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.

REPLY BRIEF OF APPELLANT

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A. Introduction

This reply brief will argue that I). RCW 26.09.170(7)(a) prohibits adjusting child support until 24 months after the *date of the entry of the order* and II). Adjustment actions are too narrow to allow the lower court to terminate previously established deviations, and III) for an award of fees per RAP 18.

B. ARGUMENT

I. This Court should dismiss the motion for adjustment of support filed on September 28, 2011 and vacate the Orders entered on December 8, 2011 because RCW 26.09.170(7)(a) Prohibits Adjusting Child Support until 24 Months Following the *Date of the Entry* of the Order.

RCW 26.09.170(7)(a) prohibits adjusting child support until 24 months following the *date of the entry of the order*. Respondent's brief asserts the date of the entry of the order should be viewed as two years before the order was actually entered, because the Arbitrator's decision constitutes an "order" under RCW 26.09.170(7)(a). Br. Respondent, at 9–10. Respondent's argument completely misses the point—both of the Statute and of Appellant's brief. This is because the plain language of RCW 26.09.170(7)(a) states that the *date of the **entry*** of the order is when the two year prohibition on adjustments begins. RCW 26.09.170(7)(a) (stating that the order may be adjusted "if twenty-four months have passed from the *date of the entry of the order*") (emphasis added); See also *In re Marriage of Scanlon & Witrak*, 109 Wn. App. at 172 (stating that "[t]he terms in RCW 26.09.170 reflect no ambiguity").

Until the order is *entered* through a *court*, it is not "entered" for purposes of RCW 26.09.170(7)(a). If the statute read "date of the order's effect" or "date of the Arbitrator's decision", or "date the parties began following the arbitrator's decision", then the statute

would support Respondent's arguments. But RCW 26.09.170(7)(a) clearly states the "date of the entry of the order." Which is the date that the order is entered with the clerk of the court for filing. *See Metz v. Sarandos*, 91 Wn. App. 357, 360, 957 P.2d 795 (1998). This is regardless of when the Arbitrator signed the order, when the order's provisions took effect or when the parties began following it.

The Respondent argues that the Order was entered nunc pro tunc to June 1, 2009. That an outright falsehood. Nowhere was the Order of Support identified to have been entered nunc pro tunc to any date. The effective date shown in the Order was June 1, 2009, but the Order was entered September 10, 2010.

In any event, it wouldn't matter whether a lower court entered the order nunc pro tunc to reflect some earlier date, as a nunc pro tunc entry changes the order's *effective* date, but not the date of that order's *entry*. RCW 26.09.290 (Stating that the court can enter an order "granting the dissolution as of the date when the same *could have been* given or made by the court if applied for."). RCW 26.09.170 does not allow the Judge to change the "date of the entry of the order" with a nunc pro tunc device any more than CR 58(b) and CR 59(b) allowed the Judge in *Metz* to rule that the rule's 10 day time limit should begin at the date counsel received the order. *See* Br. Appellant at 11–12; *Metz v. Sarandos*, 91 Wn. App. 357, 360, 957 P.2d 795 (1998).

It is also irrelevant that the Appellant stated that "it has been more than two years since support was last "ordered," as this statement refers to the order's "effective date" not the "date of the entry" of the order. *Compare* Declaration of Matthew Anderson at 1 *with* RCW 26.09.170(7)(a).

The Order was entered on September 10, 2011, a date confirmed by the lower court. *See* In re: Marriage of Anderson, Verbatim report of Show Cause Motion, December 8, 2011. Thus the 24 month prohibition on adjustments lasts until September 10, 2013, and this Court should dismiss adjustment or modification of the child support as premature under the statute until that date.[1]

Respondent also argues the children's basic needs are not being met. Again, a specious argument, as these parents both enjoy a substantial income. The parent's net monthly incomes, after payment of support per the September 10, 2009 Order are virtually identical (father $6,100/mo. and mother $5,800/mo.) and the children spend a significant amount of overnights with the father, thus again, roughly equalizing the parents' responsibility for housing, food, utilities, etc. for the children. The parents each described the extracurricular activities and vacations, etc. they provide the children. Obviously, the children's needs are more than being met and any argument that the children are being harmed by being forced to wait the required statutory period to file a Motion for Adjustment is false. Besides, there was/is nothing preventing the Respondent from properly filing a Petition for Modification at any time there was a substantial change

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[1] Respondent correctly points out that the controlling "date of adjustment"—when analyzing whether an adjustment is premature—is the date of actual adjustment, rather than the date a party files for adjustment. Br. Respondent at 4, n. 1; *In re Marriage of Roth*, 72 Wn. App. 566, 574, 865 P.2d 43 (1994). This is because "[s]tatutory language is given its ordinary and usual meaning." *Id.* The Court in *Roth* stated:

> The next question is whether this statute requires a petitioner to file after 24 months, or whether it simply requires 24 months to pass before modification is granted. While amended subsection (8)(b) referred to a parent's right to *petition* the court for modification after 12 months, subsection (8)(a) simply states that '[a]ll child support decrees *may be adjusted* once every twenty-four months ...'. (Italics ours.) Statutory language is given its ordinary and usual meaning.

Id. This is a *perfect* example of the plain meaning analysis that we ask this Court to conduct when interpreting "date of the entry of the order" provision of RCW 26.09.170(7)(a). Such a plain meaning analysis leads to dismissal of Respondent's petition.

in circumstances. The Appellant should not be punished for the Respondent's failure to file her action properly.

II. This Court should overturn the lower court's decision to terminate Appellant's deviation because re-deciding deviations is beyond the scope of the narrow adjustment petition Respondent brought before the court.

This Court should vacate the lower court's decision to terminate Appellant's deviation because re-deciding deviations is beyond the scope of the narrow adjustment motion Respondent brought before the lower court. Respondent asserts it is Appellant's burden to re-prove the deviation because Appellant's circumstances have changed. *See* Br. Respondent at 17–19. However, this incorrectly assumes that the deviation determination may be reopened on an adjustment motion.

Respondents brought a motion for *adjustment* before the lower court. A motion for adjustment allows a party to narrowly reopen a child support determination. *In re Marriage of Scanlon & Witrak*, 109 Wn. App. 167, 172–73, 34 P.3d 877 (2001). The adjustment motion's purpose is limited to addressing the two specific considerations enumerated in 26.09.170(7)(a); considerations which the legislature determined should free a party from proving "a substantial change in circumstances." *See* RCW 26.09.170(1) (Stating that outside of certain explicitly codified circumstances, child support may be modified "only upon a showing of a substantial change of circumstances"); *See also In re Marriage of Gillespie*, 77 Wn. App. 342, 346, 890 P.2d 1083 (1995) (explaining that the legislature's intent in amending a very similar provision of RCW 26.09.170—RCW 26.09.170(6)—was to "eliminate the necessity of establishing a substantial change in circumstances for *certain enumerated modification requests*.") (emphasis added).

The legislature's purpose in requiring a party to show a "substantial change in circumstances" before reopening child support determinations in all but a few enumerated instances is to prevent excessive litigation of child support determinations. *In re Marriage of Cook*, 28 Wn. App. 518, 521, 624 P.2d 743 (1981) ("The function of the statutory requirement that 'changed circumstances' be shown is to insure against the protracted litigation to which disgruntled former spouses are sometimes prone"). Respondent brought her adjustment action based upon one of these two narrow enumerated issues—a change in the statutory tables—so as to avoid the burden of showing a "substantial change in circumstances." *See* RCW 26.09.107(7)(a)(ii); *See also* Scanlon, 109 Wn. App. at 173 (explaining how lower the burdens are for filing an adjustment motion relative to a petition for modification).

But Respondent wants to grossly expand the scope of a motion for adjustment to make it the same as a Petition for Modification, but without having to prove a substantial change in circumstances. Respondent first used a change in statutory tables to justify a narrow adjustment motion, to get back into court without having to prove a "substantial change in circumstances." Then, after avoiding the burden of showing a substantial change in circumstances," Respondent re-litigated Appellant's deviation, so as to allow her to allege that a *substantial change in circumstances* justifies terminating Appellant's deviation.

Thus, rather than properly having the burden of demonstrating a substantial change in circumstances, Respondent's maneuver avoids that burden and places the burden on Appellant to prove that the deviation is still justified, as if the lower court should answer the question of the deviation on a blank slate. *See* Br. Respondent at 19.

This is impermissible for two reasons. First, reopening the deviation question in an adjustment action is contrary to RCW 26.09.170(7)(a) and case law, which establishes adjustment actions are designed to address only the two enumerated issues in 26.09.170(7)(a) that authorize a court to consider adjusting child support without a party showing a "substantial change in circumstances." *See* RCW 26.09.170(1); *See also Gillespie*, 77 Wn. App. at 346. To allow adjustment actions to expand beyond this frustrates the purpose of RCW 26.09.170 — avoiding excessive re-litigation of child support. *See In re Marriage of Cook*, 28 Wn. App. at 521.

Even beyond the statutory considerations, fundamental principles of fairness prohibit changing a deviation in an adjustment proceeding in this case. This is because Respondent failed to properly put Appellant on notice that the deviation issue would be reopened during a narrow adjustment motion hearing. This failure to inform Appellant deprived him of an adequate opportunity to respond to the deviation issue at the hearing, and thus the lower court should not have reopened the deviation issue. *See Starkey v. Starkey*, 40 Wn.2d 307, 317–18, 242 P.2d 1048 (1952) (ruling that the lower court had no authority to modify support when the issue had not been properly raised); *See also In re Marriage of McLean*, 132 Wn.2d 301, 305–06, 937 P.2d 602 (1997) ("[A] judgment may be attacked if a party has not been provided with proper notice and an opportunity to be heard.").

Respondent failed to give adequate notice because she filed a motion for adjustment and not a Petition for Modification, because doing so is beyond the scope of a motion for adjustment. Given the narrow language of the adjustment motion, there is no way Appellant could reasonably expect the lower court would consider terminating a

deviation — a motion to adjust child support to accommodate new statutory tables per RCW 26.09.170(7)(a)(ii).

Appellant in fact did *not* expect that he would have to defend the deviation, and was thus prejudiced by his inability to prepare a full argument in this regard. Specifically, Appellant did not properly account for all of his significant expenses, as well as the substantial number of overnights he spends with his child. Appellant did not do this because he reasonably believed these issues were irrelevant to the question before the lower court—an adjustment to accommodate a change in the statutory tables. Thus Respondent's narrow adjustment motion failed to give Appellant notice that he would need to defend his deviation against revocation. For this reason as well, this Court should overturn the lower court's decision to terminate Appellant's deviation.

III. This Court Should Grant Attorney's Fees to Appellant per RAP 18.

Appellant requests an award of fees and costs upon Declaration and per RAP 18.1. Appellant requested attorney's fees in his original brief, and perfects his request here. "In awarding attorney fees on appeal, the court should examine the arguable merit of the issues on appeal and the financial resources of the respective parties." *Matter of Marriage of Booth*, 114 Wn.2d 772, 779–80, 791 P.2d 519 (1990) (internal quotations omitted).

The merit of the arguments also justifies an award of attorney's fees in favor of the Appellant. Appellant's arguments are based on an clear plain text analysis of RCW 26.09.170(7)(a) and relevant case law. Respondent fighting these matters on appeal completely lacks merit, and as such the Court should award fees to Appellant.

Appellant has met his burdens under RAP 18.1 for demonstrating that attorney fees are necessary. Therefore we request that the Court award attorneys fees to McGavick Graves, P.S., to cover the fees and costs incurred by the Appellant on appeal.

IV. Conclusion

This Court should dismiss the adjustment motion in its entirety because it was filed sooner than 24 months after the *date* that the Arbitrator's ruling was *entered* as an Order and vacate the Orders entered December 8, 2011. It does not matter when the arbitrator signed the order, when the order took effect, or whether a lower court used a nunc pro tunc procedural device (which it did not). The Statute, on its face, says a party must wait 24 months from the *date of the entry* of the Order before filing a motion for adjustment. Twenty-four months have not passed since that date, and thus this Court should vacate the Orders entered on December 8, 2011. Respondent could have filed a Petition for Modification if she could show a substantial change in circumstances at any time, and could have as soon as her error was brought to her attention.

Even if this Court upheld the adjustment action, this Court should overturn the lower court's decision to terminate a deviation in an adjustment proceeding. Respondent's adjustment motion asked the lower court to adjust the child support based upon a change in statutory tables. Reopening a deviation determination in such a narrow proceeding is contrary to RCW 26.09.170(7)(a)'s text and the case law interpreting that statute. Furthermore, it violates fundamental principles of fairness to terminate a deviation in this case because the narrow adjustment petition regarding statutory tables never proposed terminating said deviation. Thus, especially given the fact that the adjustment petition is narrow in nature, Appellant had no notice that the deviation issue

would be reopened. Basic principles of fairness thus require this Court to overturn the lower court's termination of the deviation.

Dated this 17th day of September 2012.

RESPECTFULLY SUBMITTED,

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