70048-1

70048-1

70048-1

No. ~~70048-4-I~~

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

LALIDA SCHNURMAN, Respondent

v.

SETH SCHNURMAN, Appellant

REPLY BRIEF OF APPELLANT

H. Michael Finesilver
Attorney for Appellant

207 E. Edgar Street
Seattle, WA 98102
(206) 322-2060
W.S.B.A. #5495

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Statutes

Regulations and Rules

I. Statement of the Case

Mr. Schnurman argued that the deviation statute under RCW 26.19.075 does not apply in equal residential time circumstances In the memorandum submitted on behalf of Mr. Schnurman, the following representation was made: "Where there is a majority residential parent the costs of these items to the majority parent are apportioned through the standard calculation on the schedule…decreased or increased by 'deviations' where appropriate given the factors identified under RCW 26.19.075. Although one of the circumstances entitling a downward deviation is significant residential time, as long as the primary residential is not left with inadequate funds (see, RCW 26.19.075 (1) (b), the operative circumstances which trigger the weighing of deviation factors is a majority residential parent entitled to a transfer payment based upon the standard calculation. Here, there is no majority residential parent" (CP 40).

Thus, contrary to the representation made in the responsive brief, he did not seek a deviation.

II. Argument

A. The Trial Court's Determination That The Father Sought A Deviation Was In Reality A Conclusion of Law: That His Request For A Transfer Payment Less Than The Standard Calculation Had To Be Treated As A Request For Deviation

The issue on this appeal is what constitutes the proper methodology to determine what the amount of the transfer payment should be, where there is no primary residential parent. The trial court thought it could only justify an amount of transfer payment lower than the standard calculation by treating Mr. Schnurman's position as if it were a request for a deviation. The only provision under RCW 26.19.075 which could justify a "deviation" involves consideration of significant residential time and whether insufficient funds would be left in her household. As a result, the finding that he sought a deviation is in reality a legal conclusion.

B. The Gravamen Of This Appeal Does Not Involve The Same Arguments As Raised By The Father In State ex rel M.M.G. v Graham, 159 Wn.2d 623, 152 P.3d 1005 (2007)

The response brief inaccurately portrays Mr. Schnurman's position on this appeal as being identical to the position taken by the father, (Mr. Graham) in *State ex rel MMG v. Graham,* 159 Wa.2d 623, 152 P.3d 1005 (2007). The response brief argues: "The father in Graham, like the appellant here, claimed the equally shared residential schedule required

the parents to incur equivalent residential costs f.n.13" (Response brief page 4). While that formulation is literally how the State Supreme Court described Mr. Graham's argument regarding the *Avrey* formula (*In re Marriage of Arvey,* 77 Wn.App 817, 894,P.2d 1346 (1995). (*Graham* supra at 633) (2007) this is not the position taken by Mr. Schnurman.

1. Mr. Graham's Argument: Determine The Obligation By Treating Each Parent As If He Or She Is A Primary Residential Parent

Mr. Graham's argument focused on the obligation with no consideration of the actual costs incurred attributable to the children paid by each parent. Graham reasoned that because the residential schedule requires both parents to incur the same costs, determination of the obligation to pay support must be based upon the standard calculation, the standard calculation is premised on one parent having primary residential care of the children. He argued that the sward should cut both ways, as provided in the *Arvey* formula. In other words, each parent should be treated as if each were a primary residential parent. *Avrey* supra involved divided custody. Each parent was the primary parent of a different child. In a shared custody arrangement Graham's theory amounted to a fiction that he put forth to achieve his theory of equity between the parents, since

the child support statute does not pertain to parents who share residential time with the same children equally.

Since Graham's position started with the notion that each parent should be treated as if he or she is a primary residential parent, the Court of Appeals, and the State Supreme Court easily disposed of his argument. With him using the standard calculation as the starting point, the court turned to the only statutory alternative available in that context, the deviation statute, and concluded there is enough discretion under that statute to make whatever adjustments are appropriate.

2. Mr. Schnurman's Argument: Before Any Legal "Obligation" Can Be Determined, The Actual Costs In Both Parents' Households Must Be Ascertained and Equitably Apportioned Based Upon Their Incomes and Financial Resources

That is the essence of Mr. Schnurman's position on this appeal. Mr. Schnurman is not arguing that the equally shared residential schedule "requires" both parents "to incur" equivalent residential costs. Taken literally the formulation is nonsensical. The residential schedule does not "require" the parents to "incur" anything. One parent might have mortgage or rent obligations. The other might live mortgage free. One parent might buy the children clothes; the other parent, none.

Mr. Graham did not argue that the actual costs in each household should be analyzed, as Mr. Schnurman does here. In fact the actual costs incurred by either parent to directly take care of the children encompassed by a transfer payment under RCW 26.19.080 (1) played no role whatsoever in his approach. Unlike that of Mr. Graham, the argument here is that 1) The analysis of the actual costs in each parent's household is essential, and 2) the trial court's failure to do so when asked constitutes error because those actual costs should be the basis upon which the ultimate obligation should be determined by equitably apportioning those costs based upon the parties' respective incomes (or other resources in appropriate cases: e.g. where their combined incomes exceed the maximum advisory level of $12,000 per month).

Mr. Schnurman's position is consistent with a warning announced by the Court of Appeals: "However, placing the entire child support obligation on one parent where the residential schedule is shared also would not meet the legislature's intention of equitably apportioning the child support obligation between the parents," citing RCW 26.19.001 (*State ex rel MMG v. Graham* 123 Wn.App 931 at 941, 99 P.3d 1248 (2004)).

As our State Supreme Court said in rejecting the *Avrey* approach: "Conversely, in shared residential situations, both parents are responsible for the same children and the same needs." By focusing on the obligation, none of the three contending parties, Mr. Graham, the mother and the state, argued that the actual costs incurred by each parent in their respective households should be analyzed or even considered to fulfill the mandate of RCW 26.19.001 to equitably apportion the obligation. That mandate cannot be fulfilled by the court unless it determines the actual costs in both households attributable to the children, which the transfer payment obligation is designed to apportion. Thus, instead of thwarting the policy of RCW 26.19.001, as argued in the response brief, Mr. Schnurman's approach implements it.

It is fiction, Ms. Schnurman being treated as the primary residential parent when she is not. RCW 26.19.075 is inadequate to fulfill that mandate because it does not allow the court to consider the economic impact on Mr. Schnurman's of him paying the standard calculation of $1305 per month.

Mr. Schnurman had $100 in his account (CP 4). His mortgage payments (interest only) and utilities were approximately $2500 per month

(CP 4 and 5). His car payments, tabs and license were $817 per month. Health insurance premiums were $380 per month, life insurance premium of $59 per month. Monthly payments were over $1800 per month, on 5 credit cards assigned to him by the court and other listed unsecured debt with aggregate balance totaling over $60,000 (CP 6). The total of those fixed expenses is $5,556 per month with a net income per month of $6,338 (CP 107). This leaves him $782 per month for food, transportation, and clothes for himself and their two children. To pay a standard calculation of $1305 per month to Ms. Schnurman plus 65.2% of the children's tuition ($562 per month CP 5 and 11) is economically untenable even with reduced payments on his unsecured debt. The standard calculation of $1305 per month leaves him with inadequate resources to provide for the children.

And yet, the deviation statute precludes consideration of those costs, even though he has both children an equal amount of time. RCW 26.19.075 (1) (c) allows for deviation for "debt and high expenses...after consideration of the following expenses: (i) extraordinary debt not voluntarily incurred." His mortgage (or if he paid rent, his lease payments) and utility costs for providing their children shelter and heat cannot be a

basis for deviating because those costs are debts that are not extraordinary and are voluntarily incurred.

Subsection (ii) does allow for consideration of a "... significant disparity in the living costs of the parents due to conditions beyond their control" because he incurs those expenses of his own volition. But the actual costs paid by Mr. Schnurman absorbed by a transfer payment (housing, clothes, etc) cannot be considered under subsection (ii).

Thus, in an equal sharing residential arrangement the deviation statute only allows the court to travel a path one way path along a two way street. It does not allow for an apportioning of fungible living costs that involve the needs of the children because those costs may not be "beyond their control" and because the context in which the deviation factors are to be considered in the first place is that there is a primary residential parent to whom the standard calculation is owed.

As to binding precedent, the response brief cites to an unpublished decision at page 4 (Rule 14.1 (a)): *In re the Marriage of Stephenson*, 68507-4-I WL133778 (April 1, 2013). Again, as in *Graham*, supra (2007) the father failed to argue actual costs in both households. Both parents began with the same methodology: standard calculation followed by

deviation statute analysis. In short, neither in *Graham* supra (2007) nor in any other published (or unpublished decision) has the methodology being proposed here ever been argued before the appellate courts.

C. The Standard Calculation Only Applies To A Primary Residential Parent

Contrary to the argument in the response brief at page 5, *In re Marriage of Holmes,* 128 Wn.App 727, at 739, 117 P.3d 370 (2005), as explained in the extensive summary of the legislative history quoted in the initial brief, does hold only the parent who has primary residential care of the children is entitled to a transfer payment of child support.

The response brief deny that it is only by virtue of the primary residential parent providing a home that he or she is entitled to a transfer payment of child support. *In re Marriage of Holmes* supra at 739. This is why Mr. Schnurman's position is that since neither parent is the primary residential parent, the housing costs of both parents, as well as other fungible costs, such as food, clothing and transportation, for the children must be considered in achieving the goal of the statute to equitably divide between the parents the obligation.

D. Predictability Cannot Justify An Inequitable Apportionment Of The Actual Costs Each Parent Bear That Are Encompassed By A Child Support Transfer Payment.

The response brief argues that if the methodology urged by Mr. Schnurman is adopted the benefit of predictability and uncertainty is lost. That argument is inaccurate for two reasons. The methodology urged here will lead to predictable results if the facts to which it is applied are not subject to significant dispute as to the expenses attributable to the children in each household or the incomes of the parties. That methodology is for the trial: 1) to determine the expenses of each parent, reasonably attributable to the children in the categories of expenses to be covered by a transfer payment. For example, where there was one child adult, the mother and two living in the mother's household the court attributed one half the costs of rent and utilities to the children. (See *In re Marriage of Krieger and Walker*, 147 Wn.App 952 at 964, 199 P.3d 450, footnote 31 (2008)).

2) To then apportion those actual costs based upon the incomes and resources of the parties which will result in a transfer payment from one parent to the other where there is disparity of incomes.

Predictability cannot take priority over fixing the obligation commensurate with the children's basic needs. This is why our State Supreme Court rejected the predictability of the use of an extrapolation formula where there is one primary residential parent and the combined incomes of the parents exceed the maximum advisory level on the economic table:

"Further, the intent of the statute is to ensure that awards of child support meet the children's basic needs....RCW 26.19.001" (*In re Marriage of McCausland* 159 Wn.2d 607, 152 P.3d 1013 (2007)). It held that there must be findings as to the "parent's (1) standard of living and (2) the children's special medical, educational or financial needs," *McCausland* supra (2007). The same approach, by analogy, is what is suggested here but as to both households.

III. Conclusion

The issue raised in this appeal, not faced in any other published or unpublished decision, is whether the trial court abused its discretion when it ignored the actual costs of raising the children in the home of the parent who earns more than the other parent, and who has equal residential time with the children when it was asked to do so (CP 46 through 50).

A report of proceedings as to all testimony would not reveal any evidence related to the rule of law urged in this case. The response brief points to none. The rule of law urged here is a simple methodology which enables the court to accurately and fairly quantify the obligation which RCW 26.19.001 mandates be equitably apportioned. Unless that obligation is quantified accurately the statutory mandate to equitably apportion it through a transfer payment cannot be achieved. Where there is equal sharing of residential time with their children the only way to accurately quantify the obligation is to determine what each parent actually incurs towards the fungible expenses attributable to the children in each household. The failure of the trial court here to do so constitutes reversible error.

DATED this 25th day of July, 2013.

Respectfully submitted,

H. Michael Finesilver #30184
Attorney for Appellant
W.S.B.A. #5495