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Court of Appeal Cause No. 83031-7-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ALICIA O'NEIL,

Respondent,

v.

TRISTAN O'NEIL,

Petitioner.

PETITION FOR REVIEW

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INTRODUCTION

Alicia O'Neil chose to bring a motion to adjust the parties' child support order rather than a petition to modify it. The trial court nevertheless impermissibly modified the child support order by removing a downward deviation on what should have been a motion limited to adjusting child support. The Court of Appeals affirmed. This result conflicts with the published Court of Appeals opinion in *In re Marriage of Scanlon and Witrak*, 109 Wn. App. 167, 34 P.3d 877 (2001), as amended on denial of reconsideration (Dec. 19, 2001). *Scanlon* makes clear that a motion to adjust child support is a narrow procedure with only limited relief available, and carefully distinguishes such a motion from a petition to modify child support, citing the relevant statutes. RAP 13.4(b)(2).

Because Alicia O'Neil brought only a motion to adjust the child support order and not a petition to modify it, Petitioner Tristan O'Neil lacked proper notice of what relief she was seeking and did not have a meaningful opportunity to be heard. Furthermore, Alicia

O'Neil raised for the first time in reply a financial hardship argument, which the trial court ultimately found persuasive. Because this argument was raised for the first time in reply, Tristan O'Neil had no opportunity to conduct discovery on this issue or even address it in a response. Because he lacked proper notice and a meaningful opportunity to be heard, Petitioner was denied his constitutionally guaranteed procedural due process rights under both the U.S. Constitution and also the Washington State Constitution. RAP 13.4(b)(3).

The lack of following the correct procedure and violation of due procedural due process guarantees affect similarly situated parties seeking or opposing child support order modifications, and thus is a matter of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

For these reasons, review should be granted.

A. IDENTITY OF PETITIONER

Tristan O'Neil asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Petitioner requests the Washington Supreme Court review the Washington State Court of Appeals Unpublished Opinion in *Alicia D.K. O'Neil, v. Tristan B. O'Neil,* Case No. 83031-7-I, Washington Court of Appeals, Division One (June 13, 2022) (the "Opinion"), reconsideration denied, August 25, 2022.

A copy of the Opinion is in the **Appendix** at pages A-1 through 7. A copy of the order denying petitioner's motion for reconsideration is in the **Appendix** at page A-8.

C. ISSUES PRESENTED FOR REVIEW

1. ***Whether the trial court, as upheld by the Court of Appeals, granted extra and further relief to Respondent Alicia O'Neil that was not available on her necessarily limited motion to adjust a child support order?*** Yes, the trial court impermissibly modified a child support order by removing a downward deviation on a necessarily limited motion to adjust child support. Doing so conflicts with the published Court of Appeals opinion in *In re Marriage of Scanlon and Witrak,* 109 Wn. App. 167, 34 P.3d 877 (2001)*, as amended on denial of reconsideration* (Dec. 19, 2001). RAP 13.4(b)(2).

2. ***Whether Petitioner Tristan O'Neil lacked proper notice of the relief Alicia O'Neil was seeking, including that she was claiming financial hardship as a basis, such that he was denied his constitutionally guaranteed procedural due process rights of notice and a meaningful opportunity to be heard under both the U.S. and Washington State Constitutions?*** Yes, Alicia O'Neil brought a motion to adjust trial support order, and not a petition to

modify child support, such that Tristan O'Neil did not have adequate notice of the remedy she was seeking. Furthermore, Alicia O'Neil raised the argument of financial hardship for the first time in reply, when Tristan O'Neil had no opportunity to conduct discovery on this issue or even address it in a response. Because he lacked proper notice and a meaningful opportunity to be heard, Petitioner was denied his constitutionally guaranteed procedural due process rights. Where a trial court, as upheld by the Court of Appeals, can modify a child support order under such circumstances, this raises a significant question of law under the Fourteenth Amendment of the U.S. Constitution and also the Washington State Constitution. RAP 13.4(b)(3).

3. ***Whether the trial court's and Court of Appeals disregard of statutory procedure as set out in* Scanlon *and disregard of constitutional due process guarantees is a matter of substantial public interest?*** Yes. All parents responding to a motion to adjust child support have a constitutional right to notice of which issues will actually be before the court. If a trial court has plenary

authority to broaden the issues to include those not included under the statutorily created adjustment procedure, this is a matter of substantial public interest. RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

On May 15, 2015, Alicia O'Neil (the "Mother") petitioned to dissolve the parties' marriage. Op. at 2. On April 4, 2016, the parties entered an agreed order of child support for their three children. *Id*. Under the child support order, Tristan O'Neil (the "Father") was to pay the Mother $400 per month. *Id*. This child support order included a downward deviation from the standard calculation of $1564.88 per month, based on a shared residential schedule providing the children reside with each parent 50 percent of the time. *Id*; s*ee* RCW 26.19.075(1)(d).

On March 8, 2021, Respondent/Mother Alicia O'Neil filed a Motion to Adjust Child Support Order ("Motion"). CP 66-68, Op. at 2. No summons was issued, and she served Appellant/Father with CR 5 notice applicable to motions. CP 62-65. The Mother's Motion alleged she was asking "the court

to adjust the Child Support Order". CP 67, ¶ 1. As the bases for her Motion, the Mother alleged "At least two full years (24 months) have passed since the current order was issued and… the economic table or standards in RCW 26.19 have changed…" and "the parents' income has changed." CP 67, ¶3. In ¶ 5 entitled "Other (if any)," Mother alleged an additional ground that now "Two of the children are over the age of 12." CP 67. The Mother requested increasing the Father's obligation to $1903.80 per month, based on an assumed increase in his wages, and not including a downward deviation. Op. at 2.

The Mother's accompanying Declaration explained that her spousal maintenance ended in February 2018. CP 69. Her attorney set her Motion hearing on March 22, 2021. CP 62-65. This provided 14 days' notice.

The following day, the Mother re-noted her Motion for hearing for April 15, 2021. CP 111-14.

On April 8, 2021, the Father responded. Op. at 2. The Father argued, citing *Anderson v. Anderson*, 176 Wn. App.

1017 (September 4, 2013) [UNPUBLISHED] and argued courts did not have the expansive jurisdiction to eliminate a previous downward deviation in child support in a child support adjustment proceeding initiated merely by motion. CP 119.

On April 12, 2021, the Mother submitted a Reply arguing for higher support. CP 156-75. She argued that the parties did not agree that the downward deviation was nonmodifiable and also argued a material change of circumstance. Op. at 2.

On April 14, 2021, the Father filed a Motion to Strike the new calculations because the Mother's filing included new issues, arguments, and materials raised for the first time in reply and therefore not in direct reply to his response; he therefore did not have an opportunity to respond and provide support for his position that his compensation structure was front-loaded and that using his February paystubs did not accurately reflect his annual income. CP 186-92. On April 15, 2021, the Commissioner continued the hearing to May 18, 2021, allowing the Father more time to supplement his response, but

sanctioned the Father $405 for requesting the continuance. CP 195-97. Op. at 2.

On May 11, 2021, the Father filed his supplemental response, CP 203-209, and more financial documents, CP 198-202 and 747-818. These showed that the Mother's higher numbers were incorrect, and that the Mother's attempt to take his first two months' paystubs and annualize them vastly overstated his yearly income. CP 206. He argued that the downward deviation should continue to be used. CP 209. He also reiterated that the adjustment proceeding by motion was the procedurally incorrect vehicle for removing the downward deviation. Op. at 2.

On May 13, 2021, the Mother filed a lengthy reply arguing for the first time additional bases to support eliminating the downward deviation in child support. CP 210-228. In her reply, which was argument and not a sworn declaration, she asserted the children should enjoy a similar standard of living in both homes and that the purpose of child support is not only to meet

a child's basic needs but also to provide additional support commensurate with the parents' income. *See* the Mother's Strict Reply, CP 212, ln. 17, and CP 213, ln. 3. These purported bases were not in the Motion or the Declaration and the Father had no way to respond to them because they were raised for the first time in reply. The reply did not address the *Anderson* case.

The family law commissioner did not disturb the downward deviation, having determined the downward deviation could not be disturbed on the limited motion to adjust that was before the court. Op. at 3. The commissioner applied the parties' income to the current economic table using the children's ages and applied the same downward deviation used in the original child support order. Op. at 3. The Father was ordered to pay $531.53 per month. Op. at 3.

The Mother timely moved to revise. CP 239-42. She argued that the trial court actually did have jurisdiction to eliminate the downward deviation. CP 239. On July 9, 2021, the Father responded, asserting again that the court could not modify the

downward adjustment and that he had not had the chance to respond to the Mother's May 13, 2021 reply. Op. at 3.

On July 20, 2021, the trial court granted in part and denied in part the Mother's Motion for Revision. CP 282-88, Op. at 3. The downward deviation was eliminated. CP 284, Op. at 3.

On August 2, 2021, the Father moved for reconsideration, pointing out that the Mother had not raised the issue of financial hardship until reply in a proceeding that was never more than a motion for adjustment. CP 292-94. He argued that with no notice of the claim, he had no opportunity to respond, and was denied his right to a trial by affidavit and discovery. CP 292. He pointed out that the Mother's lengthy reply asserted for the first time additional bases to support eliminating the downward deviation in child support, and she had asserted in argument that the children should enjoy a similar standard of living in both homes, and that child support is not only to meet a child's basic needs, but is also to provide additional support commensurate with the parents' income. CP 292-93.

The Father further argued that RCW 26.09.175 requires all modification actions to be initiated by petitions and summons, that the only exception is for an adjustment proceeding under [now RCW 26.09.170(9)] that allows for adjustments in a few enumerated circumstances that do not include financial hardship. CP 293. He pointed out that severe financial hardship is not a ground for adjustment because it is not enumerated in [now RCW 26.09.170(9)]. CP 293. He pointed out that the statute does mention "severe economic hardship" under RCW 26.09.170(8)(a), but subsection (8) allows for an order to "be modified," not adjusted. CP 293. Finally, the Father argued that the adjustment proceeding should have been limited to the grounds for adjustment enumerated in [now RCW 26.09.170(9)], citing *In re Marriage of Scanlon and Witrak*, 109 Wn. App. 167, 173, 34 P.3d 877, 882 (2001), *as amended on denial of reconsideration* (Dec. 19, 2001); and *Anderson v. Anderson*, 176 Wn. App. 1017 (September 4, 2013). CP 293.

The court denied reconsideration on August 17, 2021. CP 298-99, Op. at 3. On August 17, 2021, the Father appealed. CP 300-331, Op. at 4.

The Court of Appeals determined that the trial court did have authority to eliminate the downward deviation under its broad equitable powers, citing *In re Marriage of Schumacher*, 100 Wn. App. 208, 213, 997 P.2d 399 (2000) and explaining that because the original child support order was reached by agreement, the trial court was not obligated to find a substantial change in circumstances, as also supported by statute, citing RCW 26.09.170(9)(a) and (b). Op. at 5.

The Court of Appeals further agreed with the trial court that because the Mother's motion for adjustment was based on financial hardship, it need not find a substantial change in circumstances to modify the child support order by eliminating the downward deviation, that the changes examined to justify removal of the downward deviation were within RCW 26.09.170's adjustment provision, and that the changes in

financial information "were not drastic enough to constitute a substantial change in circumstances requiring a petition to modify." Op. at 5–6. Tristan O'Neil filed a Motion for Reconsideration, which was denied by order entered on August 25, 2022.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The trial court's decision to modify a child support order on a petition to adjust child support, as upheld by the Court of Appeals, conflicts with the Court of Appeals decision in *Scanlon v. Witrak*.

The trial court impermissibly modified a child support order by removing a downward deviation on a necessarily limited motion to adjust child support. Doing so conflicts with the published Court of Appeals opinion in *In re Marriage of Scanlon and Witrak,* 109 Wn. App. 167, 34 P.3d 877 (2001*), as amended on denial of reconsideration* (Dec. 19, 2001*)*. RAP 13.4(b)(2).

Alicia O'Neil brought a *motion to adjust* child support, which is procedurally a different animal from a *petition to modify* child support. *Scanlon* makes clear that an action to

adjust child support is more limited in scope than an action to *modify* child support, thus limiting the relief a trial court can grant. *Scanlon*, 109 Wn. App. at 172. The controlling statutes make plain by the qualifying circumstances and procedural requirements of each that an adjustment action is more limited in scope than a modification. *Scanlon*, 109 Wn. App. at 172–73.

A *modification* action cannot be brought before the court by motion and is instead commenced by service of a summons and petition and then resolved by trial. *Scanlon*, 109 Wn. App. at 173, citing RCW 26.09.175. A modification may be sustained only under certain prescribed circumstances. *Scanlon*, 109 Wn. App. at 173, citing RCW 26.09.170. The relevant prerequisite is generally a substantial change of circumstances. *Id.* at 173, citing RCW 26.09.170(1). Washington courts have consistently held that *a substantial change of circumstances* is a change that was not contemplated at the time the original order of support was entered. *Scanlon*, 109 Wn. App. at 173. A full modification

action is significant and anticipates making substantial changes and/or additions to the original order of support. *Id.* at 173.

In contrast, parties may move to *adjust* an order of child support every 24 months on a change of incomes, without showing a substantial change in circumstances. *Id*. This is a routine action and may be brought about simply by filing a motion with the court and noting a hearing. *Id*. No summons or trial is necessary. *Id*. There is no provision for discovery. An adjustment action simply conforms existing provisions of a child support order to the parties' current circumstances. *Id.* at 173. Stated another way, an adjustment takes the existing support order, inputs current income of the parties, and arrives at the appropriate result. The current subsection of RCW 26.09.170 governing adjustments is (9)(a)-(b), which reads:

> (9)(a) If twenty-four months have passed from the date of the entry of the order or the last adjustment or modification, whichever is later, the order may be adjusted without a showing of substantially changed circumstances based upon:
> (i) Changes in the income of the person required to pay support, or of the payee under the order or

> the person entitled to receive support who is a parent of the child or children covered by the order; or
>
> (ii) Changes in the economic table or standards in chapter 26.19 RCW.
>
> (b) Either party may initiate the adjustment *by filing a motion and child support worksheets*.

(emphasis added).

In the Opinion, the Court of Appeals relied on *In re Marriage of Schumacher*, 100 Wn. App. 208, 213, 997 P.2d 399 (2000), which states that a court has "general and equitable powers to modify any order pertaining to child support payments when the child's needs and parents' financial ability so require," to affirm the trial court's full child support modification following Alicia O'Neil's limited motion to adjust child support.

Petitioner does not dispute that a child support order may be modified based on a substantial change in circumstances, or that courts have inherent authority in equity to address or prevent a substantial hardship. But to invoke the court's equitable powers, a party must follow the correct procedure, for modification, as outlined in *Witrak*. Invoking the court's equitable powers requires a

formal procedure commencing with the filing of a petition and the service of the petition with a summons.

As discussed in *Witrak*, the Legislature also created a proceeding, unknown to common law, called a child support adjustment. An adjustment does not require that a party follow the traditional procedure to invoke the court's inherent jurisdiction by service of a petition and summons. A request for an adjustment can be brought before the court upon a simple motion filing, served as set out in the statute. If a party follows this motion procedure, the party invokes the statutory adjustment proceeding specially created by the Legislature.

A party does not invoke the court's inherent equitable authority to modify child support without use of a summons and petition. The Legislature has required that procedure to invoke such equitable authority.

RCW 26.09.170(8)(a) does provide for modification of a child support order where an existing order "works a severe economic hardship." But RCW 26.09.170 clearly distinguishes between a

petition for modification on the one hand and a motion for adjustment on the other. *See* RCW 26.09.170(1), mentioning both procedures, and RCW 26.09.170(9), quoted above, which covers adjustments. The actions that the court can take on a motion for adjustment are limited and are set out under RCW 26.09.170(9).

More extensive changes to a child support order can be made, but only as part of a modification. Modification must be commenced with the filing of a petition, and a summons must be served. RCW 26.09.175(1)-(2). The trial court, as upheld by the Court of Appeals, relied on a finding of substantial hardship to remove the downward deviation. Again, RCW 26.09.170(8)(a) does authorize child support order modification without a showing of a substantial change of circumstances where an existing child support order "works a severe economic hardship," but read in conjunction with RCW 26.09.175, a modification must be commenced with a petition and served along with a summons.

Scanlon makes clear that a motion for adjustment is a far more limited procedure and draws a clear distinction between a motion

for adjustment and a petition for modification. The trial court and Court of Appeals determined that a trial court authority for modification on a finding of economic hardship when all that is before the trial court is a motion to adjust. This contradicts *Scanlon*. RAP 13.4(b)(2).

2. The Opinion Violates Procedural Due Process Guarantees under both the U.S. and Washington State Constitutions.

The U.S. and Washington State Constitutions both guarantee a right to due process. U.S. CONST. amend. XIV, § 1 ("No State shall… deprive any person of life, liberty, or property, without due process of law"); WASH. CONST. art. I, § 3 ("No person shall be deprived of life, liberty, or property, without due process of law.")

"Due process protections include ... the right to notice and an opportunity to be heard and defend." *In re the Welfare of M.B.*, 195 Wn.2d 859, 867, 467 P.3d 969 (2020); *see also Morrison v. Dep't of Labor & Industr.*, 168 Wn. App. 269, 273, 277 P.3d 675 (2012) ("An essential principle of due process is

the right to notice and a meaningful opportunity to be heard."). Procedural due process prohibits the state from infringing on an individual's protected liberty interests without notice and an opportunity to be heard. *Segaline v. State Dep't of Lab. & Indus.*, 199 Wn. App. 748, 765, 400 P.3d 1281, 1290 (2017), citing *Mathews v. Eldridge*, 424 U.S. 319, 332-33, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976).

Because Alicia O'Neil brought only a motion to adjust the order of child support and not a petition to modify it, and because her financial hardship argument was raised for the first time in reply, Tristan O'Neil was not on notice as to the full extent of relief she was seeking, and did not have an opportunity to conduct discovery on this issue, and therefore lacked a meaningful opportunity to be heard.

As for discovery, for example, despite Alicia O'Neil's claim of financial hardship, on December 28, 2020, she made a deposit into her credit union account of $100,000 from an Edward Jones account. CP 453. Whose Edward Jones account

was this, and what was the source of those funds? LFLR 10 requires parties to produce financial statements, but Alicia O'Neil produced none for this account. Tristan O'Neil would have conducted discovery into this transaction if Alicia O'Neil's financial hardship argument had been raised prior to reply.

Alicia O'Neil argued that a downward deviation was not equitable due to substantial change in circumstances. Again, this was raised for the first time in argument in her May 13, 2021 reply (CP 210-228), and Tristan O'Neil had no opportunity to respond to that. This was where Alicia O'Neil asserted the children should enjoy a similar standard of living in both homes and that the purpose of child support is not only to meet a child's basic needs but also to provide additional support commensurate with the parents' income. *See* Alicia O'Neil's Strict Reply, CP 212, ln. 17, and CP 213, ln. 3. These purported bases were not in the Motion or the Declaration and because they were raised for the first time in reply, Tristan

O'Neil had no way to respond to them. This denied him his Constitutional right of procedural due process, which requires at a minimum notice and a meaningful opportunity to be heard.

The Court of Appeals upheld the procedural due process error when it affirmed the trial court. Tristan O'Neil had no notice that Alicia O'Neil intended to proceed on a theory of economic hardship until she raised it for the first time in her reply, nor that she was seeking anything more than a simple adjustment of the child support order. Thus the Opinion raises a significant question of law under both the U.S. and Washington State Constitutions. RAP 13.4(b)(3).

3. The courts' ignoring the distinction between a motion to adjust a child support order and a petition to modify a child support order affects all parents seeking to adjust or modify child support.

This is a matter of substantial public interest because many parents will at some point in their children's lives bring or respond to a motion to adjust child support. Under RCW 26.09.170(9)(a)-(b), a child support adjustment is supposed to

be a more or less rote, mathematical procedure. A parent responding to a motion to adjust child support is not on notice that the court might invoke its broad equitable powers to fashion whatever remedy it finds appropriate, just as if the other party had filed a full-blown petition to modify child support. Review should be accepted due to the broad affect on parents paying or receiving child support. RAP 13.4(b)(4).

F. CONCLUSION

For the reasons expressed herein, review should be granted and this Court should reverse and vacate the Court of Appeals' Opinion and vacate the trial court's Order on Revision and remand the matter back to the trial court with instructions that the Commissioner's June 9, 2021 order on Alicia O'Neil's motion to adjust child support order be the operative order in this case.

RESPECTFULLY SUBMITTED September 26, 2022.

I certify that the foregoing document contains 4,053 words, in compliance with RAP 18.17.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of: ALICIA D.K. O'NEIL, Respondent, and TRISTAN B. O'NEIL, Appellant.	No. 83031-7-I DIVISION ONE UNPUBLISHED OPINION

MANN, J. — Tristan O'Neil appeals a final child support order stemming from the dissolution of his marriage with Alicia O'Neil. Tristan[1] argues: (1) that because Alicia brought a request to remove a downward deviation from the child support order as a motion to adjust, not a petition to modify, the trial court lacked authority to remove the deviation; (2) that he was denied procedural due process; and (3) that he should not have been sanctioned $405 in attorney fees for requesting a continuance. We affirm.

[1] This opinion refers to the parties' first names for clarity. We intend no disrespect.

FACTS

On May 15, 2015, Alicia petitioned for dissolution of marriage. On April 4, 2016, Alicia and Tristan entered an agreed order of child support for their three children. Under the child support order, Tristan was to pay Alicia $400 per month. The child support order included a downward deviation from the standard calculation of $1564.88 per month. The downward deviation was based on the shared residential schedule that provided the children reside with each parent 50 percent of the time. See RCW 26.19.075(1)(d).

On March 8, 2021, Alicia moved to adjust child support, increasing Tristan's obligation to $1903.80 per month. The increase was based on an assumed increase in Tristan's wages and did not include a downward deviation. On April 8, 2021, Tristan responded, contending that Alicia's motion to adjust was procedurally improper and should have instead been filed as a petition for modification. On April 12, 2021, Alicia replied, stating that the parties did not agree that the downward deviation was nonmodifiable, and that there had been a material change of circumstance. Tristan moved to strike or continue the hearing and for fees, arguing that Alicia's reply was not a strict reply to his response and that he needed more time to consider arguments related to income. The King County Superior Court family law commissioner granted Tristan's request for a continuance until May 18, 2021, but awarded $405 in attorney fees to Alicia.

On May 11, 2021, Tristan again responded. Tristan did not contest Alicia's income calculations or the increase in child support obligations, but reiterated that an adjustment proceeding was the incorrect vehicle for removing the downward deviation.

On May 13, 2021, Alicia filed another reply and reiterated her substantive arguments that the downward deviation should be removed.

On May 18, 2021, the family law commissioner entered an order adjusting the original child support order. The commissioner determined that they could not address any claims for modification of the downward deviation because a limited motion to adjust was before them. The commissioner applied the parties' income to the current economic table using the children's ages, and applied the same downward deviation used in the original child support order. Tristan was ordered to pay $531.53 per month.

On June 18, 2021, Alicia timely moved for revision asserting that the court could in fact address claims for the modification of the downward adjustment. On July 9, 2021, Tristan responded, reasserting that the court could not modify the downward adjustment and that he did not have the chance to respond to Alicia's May 13, 2021 reply.

On July 20, 2021, the trial court granted in part and denied in part Alicia's motion for revision. The court determined that "Washington courts have general equitable power to modify any order pertaining to child support payments when the child's needs and parent's financial ability so require."[2] The court found that:

> Petitioner's loss of spousal maintenance, her ongoing responsibility for community debt, the children's increased expenses now that they are older, and Respondent's significantly higher income compared to Petitioner's need demonstrated in her Financial Declaration all support a finding that the downward deviation should be eliminated. Because Petitioner's justification relate[s] to financial hardship rather than any changes in residential schedule, the Court may eliminate the deviation as an "adjustment."

The court denied Tristan's motion for reconsideration.

[2] (Emphasis added).

Tristan appeals.

ANALYSIS

A. Downward Deviation

Tristan argues that the trial court lacked authority to remove the downward deviation. We disagree.

On appeal from a decision of a superior court revision of a court commissioner's order, we review the superior court's decision, not the commissioner's order. State v. Ramer, 151 Wn.2d 106, 113, 86 P.3d 132 (2004). "We review child support modifications and adjustments for abuse of discretion." In re Marriage of Ayyad, 110 Wn. App. 462, 467, 38 P.3d 1033 (2002). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. In re Marriage of Scanlon and Witrak, 109 Wn. App. 167, 174, 34 P.3d 877 (2001). A court necessarily abuses its discretion if its decision is based on an erroneous view of the law. Scanlon, 109 Wn. App. at 175.

Tristan's primary contention is that, because Alicia requested the downward deviation be removed in a motion to adjust, not a petition to modify, the trial court did not have authority. Tristan ignores the trial court's broad equitable powers. "Washington courts have general and equitable powers to modify any order pertaining to child support payments when the child's needs and parents' financial ability so require." In re Marriage of Schumacher, 100 Wn. App. 208, 213, 997 P.2d 399 (2000) (citing Pippins v. Jankelson, 110 Wn.2d 475, 478, 754 P.2d 105 (1988)). As we explained in Schumacher:

> Just because the parties have an agreement on child support does not mean that the courts cannot revise it. It is true that, as a general rule,

> courts must find a substantial change of circumstances before modifying an order. But, this general rule presumes that the court independently examined the evidence after a fully contested hearing. Where a court order arises from an uncontested proceeding, we presume otherwise and, therefore, the court need not find a substantial change of circumstances.

100 Wn. App. at 213. Here, the original child support order was reached by agreement and the trial court was not obligated to find a substantial change in circumstances.

The trial court's authority is also supported by statute. RCW 26.09.170 controls modifications of maintenance and child support orders. RCW 26.09.170(5)(a) allows a party to petition for modification based on a substantial change in circumstances. Under RCW 26.09.170(9)(a), however, if 24 months have passed since entry of the order, a court may adjust the child support order without a showing of substantially changed circumstances. An adjustment is authorized where there have been changes in the income of either party. RCW 26.09.170(9)(a)(i); Scanlon, 109 Wn. App. at 173.[3] An adjustment may be initiated by either party by filing a motion and child support worksheets. RCW 26.09.170(9)(b).

Here, the trial court determined that because Alicia's motion for adjustment was based on financial hardship,[4] it need not find a substantial change in circumstances to modify the child support order by eliminating the downward deviation. Alicia's spousal support had ended, Tristan's income more than doubled, and the parties did not dispute one another's financial information. The changes examined in order to justify removal

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[3] Some changes of incomes, however, "are such that they will not have been contemplated by the parties at the time the previous order of child support was entered and thus a change in incomes could constitute a substantial change in circumstances." Scanlon, 109 Wn. App. at 174 (holding that a spouse's income increasing to over $270,000 per year, remarrying a physician of substantial wealth, and having household assets exceeding $5 million constituted a substantial change).

[4] For the first time in reply, Tristan argues that Alicia's motion was heard on the wrong calendar. Because the issue was raised for the first time in reply, it is too late to warrant consideration. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

of the downward deviation were within RCW 26.09.170's adjustment provision. Further, such changes in financial information were not drastic enough to constitute a substantial change in circumstances requiring a petition to modify.

Finally, while Tristan argues for the first time on appeal that his due process rights were violated, we cannot identify what other procedures a petition to modify would afford Tristan. Alicia requested the downward deviation be removed when she first moved to adjust. Tristan has maintained the same argument through three responses, a continuance, a hearing in front of the family law commissioner, and a hearing on revision before the trial court. After agreeing on both parties' incomes, Tristan's sole assertion is that procedure was improper or that he was denied due process. After examining the procedural posture of this appeal, we cannot agree.

B. Sanction for Continuance

Tristan argues that the commissioner erred in awarding Alicia $405 for attorney fees for requesting more time to supplement his response. Tristan dedicates a single sentence in his opening brief that states "he should not have been sanctioned the $405 merely for requesting additional time to supplement his response to address items included by [Alicia] for the first time in reply." Because Tristan's argument fails to cite to any legal authority, we need not address it. RAP 10.3(a)(6); State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990).

C. Attorney Fees on Appeal

Both parties request fees on appeal. Under RAP 18.1, a party may request reasonable attorney fees on appeal if an applicable law grants the party the right to recover attorney fees. RCW 26.09.140 provides:

> The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceeding after entry of judgment.
>
> 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 attorneys' fees in addition to statutory costs.

Here, after considering the financial resources of both parties, we decline to award fees to either party.

Affirmed.

Mann, J.

WE CONCUR:

Chung, J.

Smith, A.C.J.

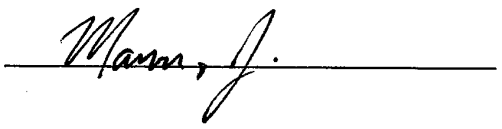
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of ALICIA D.K. O'NEIL, Respondent, and TRISTAN B. O'NEIL, Appellant.	No. 83031-7-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Tristan O'Neil moved to reconsider the court's opinion filed on June 13, 2022. The panel has determined that the motion for reconsideration should be denied. Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:



RCW 26.09.170 Modification of decree for maintenance or support, property disposition—Termination of maintenance obligation and child support—Grounds. (1) Except as otherwise provided in RCW 26.09.070(7), the provisions of any decree respecting maintenance or support may be modified: (a) Only as to installments accruing subsequent to the petition for modification or motion for adjustment except motions to compel court-ordered adjustments, which shall be effective as of the first date specified in the decree for implementing the adjustment; and, (b) except as otherwise provided in this section, only upon a showing of a substantial change of circumstances. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

(2) Unless otherwise agreed in writing or expressly provided in the decree the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance or registration of a new domestic partnership of the party receiving maintenance.

(3) Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child or by the death of the person required to pay support for the child.

(4) Unless expressly provided by an order of the superior court or a court of comparable jurisdiction, provisions for the support of a child are terminated upon the marriage or registration of a domestic partnership to each other of parties to a paternity or parentage order, or upon the remarriage or registration of a domestic partnership to each other of parties to a decree of dissolution. The remaining provisions of the order, including provisions establishing parentage, remain in effect.

(5)(a) A party to an order of child support may petition for a modification based upon a showing of substantially changed circumstances at any time.

(b) The voluntary unemployment or voluntary underemployment of the person required to pay support, by itself, is not a substantial change of circumstances.

(6) An order of child support may be modified at any time to add language regarding abatement to ten dollars per month per order due to the incarceration of the person required to pay support, as provided in RCW 26.09.320.

(a) The department of social and health services, the person entitled to receive support or the payee under the order, or the person required to pay support may petition for a prospective modification of a child support order if the person required to pay support is currently confined in a jail, prison, or correctional facility for at least six months or is serving a sentence greater than six months in a jail, prison, or correctional facility, and the support order does not contain language regarding abatement due to incarceration.

(b) The petition may only be filed if the person required to pay support is currently incarcerated.

(c) As part of the petition for modification, the petitioner may also request that the support obligation be abated to ten dollars per month per order due to incarceration, as provided in RCW 26.09.320.

(7) An order of child support may be modified without showing a substantial change of circumstances if the requested modification is to modify an existing order when the person required to pay support has been released from incarceration, as provided in RCW 26.09.320(3)(d).

(8) An order of child support may be modified one year or more after it has been entered without a showing of substantially changed circumstances:

(a) If the order in practice works a severe economic hardship on either party or the child;

(b) If a child is still in high school, upon a finding that there is a need to extend support beyond the eighteenth birthday to complete high school; or

(c) To add an automatic adjustment of support provision consistent with RCW 26.09.100.

(9)(a) If twenty-four months have passed from the date of the entry of the order or the last adjustment or modification, whichever is later, the order may be adjusted without a showing of substantially changed circumstances based upon:

(i) Changes in the income of the person required to pay support, or of the payee under the order or the person entitled to receive support who is a parent of the child or children covered by the order; or

(ii) Changes in the economic table or standards in chapter 26.19 RCW.

(b) Either party may initiate the adjustment by filing a motion and child support worksheets.

(c) If the court adjusts or modifies a child support obligation pursuant to this subsection by more than thirty percent and the change would cause significant hardship, the court may implement the change in two equal increments, one at the time of the entry of the order and the second six months from the entry of the order. Twenty-four months must pass following the second change before a motion for another adjustment under this subsection may be filed.

(10)(a) The department of social and health services may file an action to modify or adjust an order of child support if public assistance money is being paid to or for the benefit of the child and the department has determined that the child support order is at least fifteen percent above or below the appropriate child support amount set forth in the standard calculation as defined in RCW 26.19.011.

(b) The department of social and health services may file an action to modify or adjust an order of child support in a nonassistance case if:

(i) The department has determined that the child support order is at least fifteen percent above or below the appropriate child support amount set forth in the standard calculation as defined in RCW 26.19.011;

(ii) The department has determined the case meets the department's review criteria; and

(iii) A party to the order or another state or jurisdiction has requested a review.

(c) If incarceration of the person required to pay support is the basis for the difference between the existing child support order amount and the proposed amount of support determined as a result of a review, the department may file an action to modify or adjust an order of child support even if:

(i) There is no other change of circumstances; and

(ii) The change in support does not meet the fifteen percent threshold.

(d) The determination of whether the child support order is at least fifteen percent above or below the appropriate child support amount must be based on the current income of the parties.

(11) The department of social and health services may file an action to modify or adjust an order of child support under subsections (5) through (9) of this section if:

(a) Public assistance money is being paid to or for the benefit of the child;

(b) A party to the order in a nonassistance case has requested a review; or

(c) Another state or jurisdiction has requested a modification of the order.

(12) If testimony other than affidavit is required in any proceeding under this section, a court of this state shall permit a party or witness to be deposed or to testify under penalty of perjury by telephone, audiovisual means, or other electronic means, unless good cause is shown. [2020 c 227 § 13; 2019 c 275 § 2; 2010 c 279 § 1; 2008 c 6 § 1017; 2002 c 199 § 1; 1997 c 58 § 910; 1992 c 229 § 2; 1991 sp.s. c 28 § 2; 1990 1st ex.s. c 2 § 2; 1989 c 416 § 3; 1988 c 275 § 17; 1987 c 430 § 1; 1973 1st ex.s. c 157 § 17.]

Effective date—2020 c 227 §§ 3-13: See note following RCW 26.09.320.

Findings—Intent—2020 c 227: See note following RCW 26.09.320.

Rule-making authority—2020 c 227: See RCW 26.09.916.

Part headings not law—Severability—2008 c 6: See RCW 26.60.900 and 26.60.901.

Short title—Part headings, captions, table of contents not law—Exemptions and waivers from federal law—Conflict with federal requirements—Severability—1997 c 58: See RCW 74.08A.900 through 74.08A.904.

Severability—Effective date—Captions not law—1991 sp.s. c 28: See notes following RCW 26.09.100.

Effective dates—Severability—1990 1st ex.s. c 2: See notes following RCW 26.09.100.

Effective dates—Severability—1988 c 275: See notes following RCW 26.19.001.

Severability—1987 c 430: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1987 c 430 § 4.]

RCW 26.09.175 Modification of order of child support. (1) A proceeding for the modification of an order of child support shall commence with the filing of a petition and worksheets. The petition shall be in the form prescribed by the administrator for the courts. There shall be a fee of twenty dollars for the filing of a petition for modification of dissolution.

(2)(a) The petitioner shall serve upon the other party the summons, a copy of the petition, and the worksheets in the form prescribed by the administrator for the courts. If the modification proceeding is the first action filed in this state, service shall be made by personal service. If the decree to be modified was entered in this state, service shall be by personal service or by any form of mail requiring a return receipt. Proof of service shall be filed with the court.

(b) If the support obligation has been assigned to the state pursuant to RCW 74.20.330 or the state has a subrogated interest under RCW 74.20A.030, the summons, petition, and worksheets shall also be served on the attorney general; except that notice shall be given to the office of the prosecuting attorney for the county in which the action is filed in lieu of the office of the attorney general in those counties and in the types of cases as designated by the office of the attorney general by letter sent to the presiding superior court judge of that county.

(3) As provided for under RCW 26.09.170, the department of social and health services may file an action to modify or adjust an order of child support if:

(a) Public assistance money is being paid to or for the benefit of the child;

(b) A party to the order in a nonassistance case has requested a review; or

(c) Another state or jurisdiction has requested a modification of the order.

(4) A responding party's answer and worksheets shall be served and the answer filed within twenty days after service of the petition or sixty days if served out of state. A responding party's failure to file an answer within the time required shall result in entry of a default judgment for the petitioner.

(5) At any time after responsive pleadings are filed, any party may schedule the matter for hearing.

(6) Unless all parties stipulate to arbitration or the presiding judge authorizes oral testimony pursuant to subsection (7) of this section, a petition for modification of an order of child support shall be heard by the court on affidavits, the petition, answer, and worksheets only.

(7) A party seeking authority to present oral testimony on the petition to modify a support order shall file an appropriate motion not later than ten days after the time of notice of hearing. Affidavits and exhibits setting forth the reasons oral testimony is necessary to a just adjudication of the issues shall accompany the petition. The affidavits and exhibits must demonstrate the extraordinary features of the case. Factors which may be considered include, but are not limited to: (a) Substantial questions of credibility on a major issue; (b) insufficient or inconsistent discovery materials not correctable by further discovery; or (c) particularly complex circumstances requiring expert testimony.

(8) If testimony other than affidavit is required in any proceeding under this section, a court of this state shall permit a

party or witness to be deposed or to testify under penalty of perjury by telephone, audiovisual means, or other electronic means, unless good cause is shown. [2010 c 279 § 2; 2002 c 199 § 2; 1992 c 229 § 3; 1991 c 367 § 6; 1990 1st ex.s. c 2 § 3; 1987 c 430 § 2.]

Severability—Effective date—Captions not law—1991 c 367: See notes following RCW 26.09.015.

Effective dates—Severability—1990 1st ex.s. c 2: See notes following RCW 26.09.100.

Severability—1987 c 430: See note following RCW 26.09.170.

WWLG

September 26, 2022 - 3:04 PM

Filing Petition for Review

Transmittal Information

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Appellate Court Case Title:	Alicia O'Neil, Respondent v. Tristan O'Neil, Appellant (830317)

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