

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

In the Matter of the Marriage of	)	
	)	No. 65628-7-1
JOSEPH J. AUSTIN, M.D.,	)	
	)	DIVISION ONE
Appellant,	)	
	)	UNPUBLISHED OPINION
and	)	
	)	
SILVANA M. DI GIACOMO,	)	
	)	FILED: September 12, 2011
Respondent.	)	

Grosse, J. — Failure to pay maintenance as ordered by a decree of dissolution may result in the obligor being found in contempt of court. Here, the evidence showed that Joseph Austin intentionally concealed income from Silvana Di Giacomo and failed to pay maintenance in a timely manner. The trial court’s judgment, order of contempt, and attorney fee award is affirmed.

**FACTS**

Silvana Di Giacomo and Joseph Austin entered into a separation contract on January 7, 2000, the terms of which were incorporated into a decree of dissolution entered on January 26, 2000. When the decree was entered, Austin was employed as a cardiac surgeon at Overlake Hospital Medical Center. Under the separation contract, Austin agreed to pay one-half of his total gross income as maintenance.

Austin’s contract with Overlake Hospital expired at the end of June 2009. Austin has made no maintenance payments to Di Giacomo since June 2009. Austin informed Di Giacomo that he was no longer working and that he was

pursuing various options, including retirement. Di Giacomo filed an order to show cause for contempt and requested documentation seeking maintenance from June 2009 through January 2010. Di Giacomo discovered that Austin received \$67,581.25 from Overlake Hospital for vacation time that he did not use. Additionally, discovery revealed that Austin had signed a contract with Everett Cardiovascular and Thoracic Surgical Associates, P.S. for an annual salary of \$400,000. On September 11, that contract was amended at Austin's request and now only pays Austin's expenses and not a salary.

After hearing argument from counsel and reviewing the documentation, the trial court found that the paid time off (PTO) was part of Austin's gross salary and thus one-half was owed Di Giacomo for maintenance. The trial court awarded Di Giacomo \$34,671.82 and \$11,000.00 in attorney fees. The trial court found Austin had violated the order because he failed to pay maintenance in a timely manner. In holding Austin in contempt, the trial court found:

The husband intentionally concealed income from the wife and intentionally tried to mislead her with respect to his job and salary. The court considers his statements [and] arguments with respect to a maintenance cap, arguing that the income provision was related only to Overlake Hospital and that she had access to all documents to be arguments made in bad faith.

The court further found that Austin knew what the decree said and had the funds to pay. The contempt would be purged on payment. Austin appeals contending the money he received for PTO was not salary and that the trial court abused its discretion in holding him in contempt and awarding Di Giacomo attorney fees.

#### ANALYSIS

RCW 7.21.010(1)(b) defines “contempt of court” as intentional “[d]isobedience of any lawful judgment, decree, order, or process of the court.” Contempt proceedings may be initiated as part of a dissolution action when the party obligated to pay maintenance fails to comply. RCW 26.18.050(1). Judges also have general contempt powers under RCW 7.21.020. A court may issue an order requiring the obligor to appear and show cause as to why the relief requested under a petition or motion for contempt should not be granted. RCW 26.18.050(1).

Austin argues that the money he received for PTO was not part of his gross salary. Paragraph 6.1 of the separation contract defines “gross income” as “the amount remaining from the husband’s gross salary after deducting any and all pension contributions, including both mandatory and voluntary pension contributions, social security taxes, and Medicare taxes.” Under this definition, the payment for PTO is clearly gross income. Under the separation contract one-half of that amount is owed to Di Giacomo as maintenance.

Austin also argues the amount awarded is questionable. The issue is whether substantial evidence supports the trial court’s findings. If so, we will not disturb them on appeal. Here, the record established that the trial court based its award on the documentation attached to Di Giacomo’s declaration. That documentation revealed that from January through June 2009, Austin had received \$290,699.65 in base pay after deducting pension contributions, social security taxes, and Medicare taxes. One-half of that amount equals

\$145,349.82, which is the amount owed Di Giacomo for maintenance under the agreement. The record showed that Austin paid Di Giacomo \$109,928.00 leaving a balance owing of \$35,421.82. The trial court deducted \$750.00 from that amount for allocation to Austin's pension, arriving at the amount awarded of \$34,671.82. We find no error in the trial court's calculation of the amount awarded to Di Giacomo.

Austin next argues that the trial court's reasons for finding him in contempt are not supported by substantial evidence. Whether contempt is warranted is a matter within the trial court's discretion.<sup>1</sup> We will not disturb the trial court's order unless the court abused that discretion.<sup>2</sup> Discretion is abused if its exercise was manifestly unreasonable or was based on untenable grounds.<sup>3</sup> The trial court found three reasons to find that Austin's failure to pay maintenance was in bad faith. Di Giacomo concedes that two of those reasons are not sustained by the record.<sup>4</sup> The third, however, is sufficient to support the trial court's finding of bad faith. Austin concealed the income from Di Giacomo and misled her about his employment and salary. Moreover, in its oral ruling, the trial court stated that "bad faith" was "all over the place in this record":

The paid time off or what the parties referred to as PTO is part of his salary. It's not something that was due to him as a bonus or some other thing unrelated to his work and salary package. It is

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<sup>1</sup> In re Marriage of James, 79 Wn. App. 436, 439-40, 903 P.2d 470 (1995).

<sup>2</sup> Williams v. Williams, 156 Wn. App. 22, 27-28, 232 P.3d 573 (2010).

<sup>3</sup> Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995).

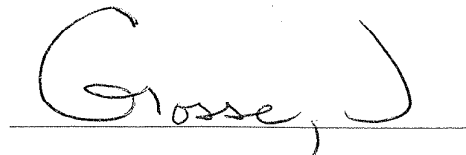
<sup>4</sup> The record does not support the trial court's finding that Austin argued that his payment of over \$2.5 million to Di Giacomo was a cap on maintenance and nothing further was owed. Nor is the trial court's finding that Austin argued that his obligation only applied to income received from Overlake Hospital supported by the record.

part of his salary and always had been considered part of his salary in the past for whatever reason. And I think it's because in his mind he's felt he's just paid enough and he doesn't want to pay anymore. He's now saying he didn't need to pay it for this 2009.

The challenged findings are supported by substantial evidence and support the conclusions of law regarding the contemptuous conduct. The trial court found that Austin had the present ability to comply with the court's order.

Finally, Austin objects to the awarding of attorney fees to Di Giacomo. Although neither the order nor the record specifically states the statute under which the attorney fee award was authorized, the motion to show cause requested attorney fees under RCW 26.18.050 and RCW 26.18.160. Under chapter 26.18 RCW, a court must find that the parent acted in bad faith in not paying the maintenance support. The trial court made a specific finding that Austin acted in bad faith and committed intentional misconduct.<sup>5</sup> The trial court had authority to award the fees.

Di Giacomo requests attorney fees on appeal. Although Di Giacomo cites RAP 18.1, under which attorney fees may be awarded in her brief, she does not cite any authority under which those fees should be awarded. Accordingly, her request for attorney fees on appeal is denied.

A handwritten signature in cursive script that reads "Grosse, J." is written above a horizontal line.

WE CONCUR:

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<sup>5</sup> In re Marriage of James, 79 Wn. App. at 441.

Edington, J.

Becker, J.