Case No. 43125-4-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

In Re the Matter of:

TAMRA ANDERSON
Respondent

v.

MATTHEW ANDERSON
Appellant.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The trial court erred by hearing the motion for adjustment per RCW 26.09.170(7)(a) when it had not been 24 months from the entry of the order or last adjustment or modification, whichever is later.
2. The trial court erred when it found the date to begin calculating the running of the 24 months before a motion for adjustment is allowed per RCW 26.09.170(7)(a) was the date of the arbitrator's decision and not the date of the entry of the Order of Support.
3. The trial court erred when it did not dismiss the motion for adjustment upon counsel's objection.
4. The trial court erred when it terminated the father's deviation for residential time with the children under a motion for adjustment.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does a parent have a right to make a motion for adjustment of support when 24 months has not passed since entry of the order sought to be modified?
2. Does an arbitrator's decision count as the date entry of an order?
3. Does the court have the ability to terminate a deviation under a motion for adjustment?

B. STATEMENT OF THE CASE

Matthew Anderson and Tamra Anderson were married in 2002 and have two children of this marriage, namely Reagan A. Anderson, DOB: 12/2004 and

Peyton A. Anderson, DOB: 04/2007. A petition for dissolution was filed by the husband on August 14, 2008. Thereafter, the parties entered into an agreement to have their dissolution determined by binding arbitration with arbitrator Lawrence Besk. An arbitration occurred with Mr. Lawrence Besk, where parties and counsel entered a CR2(a) agreement on January 30, 2009 (the document was misdated as 2008, but there is no dispute it was 2009). The parties subsequently were divorced *16 months later*, (it is unclear why there was such a long delay), on September 10, 2010. At that time the Court entered a Decree of Dissolution, Findings of Fact and Conclusions of Law, a Parenting Plan and an Order of Support. These documents embodied the terms of the CR2(a) agreement entered into by the parties.

On September 28, 2011, only twelve months after the Order of Support sought to be modified was entered, the respondent mother filed a motion for adjustment of child support. The pattern form for a motion for adjustment states, in paragraph 2.3, which was the basis for the respondent's motion to allow support to be adjusted, "[i]t is more than 24 months since the order was entered or since the last incremental change went into effect, whichever is later, and there have been changes in the economic table or standards in RCW 26.19 as follows:". Curiously, the motion filed by the respondent changed the pattern language to state: "[i]t is more than 24 months since the order was entered *by arbitration dated May 17, 2009* or since the last incremental change went into effect, whichever is later, and there have been changes in the economic table or standards in RCW 26.19 as follows:" Emphasis added. (The economic Table is in RCW 26.09.020 and was changed effective October 01, 2009.)

The basis for the adjustment per the respondent's motion, paragraph 2.3, states "[s]ince the amount of child support was arbitrated a new standard for the calculation of child support was adopted by the State." And goes on to state "[t]here is no longer any factual basis to allow father a deviation in his child support obligation."

The motion was heard initially by Commissioner Dicke in Pierce County Superior Court on the family law motions calendar on December 8, 2011. Commissioner Dicke, over objection, ordered that the motion for adjustment be granted. Commissioner Dicke ordered; 1) support to be adjusted according to the mother's worksheets, 2) the termination of the father's residential credit deviation, and 3) the entry of a judgment for father's unpaid share of daycare. She did, however, order that the father's right to present the issue of nanny as daycare be preserved for father to pursue (which he is doing so currently). See Commissioner Dicke's December 12, 2011 Order of Support at CP 183 - 198.

Appellant terminated his counsel, retained new counsel, Mr. Cameron J. Fleury, of McGavick Graves, PS, who prepared and filed a motion for revision of Commissioner Dicke's ruling. Said revision was heard by Pierce County Superior Court Judge Edmund Murphy on February 3, 2012. Judge Murphy denied the motion and upheld all of Commissioner Dicke's prior rulings. Ruling at CP 268 – 269. In his oral ruling, Judge Murphy confirmed that his finding was that the 24 month waiting period to file a motion for adjustment began with the date of the arbitrator's ruling (VRP February 3, 2012, at page 9 – 10 line 23 – 2). It is clear he based his decision allowing a hearing on the motion for adjustment upon the finding that more than 24 months had passed from the date of the arbitrator's decision, NOT the date the Order was entered with the Clerk's

office, or the date of the entry of the last adjustment or modification, as provided in RCW 26.09.170(7)(a). This finding was not made part of the order. However, it was included in the Clerk's Journal Memorandum. CP 266 – 267. Counsel for appellant subsequently brought a motion to clarify the ruling to include this finding, which Judge Murphy denied by ruling the basis for his ruling was clear and that such a clarification was not needed (VRP March 2, 2012, at page 7). Judge Murphy's decision also upheld Commissioner Dicke's denial of the downward deviation for residential credit (VRP February 3, 2012, at page 20 lines 11-15).

Appellant then timely filed his Notice of Appeal. CP 283 – 308.

C. SUMMARY OF ARGUMENT

RCW 26.09.170(7)(a) is clear. A Motion for Adjustment may only be filed after 24 months from the later of the entry of the current Order of Support. Here it was only 12 months, therefore the Mother's Motion should have been denied below and the matter dismissed in its entirety.

In re Marriage of Scanlon and Witrak, 109 Wn. App. 167, 173, 34 P.3d 877 (2001), review denied, 147 Wn.2d 1026 (2002) is clear, the court does not have the authority, under a Motion for Adjustment, to terminate a deviation. Here, the court below did exactly what is proscribed and should be reversed.

D. ARGUMENT

This section will argue that 1). The 24 month requirement of RCW 26.09.170(7)(a) begins when the order is filed with the clerk's office as opposed to when the arbitration ruling is signed and 2). The court lacks the authority to terminate a deviation under a motion for adjustment.

1. **The 24 month period begins when the order is actually filed with the court clerk, and thus Respondent moved for adjustment prematurely.**

RCW 26.09.170(7)(a) states that an adjustment can only be filed once "twenty-four months have passed from the date of the entry of the order, or the last adjustment or modification." The "date of the entry of the order" means the date that the order is actually filed with the court because a). this court should interpret RCW 26.09.170(7)(a) by its plain meaning, b). The Court has already determined that the "date of the entry of the order" means the date that the order is filed with the court clerk, and c). given that "date of the entry of the order" is a clear concept, which is critical to many areas of law, and, therefore making it a malleable term would threaten judicial restraint and lead to increased litigation.

a. **Washington Courts have stated that RCW 26.09.170 should be interpreted by plain meaning as an unambiguous statute.**

Washington Courts have stated that RCW 26.09.170 should be interpreted by its plain meaning, and this should include RCW 26.09.170(7)(a)'s definition of when "24 months" begins. Consider *In re Marriage of Scanlon and Witrak*, 109 Wn. App. 167, 34 P.3d 877 (2001). In *Scanlon*, the Court determined that an "adjustment" action under RCW 26.09.170 was designed to be interpreted more narrowly than a modification action. *Id.* at 173. The *Scanlon* Court held that when a statute is unambiguous, the court will not engage in statutory construction, and instead engage in a plain meaning reading. *Id.* at 172. The court also determined that "the terms in RCW 26.09.170 reflect no ambiguity." *Id.* Understanding this, the Court interpreted RCW 26.09.170 by its plain meaning when determining that an adjustment action was designed to be narrow. *Id.* at 173.

The principle of interpreting statutory language by its plain meaning is in keeping with the Supreme Court's analysis of child support statutes. Consider *In re marriage of Briscoe*, 134 Wn.2d 344, 949 P.2d 1388 (1998) *and*, 971 P.2d 500 (1998). In *Briscoe*, the Court overturned a trial court's impermissible construction of a clear child support statute. *Id.* at 348, 349–50. RCW 26.18.190(2) stated that disability dependency benefits (benefits given directly to the child to compensate for a parent's disability) offset the disabled parent's child support. *Id.* at 348. The trial judge decided to disregard the meaning of this statute, and construct it to disallow the offset where the disabled parent had failed to report the disability payments as income. *Id.* at 347.

The Supreme Court reversed, because the Court looked to the plain meaning of RCW 26.18.190(2). *Id.* at 348. The statute said that the amount given to the child directly "shall be treated for all purposes as if the disabled person [made the payments as child support]." *Id.* The court held that this plain meaning must control, because "courts will not alter the plain meaning of statutory language through construction." *Id.*

This court should analyze RCW 26.09.170(7)(a)'s clause stating that 24 months must have passed "from the date of the entry of the order" by its plain meaning, just as it did with the same statute in *Scanlon*. Like *Scanlon* and *Briscoe*, it is irrelevant how much the trial court's judgment of fairness may differ from the legislature's words. 24 months from the "date of the entry of the order" means exactly what it says, and respondent's move to adjust was thus premature by one year.

The plain meaning of the "date of the entry of the order" is clear in this case: The final Order of Support was entered on the date of September 10, 2010. See clerk's papers at 12-25. Thus 24 months from this date is "24 months from the date of the entry of the

order", which would be September 10, 2012. Respondent's motion for adjustment was filed on September 20, 2011. Thus it is abundantly clear 24 months had not passed since the "date of the entry of the order" before the motion for adjustment was filed. Therefore, the filing of the adjustment action was in complete violation of RCW 26.09.170(7)(a).

b. Courts have interpreted the date that an order or judgment is "entered" as the date when the order is filed with the clerk.

Even beyond the plain meaning of RCW 26.09.170(7)(a), Washington Courts have previously defined the "date of the entry of the order" through its court rules to be the date that the order if filed with the court clerk, as per the plain language of CR 58(b). *Metz v. Sarandos*, 91 Wn. App. 357, 350–60, 957 P.2d 795 (1998); *see also* CR 59(b); *see also* CR 58(b).

CR 59(b) provides that a motion for new trial had to be filed "10 days after the entry of judgment." *Metz,* 91 Wn. App.357 (1998), at 359 - 360; CR 59(b). In *Metz*, the trial court decided that these 10 days should instead begin at the date counsel received the order, because the trial court believed that it would be unfair to do otherwise. *Metz*, 91 Wn. App. 357, at 360. The appellate court properly reversed the trial court, deciding that CR 59(b) clearly states "*10 days after the entry of judgment*," and this language was too clear to be subject to interpretation. *See id.* (emphasis in case). To find the definition of the entry of judgment, the Court looked to CR 58(b), which states that entry of judgment time is defined as "the *time of delivery to the clerk for filing*" *Id.* (emphasis in case). This meant that the time where the 10 days started was the delivery to the clerk. *Id.*[1] Thus the judge was wrong to modify or interpret this rule contrary to the text. *Id.*

[1] There was also another issue in that CR 6(b) explicitly prohibits judicial discretion in changing appellate deadlines. However, just as CR 6(b) prevents courts from changing appellate deadlines, the principle that

In this case, RCW 26.09.170(7)(a) clearly states the Respondent must wait 24 months after the "date of the entry of the order" to adjust child support. Here, Commissioner Dicke and Judge Murphy may have believed it would be more fair if the date ran from the date that the arbitration was concluded, because that was when the child support payments began at the amount in the Order, which was eventually entered. However, this ignores the fact that the statute clearly requires 24 months from the "date of the entry of the order" NOT "at the judge's discretion" or "the date of arbitration" or "the date that child support payments begin." Thus the judge abused his discretion in disregarding the statute based on his personal view of fairness, and this court should overturn his ruling on when the "date of the entry of the order" begins and vacate the Orders entered on December 8, 2011. *See also Cohen v. Stingl*, 51 Wn.2d 866, 868, 322 P.2d 873 (1958), (overturning a judge who changed the date of entry of the judgment from its actual entry on January 11, 1956, to September 26, 1956, so as to maintain an appeal's timeliness).

Other cases likewise support the contention it is inappropriate for a trial judge to change the date of judgment simply because payments began earlier. *State v. Trask*, 98 Wn. App. 690, 990 P.2d 976 (2000). In *Trask*, the State signed a binding agreement with the plaintiff. *Id.* at 692–93. The agreement stated that the State would condemn Plaintiff's property in exchange for an immediate payment to plaintiff of 2.5 million dollars. *Id.* The agreement stated that the plaintiff was entitled to principle plus interest of any amount a jury later valued the property above 2.5 million. *Id.*

In *Trask*, it was relevant to the case whether the interest was pre or post judgment interest. *Id.* at 694. When analyzing whether interest was pre or post judgment interest,

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courts must not construct unambiguous statutes prevents the court from changing statutory deadlines. *Compare* CR 6(b) *with Scanlon*, 109 Wn. App. at 172.

the court set the date of the entry of judgment at the date judgment was entered. *See id.* at 693, 698. The Court did not change the date of judgment to the far earlier date of the 2.5 million dollar payment.[2]

c. <u>Making the "date of the entry of the order" a malleable term will lead to confusion and increased litigation.</u>

Making the "date of the entry of the order" a malleable term would lead to confusion and increased litigation. The concept of the date of the entry of a legal order is meant to be clear and read by its plain meaning. *See Supra* Part 1.a; 1.b. Because this date is so clear, and so fundamental to all litigation, it is used in many legal areas as a starting point from which everything else is measured, (including child support, RCW 26.09.170(7)(a), Eminent Domain, *Trask*, 98 Wn. App.690, at 692–93, and Appellate Procedure, *Metz*, 91 Wn. App. 357, at 359–60).

If this court allows the "date of the entry of the order" concept to become malleable in this case, it could set a precedent where the "date of the entry of the order" is whatever the court thinks is fair. This threatens judicial restraint, resulting in cases like *Cohen*, where a judge decided he would move the date of the entry of judgment forward *six months* to activate a late appeal. *Cohen*, 51 Wn.2d at 868. Beyond the threat to judicial restraint, making such a clear concept malleable could result in more litigation, as lawyers argue over what the "date of the entry of the order" really means. *See Weston v. Emerald City Pizza LLC*, 137 Wn. App. 164, 168, 151 P.3d 1090 (2007) (discussing the importance of avoiding litigation). For example, *Cohen* had to go all the way to the State Supreme Court for resolution. *Cohen*, 51 Wn.2d at 866. This could happen in all the areas

[2] *Trask* is somewhat different than the case at bar, as there was a contract referring to a future judgment. *Id.* at 692–93. Still, *Trask* shows that the "date of the entry of the judgment" is tied to when the document is actually filed with the court, not when performance of an obligation occurs. *Id.* at 693, 698.

of law where "the date of entry" concept is found. Thus policy concerns support a plain reading of the "date of the entry of the order."

2. Trial courts may not terminate a previously established deviation in an adjustment proceeding.

Terminating a deviation goes beyond the adjustment proceeding's narrow parameters because it fundamentally changes the child support agreement. Unlike modification actions, child support adjustments are intended to be narrow in their scope. *Scanlon*, 109 Wn. App. 167, at 173. This is because while a modification action requires demonstrating a "significant change in circumstances" adjustment actions only require that the party proposing adjustment meet certain, easier to meet, statutory requirements *Id.* (in this case, a change in the statutory economic tables per RCW 26.09.170(7)(a)(iii)).

Other cases also show that Courts interpret adjustment actions to be minor, rather than major. *In re Marriage of Pape*, 139 Wn.2d 694, 716, 989 P.2d 1120 (1999) (interpreting RCW 26.09.260, a statute which allows the court to make "adjustments" to residential aspects of parenting plans without fulfilling the requirements of a full parenting plan modification); *See also In re Marriage of Hoseth*, 115 Wn. App. 563, 569, 63 P.3d 164 (2003) (doing the same).

Because adjustment actions are much narrower than modification actions, adjustments must not "mak[e] substantial changes and/or additions to the original order of support." *Scanlon*, 109 Wn. App. 167, at 173. Rather, adjustments must instead "conform[] existing provisions of a child support order to the parties' current circumstances. *Id.*

In an adjustment action, the need to "conform" to "existing provisions" prevents parties from relitigating previously decided issues as a matter of collateral estoppel. *In re*

Marriage of Trichak, 72 Wn. App. 21, 23, 863 P.2d 585 (1993). Collateral estoppel bars the relitigation of an issue where "Affirmative answers [are] given to the following questions":

> (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

Rains v. State, 100 Wn.2d 660, 665, 674 P.2d 165 (1983).

Applying the four collateral estoppel factors to this case reveals that collateral estoppel should have barred the trial judge from terminating the residential deviation in this case. Compare Respondent's motion to terminate the deviation with the prior adjudication of the deviation. The issue is identical (appellant's residential deviation without any substantial change in circumstances), the previous case constituted a final judgment on the merits (granting Appellant his deviation), and the issue here is regarding the same parties and the same parenting plan. Regarding the injustice prong, as the Respondent had a full and fair opportunity to litigate this claim originally, it would not work an injustice to deny respondent a second bite at the apple. *See id.* at 666. (no injustice where plaintiff had a "full and fair opportunity to litigate his claim in a neutral forum . . . court).

In *Trichak*, appellant attempted to modify her decree of dissolution to remove the previous proceeding's order granting Respondent a deviation for their disabled child's social security income. *Trichak*, 72 Wn. App. 21, at 23–24. [3] The Court determined that

[3] In a case where a substantial change of circumstances was shown, the court stated that "collateral estoppel . . . ha[s] no application in cases involving the custody and support of children." *Matter of Marriage of*

collateral estoppel prohibited her from relitigating the issue, because the judge granted respondent the deviation in a previous trial; a trial which she chose not to appeal. *Id.* Critically, the Court determined that she could not relitigate this issue because she did not appeal whether the deviation could be modified because of a substantial change of circumstances, but rather whether the original deviation determination was correct as a matter of law. *Id.* This was considered relitigating the issue, and as such the court prohibited it under collateral estoppel. *Id.*

This court should uphold the principle in *Trichak* by barring the judge from modifying a deviation in an adjustment proceeding. This is because the adjustment action by its nature does not require Respondent to show a "substantial change of circumstances." This is critical because without a showing of a "substantial change in circumstances," allowing the deviation to be modified in an adjustment motion is allowing a relitigation of the deviation as a matter of law. This is because absent a change in circumstances, the only thing that could possibly be argued is that the original circumstances should have resulted in a different legal conclusion. This is a question of law, which collateral estoppel should forbid relitigating.

Like these cases, the deviation for Matthew Anderson must stand, because the only action in this case is one for adjustment. Matthew Anderson had an established residential credit. As this was simply a motion for adjustment, Respondent was not required to, and failed to, demonstrate a "substantial change of circumstances", which is

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Studebaker, 36 Wn. App. 815, 817–18, 677 P.2d 789 (1984) However, this is only where "substantial circumstances" exist, as demonstrated by the cases the court cited to when making the above statement. Id. at 817–18 *citing In re Marriage of Cook,* 28 Wn. App. 518, 521, 624 P.2d 743 (1981); *In re Marriage of Roorda,* 25 Wn. App. 849, 853, 611 P.2d 794 (1980) These two cases explain that modification where substantial circumstances are shows constitutes a narrow deviation from to the traditional rule of res judicata. *Cook*, 28 Wn. App. at 521; *Roorda*, 25 Wn. App. at 853. Conversely, where no substantial change of circumstances exists, as in adjustment proceedings, collateral estoppel prevents relitigation of the issues. *Trichak* 72 Wn. App. at 23–24.

required in a Petition for Modification. Thus the adjustment action before the court was far too narrow to allow the Court to make the radical changes to the child support order it did here below. Rather, the Court should have dismissed the action as improperly filed and the Respondent could have re-filed a Petition for Modification. If the Court were to proceed on the Motion for Adjustment, it should have only made changes that did not "mak[e] substantial changes and/or additions to the original order of support." *Scanlon*, 109 Wn. App. 167, at 173.

E. CONCLUSION

The appellant, Matthew Anderson, respectfully requests this court to reverse Commissioner Mary Dicke's December 8, 2011 and Judge Edmund Murphy's February 3, 2012 rulings and find that the respondent, Tamra Anderson, filed her Motion to Adjust Support prematurely, in violation of RCW 26.09.170(7)(a) and reverse the trial court and vacate the Order of Support and Order on Modification entered below on February 3, 2012.

In the event, the Orders are not vacated in their entirety, the appellant respectfully requests this court to reverse the portion of the Order on Motion For Adjustment where it terminates the father's downward deviation based upon the residential credit and remand the issue for further hearing regarding the amount of the deviation.

The appellant also requests an award of fees and costs upon Declaration and per RAP 18.

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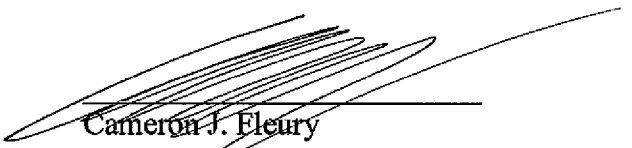
DATED this 20th day of June, 2012

Respectfully submitted,



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