IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Marriage of JENNIFER JOHNSON, Respondent, v. ANTOINE JOHNSON, Appellant.	No. 39109-1-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Antoine Johnson appeals a Grays Harbor County Superior Court order directing him to pay $77,725 in back child support. Antoine[1] contends that the trial court (1) retroactively escalated his child support obligation, (2) failed to offset the amount of back support with amounts already paid, (3) was biased, and (4) violated equitable principles when it ordered him to reimburse the State of Washington for $509 in back child support that Jennifer Johnson sought through the Temporary Assistance for Needy Families (TANF) program. The record on appeal is insufficient for us to address the merits of Antoine's challenges. We affirm.

[1] The parties' first names are used for clarity.

Facts

This case springs from a dissolution proceeding in which the parties litigated deeply disputed issues. Antoine and Jennifer married in 1996 and separated in November 2003. In December 2003, Jennifer petitioned the Grays Harbor County Superior Court for dissolution of the marriage. On December 29, 2003, the trial court (1) entered a temporary order appointing a guardian ad litem (GAL) to represent the couple's two minor children, (2) ordered Antoine to "pay the mortgage and utilities pending further court order," and (3) specified temporary custody of the children. Clerk's Papers (CP) at 68.

Litigation involving numerous hearings and a multiple-day trial followed. Throughout the proceedings, Antoine refused to provide records of his actual earnings.[2] On October 19, 2004, the trial court sent a letter to the parties containing its "preliminary final rulings" and noting that it wanted "to place in writing [its] final decision." CP at 2. Lacking accurate documentary evidence of Antoine's earnings, the trial court imputed his income under former RCW 26.19.071(6) (1997).[3] Based on Antoine's stated annual gross income, in excess of $300,000, the trial court imputed his net annual income at $100,000. The trial court then applied Washington's uniform child support schedule, and directed that Antoine pay $1,534 per month ($767 per child) in child

[2] Based on credibility determinations, evidence, and testimony at trial, the trial court found that Antoine provided inaccurate information about his actual income.

[3] Former RCW 26.19.071(6) states in pertinent part,

> The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. . . . In the absence of information to the contrary, a parent's imputed income shall be based on the median income of year-round full-time workers as derived from the United States bureau of census, current populations reports, or such replacement report as published by the bureau of census.

support.

Antoine did not pay $1,534 per month in child support. He took the position that the trial court's October 2004 decision did not establish any child support obligations because it was in the form of a nonbinding letter and not an official court order. He chose instead to comply with the December 29, 2003 temporary order which required that he make mortgage and utility payments but did not address child support.

On August 23, 2006,[4] Judge Godfrey contacted Antoine and Jennifer by letter regarding the parties' separate, proposed "entry of final pleadings." CP at 94. Judge Godfrey determined that a hearing was necessary to properly determine several disputed issues before entry of the final dissolution decree. Despite stating the need for a hearing, Judge Godfrey's letter included a ruling that denied Antoine's request to offset his child support obligation with educational expenses that he had been paying and stated that the child support "shall be computed from the decision of October 2004." CP at 94. Judge Godfrey reasoned that the educational expenses Antoine attempted to claim as offsets to his child support obligations were not agreed to in writing by Jennifer. The record does not include a verbatim report of proceedings or documentary evidence related to any hearing subsequent to the trial court's August 2006 letter.

From the record provided on appeal, it is unclear how the proceedings progressed after the August 23 letter. It appears that on August 29, 2006, Antoine moved to disqualify Judge Godfrey for bias. Although the record includes a notice of hearing on the motion, it does not include verbatim report of proceedings or documentary evidence of any hearing related to this

[4] The record contains scant evidence explaining the procedural posture between October 19, 2004 and August 23, 2006. It is unclear what stalled the entry of the final dissolution decree.

motion. In any event, Judge Godfrey presided over the remainder of the proceedings below.

On February 17, 2009, the trial court entered a temporary order of child support and a judgment ordering Antoine to pay $77,725 in back child support. The trial court based the back child support obligation on calculations using the net income that it had imputed and included in its October 2004 letter ruling. The trial court entered a second judgment for $509 to reimburse the State of Washington for child support awarded Jennifer in a TANF grant from April 1, 2007 through May 31, 2007. The trial court temporarily stayed the judgments for 60 days to allow Antoine to file a motion for reconsideration and schedule a hearing on the matter. The trial court ruled that, unless Antoine filed a timely motion to reconsider, it would automatically lift the stay.

From the record before us it does not appear that Antoine filed a motion for reconsideration of the February 17, 2009 order. Instead, Antoine filed this appeal.[5]

Discussion

Child Support Calculation

Antoine contends that the trial court abused its discretion when it set his child support obligation without considering the amount of "child support" payments that he paid Jennifer during the dissolution proceedings. According to Antoine, these included spousal maintenance, mortgage and utility payments, as well as education, healthcare, and clothing expenses for his children. The record does not support Antoine's contention.

We review a trial court's child support decision for an abuse of discretion. *In re Marriage of Booth*, 114 Wn.2d 772, 776, 791 P.2d 519 (1990); *In re Marriage of Mattson*, 95 Wn. App. 592, 599, 976 P.2d 157 (1999). Under this standard, we do not substitute our

[5] Jennifer has not responded to Antoine's appeal, either pro se or through her attorney.

judgment for that of the trial court unless the trial court's decision rests on unreasonable or untenable grounds. *In re Marriage of Leslie*, 90 Wn. App. 796, 802-03, 954 P.2d 330 (1998), *review denied*, 137 Wn.2d 1003 (1999).

In Washington, a parent's child support obligation is calculated by applying the combined monthly net income of both parents to the uniform child support schedule in former RCW 26.19.020 (1998) to determine the presumptive support level which is then apportioned according to each parent's percentage of the combined monthly net income. RCW 26.19.035(1) (enumerating the standards for application of the child support schedule). A determination of each parent's net income is essential to this calculation. *See* former RCW 26.19.071(1)-(5).[6] Each parent is required to verify net income with sufficient documentary evidence. Former RCW 26.19.071(2). Moreover, former RCW 26.19.071 enumerates income sources that a trial court must consider when computing a parent's gross income. Former RCW 26.19.071(3). The statute also enumerates expenses the trial court must deduct from gross monthly income to calculate the net monthly income used to establish the presumptive support level. Former RCW 26.19.071(5).

Here, Antoine cites former RCW 26.19.071(3) and contends that the trial court erred in computing his income because it failed to deduct maintenance that he paid to Jennifer. *See* former RCW 26.19.071(3), (5)(f). But Antoine misses the point. The trial court could not compute income based on the considerations enumerated in former RCW 26.19.071(3) and (5). Because Antoine refused to document his income, former RCW 26.19.071(6) controlled and required that

[6] Former RCW 26.19.071(1) states in pertinent part,

> All income and resources of each parent's household shall be disclosed and considered by the court when the court determines the child support obligation of each parent.

the trial court impute Antoine's income. Former RCW 26.19.071(6) provides that "[i]n the absence of information to the contrary, a parent's imputed income shall be based on the median income of year-round full-time workers as derived from the United States bureau of census." The record shows that throughout the dissolution proceedings, Antoine refused to provide records of his actual earnings. Accordingly, the trial court properly imputed his income under former RCW 26.19.071(6).[7] Former RCW 26.19.071(3) and (5) did not apply.

Moreover, the record suggests that the trial court addressed the amount of money Antoine allegedly paid Jennifer each month to support their children during the dissolution proceedings. In its August 2006 letter, the trial court acknowledged that Antoine apparently paid for his children's music lessons, sign language lessons, and private school tuition and fees. The trial court denied Antoine's request that these expenses offset his child support obligation. Even if the trial court applied former RCW 26.19.071(5)(f), which it did not, that statute requires deductions only for *court-ordered maintenance* to the extent actually paid.

Finally, we note that the trial court limited child support to $1,534 per month rather than imposing an extrapolated child support obligation of $2,036.84 per month based on his imputed income. On the record before us, the trial court based Antoine's child support obligation on tenable grounds and reasons and did not abuse its discretion when it ordered Antoine to pay $1,534 per month toward the support of his two children. *See Booth*, 114 Wn.2d at 776; *Mattson*, 95 Wn. App. at 599; *Leslie*, 90 Wn. App. at 802-03.

[7] Antoine does not assign error to the trial court's imputation of his income.

Retroactive Child Support

Antoine also alleges that the trial court retroactively escalated his child support obligation when it entered a judgment against him for $77,725 for back child support to cover the period of October 1, 2004 through January 31, 2009. The record does not support this claim.

The law prohibits retroactive modification of child support because it opens the door to uncertainties, costs, and hardship. *Cf. In re Marriage of Ortiz*, 108 Wn.2d 643, 648-49, 740 P.2d 843 (1987); *Mathews v. Mathews*, 1 Wn. App. 838, 842-43, 466 P.2d 208 (retrospective modification of accrued child support is not allowed), *review denied*, 78 Wn.2d 992 (1970). But a trial court has discretion to provide back child support under RCW 26.26.130(3) and in "the implicit power of the court to apply equity." *In re Parentage of I.A.D.*, 131 Wn. App. 207, 217, 126 P.3d 79 (2006). Before setting back support based on income, the trial court must determine actual income under former RCW 26.19.071(1)-(5) or, in the absence of records of a parent's actual earnings, impute income under former RCW 26.19.071(6).

Here, Antoine mischaracterizes the trial court's February 17, 2009 order. The trial court did not retroactively escalate his child support obligations; it merely required that he comply with the child support obligation that it imposed in its October 2004 letter ruling. On October 19, 2004, following dissolution proceedings, the trial court entered its "preliminary final rulings" by letter. CP at 2. In that letter, the trial court ordered Antoine to pay $1,534 per month ($767 per child) in child support. Antoine did not pay child support; instead, he asserted that the trial court's prior temporary order, entered on December 29, 2003, directing that he "pay the mortgage and utilities pending further court order," set out his entire court-ordered obligations and that, until a final order was entered, it controlled.[8] CP at 68. But Antoine's compliance with

financial obligations in the December 29, 2003 order is irrelevant to whether he complied with his child support obligations which were set out in the October 2004 letter ruling. In that ruling, the trial court unequivocally ordered Antoine to pay $1,534 per month in child support.

On August 23, 2006, the trial court sent a letter to the parties to address the parties' respective proposed final dissolution orders, maintenance and child support discrepancies, and to inform the parties of the necessity of a hearing to resolve the issues. The trial court's August 23, 2006 letter also addressed Antoine's child support obligations and clearly stated that child support obligations shall be computed as $1,534 per month as of October 2004 in accordance with the trial court's October 2004 decision. In addition, the trial court's August 2006 letter ruling denied Antoine's requested offsets because Jennifer had not agree in writing to accept these monies as offsets.[9]

No transcript of the hearing referenced in the August 23, 2006 letter has been provided to this court. Based on the trial court's August 2006 letter, it is clear that Antoine's child support obligations were imposed in the trial court's October 2004 letter ruling and that the trial court refused to offset or retroactively modify the amount of child support.

Likewise, on February 17, 2009, when the trial court ordered Antoine to pay $77,725 in back child support for October 1, 2004 through January 31, 2009, it did not retroactively modify the amount of child support previously imposed. Instead, it properly enforced its earlier ruling. *See I.A.D.*, 131 Wn. App. at 217. Accordingly, the trial court properly exercised its discretion

[8] The record suggests that Antoine consistently complied with his financial obligations that the trial court ordered in the December 29, 2003 order.

[9] We note that "[a]greement of the parties is not by itself adequate reason for any deviation from the standard calculation" of child support. Former RCW 26.19.075(5) (1997).

when it entered the $77,725 judgment for back child support. *See I.A.D.*, 131 Wn. App. at 217.

Appearance of Fairness

Next, Antoine contends that Judge Godfrey was not impartial during these proceedings because (1) he allegedly practiced law with the appointed GAL; and (2) he allegedly served on the board of the Grays Harbor Community Hospital, an organization with which Antoine has been involved with in ongoing litigation. The party seeking review has the burden of perfecting the record so that the appellate court has before it all the evidence relevant to the issues presented. RAP 9.2(b). The record on appeal does not contain a verbatim report of proceedings, any documentary evidence, or any court orders related to Antoine's August 2006 motion to disqualify Judge Godfrey. Accordingly, we cannot review Antoine's bias allegation.

Equitable Estoppel

Finally, Antoine asks us to apply the doctrine of equitable estoppel to the $509 judgment to reimburse the State for back child support and TANF grant. Again, the record on appeal is insufficient to show that Antoine raised the issue of equitable estoppel to the trial court and we decline to address it.[10] *See* RAP 2.5(a) (an appellate court may refuse to review an issue raised for the first time on appeal).

[10] The record includes an objection to the State's motion to compel discovery filed on November 26, 2008, in which Antoine contended that his children erroneously received TANF assistance. Antoine attached a letter from the deputy prosecuting attorney addressing the children's TANF assistance in addition to TANF public assistance print-outs and the state medical print-outs. The letter is illegible because it is a poor photocopy and, accordingly, the print-outs' relevance is unclear. Nowhere in Antoine's motion did he raise the issue of equitable estoppel. Moreover, Antoine does not direct us to any evidence in the record to show that he raised the issue of equitable estoppel before the trial court.

Attorney Fees

Antoine requests attorney fees on appeal under RCW 26.09.140.[11] Because no meritorious issues have been presented, no fees are appropriate.

We affirm.

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 pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

BRIDGEWATER, P.J.

ARMSTRONG, J.

[11] RCW 26.09.140 states in pertinent part,

> Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.