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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Marriage of: KATHRYN McRAE, Petitioner, v. DANIEL McRAE, Respondent.	No. 50178-3-II UNPUBLISHED OPINION

BJORGEN, J. — Daniel and Kathryn McRae[1] resolved all of the terms of their divorce through mediation except those covering child support. Kathryn subsequently filed a motion requesting child support with the superior court, which alleged Daniel was voluntarily underemployed. The court agreed. The superior court then entered a child support order and calculated Daniel's obligation by imputing his income based on his past earnings. Daniel appeals.

Daniel argues that the superior court erred when it (1) found him voluntarily underemployed, (2) imputed his income, (3) found their children spend most of their time with Kathryn under the 50/50 parenting plan, and (4) refused to deviate downward from the standard child support calculation. Kathryn requests an award of attorney fees and costs on appeal.

Concluding the superior court strayed from governing legal principles when it found Daniel was voluntarily underemployed, we reverse and remand.

[1] The appellant and respondent share the same last name, thus we use their first names for clarity. We intend no disrespect.

FACTS

After roughly six years of marriage, Daniel and Kathryn separated. They have two children. On March 10, 2016, Kathryn filed a petition for dissolution of marriage. On April 27, the superior court approved a temporary parenting plan, and on December 21 Daniel and Kathryn settled the majority of their issues through mediation. They agreed to split their assets equally, to follow a 50/50 parenting plan, and that spousal maintenance would terminate. A final divorce order and dissolution decree was filed on February 7, 2017. The only issue left unresolved was child support.

Daniel owns and operates a commercial harvest diving operation. In the past, Daniel owned and operated up to four commercial dive boats, conducted managerial duties, and was employed as a boat captain and diver until approximately six months before he and Kathryn separated. Daniel declared:

> When our relationship ended I found myself unable to care for my children and return to being out on the water for 12-hours a day plus working out of town for weeks at a time as I had done in the past for work. In the past with managing the business and working as a diver I would work more than 80-hours a week. I have averaged 40-50 hours a week since that time in order to care for our children and be there for them on our shared schedule.

Clerk's Papers (CP) at 378. Daniel continued:

> I already work over 40-hours a week managing my business and diving would add another 40-hour a week job to that time. I could do this when I was with Kathryn as a stay-at-home mother and homemaker, but having my two children 50% of the time and taking on all the household duties makes such overtime impossible. I was forced to decide between 50/50 custody of my children and being employed as a diver. If I chose diving I would only be able to see my children 2 days a month if that because I would be out on the water all day, doing office work at night and working on my boats during the weekends. I made the choice to reduce the hours I worked and while it had impacted the time I have been able to work it does not constitute a reduction in my hours of labor below a standard work week.

CP at 379-80.

In 2014, Daniel earned $157,900. In 2015, he earned $146,884. In 2016, he earned $93,094. Apparently, the decrease in salary reflects Daniel's choice to forego working as a boat captain and diver in his commercial harvest diving operation.

Daniel provided declarations of two other commercial fishermen who are engaged in similar work. They describe the usual or customary hours of work and duties of workers in his field. The declaration of Corey Elkins provides a list of duties he performs as the owner and operator of a commercial fishing boat; he declares he works roughly 38 hours per week. The declaration of Curtiss Bakker provides a list of duties he performs as the owner and operator of multiple commercial geoduck dive boats; he declares he works approximately 50-60 hours per week.

Kathryn has an associate's degree and training and certification in medical coding. She is employed full-time and earning a salary of $56,500 per year.

Kathryn filed a motion requesting child support. In that motion, she argued that Daniel was voluntarily underemployed and requested the court to impute his income based on his past earnings. The motion cited RCW 26.19.071(6), but did not provide a full quotation of the relevant authority.

At a hearing on the motion, the superior court stated it was "[n]ot persuaded by Mr. McRae's argument in regards to his employment situation, so I am finding that he is voluntarily underemployed, which requires that his income be imputed by the use of the historical data that is available." Verbatim Report of Proceedings (VRP) (Mar. 3, 2017) at 25-26. The superior court did not make any credibility findings. The child support order likewise discloses the court

concluded Daniel was voluntarily underemployed. The court did not make a finding—oral or written—that Daniel was purposely underemployed to reduce his child support obligation as required by RCW 26.19.071(6). The court also did not check the box on the child support order that Daniel was purposely underemployed to reduce his child support obligation.

The superior court imputed Daniel's income. It calculated his full-time pay using his historical income averaged from 2014, 2015, and 2016. Under the standard calculation section of the order, the court made the following finding:

> **All children living together** – *All of the children are living with . . . : Kathryn McRae most of the time*. The other parent must pay child support. The standard calculation from the *Child Support Schedule Worksheets* line 17 for the parent paying support is . . . $1,631.

CP at 413 (emphasis added).

In its oral ruling regarding Daniel's requested deviation from the standard calculation, the court found:

> In looking at the factors under RCW 26.19.075, I don't believe a deviation is needed or appropriate in this case and will not be ordered. There is a large disparity in the income and would result—a deviation would result in leaving Ms. McRae, the petitioner, with insufficient funds.

VRP (Mar. 3, 2017) at 26. The child support order related to Daniel's request for deviation found that "a deviation would leave insufficient funds in the mother's household." CP at 414.

Daniel appeals.

ANALYSIS

I. DETERMINATION OF CHILD SUPPORT

A. Standard of Review

The legislature adopted the uniform child support schedule as a means to equitably apportion the child support obligation between parents, insure child support is adequate to meet a child's basic needs, and provide additional child support commensurate with the parents' income, resources, and standard of living. RCW 26.19.001. A child support order must be supported by written findings of fact and must be accompanied by a completed child support worksheet. RCW 26.19.035(2), (4). On appeal, we defer to the sound discretion of the superior court unless it has manifestly abused its discretion. *In re Marriage of Booth*, 114 Wn.2d 772, 776, 779, 791 P.2d 519 (1990).

A superior court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). A superior court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. *Id.* at 47. It is based on untenable grounds if the factual findings are unsupported by the record, and it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Id.*

We review findings of fact for substantial evidence. *In re Marriage of Wilson*, 165 Wn. App. 333, 340, 267 P.3d 485 (2011). Substantial evidence exists when there is sufficient evidence to persuade a fair-minded, rational person of the finding's truth. *Id.* We treat

unchallenged findings of fact as verities on appeal. *In re Marriage of Fiorito*, 112 Wn. App. 657, 665, 50 P.3d 298 (2002).

We do not substitute our judgment for the superior court's judgment, weigh the evidence, or evaluate witness credibility. *Wilson*, 165 Wn. App. at 340. When the superior court has weighed the evidence, we determine only whether substantial evidence supports the findings of fact, and if so, whether the findings support the superior court's conclusions of law. *Id.* We review the superior court's conclusions of law de novo. *In re Marriage of Wehr*, 165 Wn. App. 610, 613, 267 P.3d 1045 (2011).

B. Voluntarily Underemployed

Daniel argues the superior court erred, as a matter of law, when it found him voluntarily underemployed. We agree.

RCW 26.19.071(6) states, in part, "The court shall determine whether the parent is voluntarily underemployed . . . based upon that parent's work history, education, health, and age, or any other relevant factors." The statute also provides that "[a] court shall not impute income to a parent who is *gainfully employed on a full-time basis.*" *Id*. (emphasis added).

Daniel points us to *In re Marriage of Peterson*, 80 Wn. App. 148, 906 P.2d 1009 (1995), to illustrate he was gainfully employed. In that case, the superior court found Peterson voluntarily underemployed because he had a law degree and was a member of the Washington State Bar Association, but earned only $1,500 per month (or $18,000 per year) working full-time for a bail bond company as in-house legal counsel and bail bond agent. *Id*. at 154. The superior court reasoned Peterson earned less than one-half the median net income for a person of his age despite his higher education. In determining whether Peterson was voluntarily underemployed

(or gainfully employed), Division One of our court analyzed two possible definitions of the term "gainful employment," which the statute does not define. *Id*. at 153-54. One definition, *Peterson* held, "focuses on whether the employment is compensated by a salary or wage, while the alternative definition looks to the nature of the employment and whether it is the person's usual or customary occupation." *Id*. at 153; *see* BLACK'S LAW DICTIONARY 678 (6th ed. 1990). *Peterson* concluded the superior court's decision was inconsistent with either definition of gainful employment and held that the superior court abused its discretion. *Id*. at 154.

This case is like *Peterson*. Daniel presented substantial evidence supporting that he was gainfully employed, including evidence of his employment, net income, and expenses. For example, Daniel declared that in the past he worked 80 hours a week as the owner and manager of three commercial harvest diving companies, but now works 40-50 hours per week in order to care for his children under the parenting plan; he no longer works as a diver because that would add an additional 40 hours per week to his current full-time managerial workload. He declared his gross income is approximately $7,758 per month (or over $90,000 per year). He also provided information regarding his expenses after separation. The information contained in the declarations and associated attachments support that Daniel was gainfully employed under either definition analyzed in *Peterson*. Just because Daniel could earn more by working an overtime schedule, does not mean that he must do so. Furthermore, the superior court did not make a credibility finding regarding his declarations.

Our courts have consistently held that full-time gainful employment need not be 40 hours per week and is determined by the amount of time considered usual or customary for the parent's job. *See, e.g., Schumacher v. Watson*, 100 Wn. App. 208, 213-14, 997 P.2d 399 (2000). Daniel

provided the declarations of two colleagues, which afford evidence of what is considered customary in his field. His colleagues' declarations are consistent with his declaration regarding his hours and duties. However, the superior court made no findings about the usual or customary hours and duties or respective salaries for individuals in jobs similar to Daniel's. It did not make findings as to the usual or customary hours and duties of a full-time owner and operator, boat captain, or diver employed in a commercial harvest diving business. Nor did it make findings as to the usual or customary salary of a full-time owner and operator, boat captain, or diver employed in a commercial harvest diving business. Instead, the court simply based its conclusion on the fact that Daniel currently earns approximately $90,000 per year, which is less than he made in the past. Without more, this finding does not support the court's legal conclusion that Daniel is underemployed.

Kathryn cites *In re Marriage of Wright*, 78 Wn. App. 230, 233-34, 896 P.2d 735 (1995), as an instructive example of voluntary underemployment analogous to this case. In *Wright*, we held that Wright could have obtained full-time employment as a nurse, even though she was the primary caretaker of five young children and a member of the National Guard. *Id*. at 234. We concluded that the superior court did not abuse its discretion in finding that Wright was voluntarily underemployed because she worked only half-time. *Id*. Here, Kathryn argues this case is like *Wright* because Daniel voluntarily reduced his working hours to stay home with their children. W*right*, however, presented a different situation. The evidence on the record in *Wright* conclusively demonstrated that Wright worked half-time and could have obtained full-time employment as a nurse. 78 Wn. App. at 233-34. Here, Daniel declared that he was working full-

time, just not overtime, and the superior court did not make a credibility finding contrary to his declaration.

We hold that the superior court erred, as a matter of law, when it found Daniel voluntarily underemployed. We therefore remand this issue for further proceedings.

C. Imputation of Income

Daniel argues the superior court erred, as a matter of law, when it imputed his income. We agree.

RCW 26.19.071(6) discusses, in part, when and how income should be imputed to a parent as follows:

> The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. The court shall determine whether the parent is voluntarily underemployed or voluntarily unemployed 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 underemployed and finds that the parent is purposely underemployed to reduce the parent's child support obligation.*

(Emphasis added.)

Thus, the child support statute directs the superior court to make two inquiries when considering whether to impute income. *Peterson*, 80 Wn. App. at 153. First, the superior court evaluates the parent's work history, education, health, age, and any other relevant factor to determine whether that parent is voluntarily unemployed or underemployed. RCW 26.19.071(6). If a parent is underemployed but also "gainfully employed on a full-time basis," the court must make a further determination as to whether the parent is "purposely underemployed to reduce the parent's child support obligation." RCW 26.19.071(6). If the parent is not underemployed for

that reason, the superior court cannot impute income to that parent. *Peterson*, 80 Wn. App. at 153.

Daniel again points us to *Peterson* to illustrate the importance of making the requisite findings. There, Division One reversed and remanded the case for recalculation of child support because it concluded Peterson was gainfully employed on a full-time basis, and the superior court made no finding that the parent was purposely underemployed to reduce his child support obligation. *Peterson*, 80 Wn. App. at 155.

Turning to present case, the superior court stated at the hearing that it was

> [n]ot persuaded by Mr. McRae's argument in regards to his employment situation, so I am finding that he is voluntarily underemployed, which requires that his income be imputed by the use of the historical data that is available.

VRP (Mar. 3, 2017) at 25-26. The order of child support likewise reveals the court concluded Daniel was voluntarily underemployed, but it does not contain written factual findings[2] supporting its legal conclusions.

Our analysis of the superior court's award is hampered by a lack of specificity in the superior court's findings. There are no other findings or explanatory information on the record to support the superior court's legal conclusions. Daniel declared he worked full-time. He provided declarations and supporting documents showing that he earned over $90,000 working in a managerial capacity. Although his salary decreased because he stopped working an overtime schedule, began working from home, and assumed a different role to provide care for

[2] "An order for child support shall be supported by written findings of fact upon which the support determination is based." RCW 26.19.035(2).

his children, the superior court did not make a finding that Daniel was not gainfully employed on a full-time basis and did not make a credibility finding regarding Daniel's declarations.

Even with these gaps, it is clear that the superior court abused its discretion when it imputed Daniel's income. The substantial evidence on the record shows that Daniel was gainfully employed on a full-time basis. Under these circumstances, RCW 26.19.071(6) prohibited the superior court from imputing income to Daniel unless it specifically found that (1) Daniel was underemployed *and* (2) he was underemployed for the purpose of reducing his child support obligation. We presume that the term "and" functions conjunctively in a statute, and its use here implies both requirements must be met. *See In re Custody of M.W.*, 185 Wn.2d 803, 815, 374 P.3d 1169 (2016) ("Use of the conjunctive 'and' requires that visitation be determined *alongside* custody.") (emphasis in original); *cf. State v. Kozey*, 183 Wn. App. 692, 698-702, 334 P.3d 1170 (2014). In this case, the superior court did not find he was underemployed for the purpose of reducing his child support obligation. Therefore, the superior court based its decision on untenable grounds or untenable reasons, which constitutes an abuse of discretion.

We hold that the superior court erred, as a matter of law, when it imputed Daniel's income. We reverse and remand for the superior court to recalculate Daniel's child support obligation based on RCW 26.19.071(6)(a): his full-time earnings at his current rate of pay.

D. Unsupported Findings

Daniel next argues that the superior court erred when it found their children spend most of their time with Kathryn under the 50/50 parenting plan. He requests us to strike this finding.

Daniel disputes the following finding contained in the child support order:

> **All children living together** – *All of the children are living with* (name): *Kathryn McRae most of the time*. The other parent must pay child support. The standard

> calculation from the *Child Support Schedule Worksheets* line 17 for the parent paying support is . . . $1631.

CP at 413 (emphasis added).

In determining whether substantial evidence exists to support a superior court's finding of fact, we review the record in the light most favorable to the party in whose favor the findings were entered, here Kathryn. *In re Marriage of Gillespie*, 89 Wn. App. 390, 404, 948 P.2d 1338 (1997). The substantial evidence viewed in the light most favorable to Kathryn does not support this finding. Kathryn stated, "I agreed to a 50/50 parenting plan because our children were doing well." CP at 328. Kathryn, like Daniel, works full-time. The implication of a 50/50 parenting plan is that each parent spends an equal amount of time with the children. Thus, the court's finding that the children spend "most of the time" with Kathryn was not supported by the substantial evidence on the record.

Nevertheless, Kathryn argues that "[i]t is well established that errors in civil cases are rarely grounds for relief without a showing of prejudice to the losing party," quoting *Saleemi v. Doctor's Associates, Inc.*, 176 Wn.2d 368, 380, 292 P.3d 108 (2013). She also claims the error was harmless. Kathryn's reliance on *Saleemi* is misplaced. In Kathryn's quotation from *Saleemi*, our Supreme Court was addressing legal errors in civil cases, not errors in findings of fact. We review findings of fact to see if they are supported by substantial evidence in civil cases. *E.g.*, *Wilson*, 165 Wn. App. at 340. Here, the finding was not supported by the substantial evidence and was therefore erroneous.

We remand to the superior court to correct the erroneous finding consistent with this opinion.

E. Deviation from Standard Calculation

Daniel argues the superior court erred when it refused to deviate downward from the standard child support calculation.

Daniel requested a deviation under RCW 26.19.075(1)(d), which provides as follows:

> **Residential schedule.** The court may deviate from the standard calculation if the child spends a significant amount of time with the parent who is obligated to make a support transfer payment. The court may not deviate on that basis if the deviation will result in insufficient funds in the household receiving the support to meet the basic needs of the child or if the child is receiving temporary assistance for needy families. When determining the amount of the deviation, the court shall consider evidence concerning the increased expenses to a parent making support transfer payments resulting from the significant amount of time spent with that parent and shall consider the decreased expenses, if any, to the party receiving the support resulting from the significant amount of time the child spends with the parent making the support transfer payment.

In its oral ruling, the superior court found:

> In looking at the factors under RCW 26.19.075, I don't believe a deviation is needed or appropriate in this case and will not be ordered. There is a large disparity in the income and would result—a deviation would result in leaving Ms. McRae, the petitioner, with insufficient funds.

VRP (Mar. 3, 2017) at 26.

The child support order also found that "[f]urther, a deviation would leave insufficient funds in the mother's household." CP at 414.

We need not reach whether the superior court erred when it refused to deviate downward from the standard child support calculation, but we direct the superior court to reconsider this

issue on remand consistently with this opinion and RCW 26.19.075. "When reasons exist for deviation, the court shall exercise discretion in considering the extent to which the factors would affect the support obligation." RCW 26.19.075(4). Although the superior court "may deviate from the standard calculation if the child spends a significant amount of time with the parent who is obligated to make a support transfer payment," it "may not deviate on that basis if the deviation will result in insufficient funds in the household receiving the support to meet the basic needs of the child." RCW 26.19.075(1)(d). The court must also enter written findings of fact supporting the reasons for any deviation or denial of Daniel's request for deviation. *In re Marriage of Schnurman*, 178 Wn. App. 634, 640, 316 P.3d 514 (2013) (citing RCW 26.19.075(3)); *State ex rel. M.M.G. v. Graham*, 159 Wn.2d 623, 627-28, 152 P.3d 1005 (2007).

II. ATTORNEY FEES

Kathryn requests an award of attorney fees and costs on appeal under RCW 26.09.140. This statute gives appellate courts "discretion to award attorney fees to either party based on the parties' financial resources, balancing the financial need of the requesting party against the other party's ability to pay." *In re Marriage of Pennamen*, 135 Wn. App. 790, 807-08, 146 P.3d 466 (2006). A showing of financial need must be made by affidavit and filed no later than 10 days before we are scheduled to consider the appeal. RAP 18.1(c). Both Kathryn and Daniel provided us with declarations on the issue of attorney fees within the specified time frame. On

review, we conclude that the declarations do not show that Kathryn is entitled to attorney fees on appeal under RCW 26.09.140.

CONCLUSION

We reverse and remand.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

BJORGEN, J.

We concur:

JOHANSON, P.J.

SUTTON, J.