trial court's Child Support Order and remand with instructions to properly calculate the parties' net incomes, then deviate upon written findings, and then properly apportion the children's special child rearing expenses.

F. The Trial Court Erred When It Issued Its Order On Motion To Clarify Because It Did Not Use The Order Solely For Clarification, But Rather Modified The Decree By Ruling On A Cause Of Action Not Ancillary To The Divorce Proceedings.

1. The motion to clarify modified the Dissolution Decree by adding a rent obligation.

The trial court erred when it added a rent obligation in its Order on Motion to Clarify. "A clarification ... is merely a definition of the rights

³⁴ RCW 26.19.075(3).

which have already been given and those rights may be completely spelled out if necessary.”³⁵ In its Motion on Clarification, the trial court set out a payment of “rent as an offset against the monies respondent has paid pursuant to the temporary order.”³⁶ However, in the Decree of Dissolution there is no reference to, or mention of, a rent obligation on either party. Clearly this was an added obligation created by the trial court in the Order on Motion to Clarify.

An added obligation is a modification. The Washington State Supreme Court has ruled that “a modification ... occurs where the ... rights given to one of the parties is either extended beyond the scope originally intended or where those rights are reduced, giving the party less rights than those he originally received.”³⁷ Certainly a right to “rent” is beyond the rights granted to Enoch in the Decree of Dissolution. Accordingly, Tami asks that the rent obligation set out in the Order on Motion to Clarify be vacated.

2. The rent obligation imposed on Tami is greater than necessary to create equity between the parties.

The trial court’s Order on Motion to Clarify sets out a rent obligation on Tami for one and one half months rent for September 2011 and half of October 2011. However, the trial court signed the Decree of

³⁵ *Rivard v. Rivard*, 75 Wash. 2d 415, 418, 451 P.2d 677, 679 (1969).

³⁶ CP 179 at Ln. 5 (internal quotations omitted).

³⁷ *Id.*

Dissolution on September 16, 2011. There was no basis, therefore, to award 1 ½ months' rent from Tami to Enoch because Enoch had the family home awarded to him for only 1 month before Tami and the children were able to move out in an orderly fashion.

In his Reply Brief, Enoch states, without cite to authority or the record, that he had to pay rent while Tami and the children vacated the family home in an orderly manner after the Dissolution Decree awarding Enoch the family home was entered.³⁸ Washington's Residential Landlord-Tenant Act requires notice 20 days before the next installment of rent becomes due to terminate an otherwise terminable lease.³⁹ The Dissolution Decree awarding the family home to Enoch was entered on September 16, 2011.⁴⁰ Enoch, therefore, would not have 20 days from the date the Dissolution Decree was entered to terminate his existing rental obligation in order to avoid paying October rent.

3. Any Action for Rent is not ancillary to the dissolution decree and as such would be recovered under a separate cause of action.

When the trial court entered its Decree of Dissolution it ended the spousal relationship of Tami and Enoch. If Tami possessed the family home and violated Enoch's right to possession, then Enoch may have had

³⁸ Br. of Resp't at 32.

³⁹ RCW 59.18.200.

⁴⁰ CP 64.

a right to ejectment and consequential damages, including the fair rental value for the home. Any such action, however, would have had to have been brought as a separate action and not as a motion ancillary to the original divorce proceeding.⁴¹

G. The Trial Court Did Not Have Authority To Modify Its Decree While An Appeal Was Pending With This Court.

The trial court erred when it issued a modification during the time when Tami had appealed the decision of the trial court. “RAP 7.2(e) provides that if the trial court makes a determination that will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision.”⁴² The trial court was aware that Tami had petitioned this court for review of the dissolution when it entered its modification of the Decree of Dissolution without first making a request of the Court of appeals to do so.

Enoch argues that the Court entered an order granting jurisdiction to the trial court to enter the order, but that is not the case. What really happened was Tami made a RAP 7.2(e) motion for this Court to relinquish jurisdiction so that the trial court could distribute personal property and award an equalizing payment. In response to Tami’s motion, Enoch

⁴¹ *Mickens v. Mickens*, 62 Wn.2d 876, 881, 385 P.2d 14, 17 (1963).

⁴² *In re Marriage of Grimsley-LaVergne & LaVergne*, 156 Wn. App. 735, 742, 236 P.3d 208, 211 (2010) (internal quotations omitted).

mentioned that this Court should also grant RAP 7.2(e) relief to enter the Order on Motion to Clarify. Enoch did not bring his own separate motion. This Court's Commissioner entered a notation ruling that said that Tami's motion for RAP 7.2(e) relief was granted. The notation ruling did not mention Enoch's request for relief that he included in his response to Tami's motion. Enoch's contention that the Court granted RAP 7.2(e) relief is not true.

Parties cannot confer subject matter jurisdiction on a court; a court either has subject matter jurisdiction or it does not. If it does not, then any judgment entered is void, and is, in legal effect, no judgment at all. Because the trial court did not have jurisdiction it was powerless to act and enter its order. Its Order on Motion to Clarify was void and a nullity, no prejudice was required to be shown.⁴³

H. Tami Is Not Subject To Sanctions Under The Rules Of Appellate Procedure At The Discretion Of The Trial Court.

The trial court erred when it sanctioned Tami for failure to comply with the Rules of Appellate Procedure. This matter was previously fully briefed by the parties to this Court in connection with Tami's motion to review the trial court's order requiring Tami to provide a full verbatim report of proceedings. This Court's Commissioner referred

⁴³ *In re Marriage of Furrow*, 115 Wn. App. 661, 667, 63 P.3d 821, 825 (2003).

the already-fully-briefed issue on sanctions to this panel for consideration. Because the matter had already been fully briefed and referred by this Court's Commissioner for a ruling, no further briefing in the Opening Brief was required. The Assignment of Error was a mere reminder to this Court that the ruling still needed to be made.

I. Enoch Is Not Entitled To Attorney Fees.

Enoch is not entitled to attorney fees. Under the Rules of Appellate procedure, to be awarded fees, "the party must devote a section of its opening brief to the request for the fees or expenses."⁴⁴ Here, Enoch did not devote a section of his brief to his fee request. Instead, he added a sentence requesting fees to the end of his section responding to Tami's fee request.⁴⁵ Because Enoch failed to devote a separate section of his brief to his own fee request, his request should be denied.

J. Footnote Seven of Enoch's Brief Should be Disregarded.

RAP 10.3(a)(5) requires citations to the record to support facts in the statement of the case. Tami respectfully asks that this Court disregard footnote 7 of Enoch's brief.⁴⁶ This footnote makes a factual assertion regarding Tami's efforts to find employment unsupported by any citation to the record.

⁴⁴ RAP 18.1(b).

⁴⁵ Br. of Resp't at 36.

⁴⁶ Br. of Resp't at 36 n.7.

K. This Matter Should be Remanded Because The Errors Of The Trial Court Have A Prejudicial Cumulative Effect.

This matter should be remanded because the errors of the trial court are sufficient to prejudice Tami. The cumulative error doctrine “is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a [party] a fair trial.”⁴⁷ The above arguments are sufficient to constitute prejudicial harm to Tami, if not individually, then certainly in their cumulative effect.

As a result Tami respectfully asks that the court remand the entirety of the trial court’s decree and dissolution proceedings, to make findings consistent with the precedent of this court, the Washington State Supreme Court, and state statutory law.

DATED this 19 day of November, 2012.

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⁴⁷ *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390, 399 (2000).

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

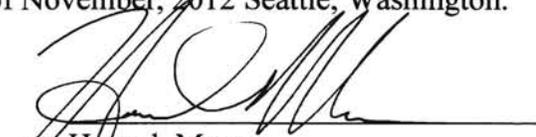
On the below written date, I caused delivery of a true copy of Tami Remick's Reply Brief to the following individuals via U.S. Mail:

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