

No. 35940-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ELAINE IRENE CHOATE, *Appellant*

v.

FREDERICK LEWIS CHOATE, *Respondent*

COURT OF APPEALS
DIVISION II
OF JUN 13 PM 2:57
STATE OF WASHINGTON
BY DEPUTY

BRIEF OF APPELLANT

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I. Introduction

The trial court entered a child support order pursuant to the parties' dissolution trial on September 9, 2006. The trial had concluded in early August 2006.

At the time of the August 2006 trial, but after conclusion of her trial testimony, Appellant Ms. Choate decided to change job from WalMart, to Glacier Northwest. She maintains this job as a clerical worker at Glacier Northwest, she earned only \$14.00 per hour.

Ms. Choate dutifully and voluntarily reported this job change to the Court. The court set the child support on September 9, 2007, based upon the income information available at trial, but allowed that child support could later be re-calculated based upon the job change of Ms. Choate.

The Respondent Mr. Choate moved for revision of the September 9, 2006, child support order, and a motion to reconsider the child support award was heard on September 29, 2006. By order of September 29, 2006, the Honorable Linda C.J. Lee, modified the child support order (1) to take into account a job change by Appellant based upon an estimate of her estimated earnings and (2) to allow for an early petition for modification of child support upon the arrival of Respondent Mr. Choate's

new issue by way of his meretricious relationship with his co-resident Rayanne Sasser. Respondent's new issue was expected in November 2006. The new issue was conceived while Respondent was litigating this dissolution proceeding.

Unfortunately, should the Respondent choose to file a brief in this matter, Respondent Mr. Choate will likely continue to inaccurately assert that Ms. Choate "lied" to the Honorable Judge Lee about changing employers at the time of trial. In fact, it is expected that his reply brief will not move far beyond assertion of his belief that Ms. Choate lied. It is expected that Mr. Choate's brief, if any, will become "high-centered" on falsely alleging Appellant's dishonesty and will fail to address the Appellant's assignment of errors of the court's February 8, 2007, modification and deviation of the child support order.

Contrary to the Respondent's expected assertions, the Appellate Panel herein should know that the Honorable Judge Lee did not agree with the Respondent's assertions that Ms. Choate had been dishonest. The court appreciated the job change notification and on September 29, 2006, simply re-set Ms. Choate's income at \$2,426.67 monthly gross and \$2,147.03 monthly net to reflect what the estimated change in income would be with the job change. Unfortunately, however, this \$2,147.03 monthly net figure is slightly too high, and the court failed to address this

error on the February 8, 2007, modification, despite the Appellant's requests.

The Respondent continues to insist in nearly every pleading and hearing that Appellant Ms. Choate was dishonest. However, despite the Respondent Mr. Choate's incessantly pressing of this allegation upon the Honorable Judge Lee, Judge Lee has declined on September 9, 2007, September 29, 2006, and again on February 8, 2007, to make any finding that Ms. Choate presented untruthful or inaccurate trial testimony.

Appellant Ms. Choate is a caring mother of two young children; she exists at a subsistence level. Appellant Ms. Choate's unchallenged financial declaration filed January 3, 2007, indicates she is in a substantially negative cash flow position. Even before the downward deviation of monthly child support from \$722.30 monthly per the September 29, 2007 Order to \$585.87 per the February 8, 2007 Order, Ms. Choate was at a \$348.01 monthly deficit. With the downward deviation, Appellant Ms. Choate is now at a \$484.44 monthly deficit per her financial declaration filed January 3, 2007.

Moreover, Ms. Choate's monthly deficit would be even worse than the present \$484.44 monthly if monthly debt payments of \$150.00 to her friend Craig Stewart and \$300.00 to her mother Lois Smith had not been temporarily suspended. But for these forbearances of Mr. Craig Stewart

and Ms. Lois Smith, Appellant Ms. Choate's monthly deficit would be \$934.44.

In contrast, Respondent Mr. Choate enjoys a double income in his household, receiving the benefit of Ms. Sasser's significant income of \$2,000.00 monthly per his financial declaration filed January 12, 2007. Appellant believes that Ms. Sasser's *net* income is \$2,000.00, per the Respondent's admission in his financial declaration of January 12, 2007.

In addition, Respondent Mr. Choate's financial declaration was challenged at the February 2, 2007, hearing on modification. Appellant Ms. Choate correctly asserted that Respondent's declaration grossly overstated his daycare obligation at \$1,000.00 monthly, and provides for unnecessary expenditures such as cigarettes for Mr. Choate. Appellant's Financial Declaration, of January 3, 2007, indicates that Respondent Mr. Choate's share of daycare expense runs at a high figure of \$687.96 monthly, not \$1,000.00. This figure of \$687.96 is on the high side, too. Usually, Respondent's share of the daycare is only \$550.00 to \$560.00.

Correcting for \$100.00 in unnecessary tobacco expenditures and the at least \$312.04 overstatement in daycare expenditures, a corrected financial declaration for Respondent Mr. Choate's would place him at a mere \$76.03 monthly deficit, and this is *prior* to figuring in any contribution from girlfriend/co-resident Ms. Sasser, who has \$2,000.00

monthly income available, per Respondent Mr. Choate's Financial Declaration of January 12, 2007.

Clearly, Respondent Mr. Choate suffers much less economically than does the Appellant. The deviation of child support is very harmful to the Appellant.

The Respondent Mr. Choate did not provide any information about the expenses or expenditures of his co-resident Ms. Sasser with respect to her reported \$2,000.00 monthly income. No other inference was possible other than that all or substantially all of her income was available for Respondent Choate's household in which she meretriciously participates, as no information about Ms. Sasser's individual expenditures was ever presented.

In ordering the February 2, 2007, modification, the Honorable Judge Lee overlooked Appellant Ms. Choate's correct income calculation, setting Appellant Ms. Choate's income at \$2,426.67 monthly gross and \$2,147.03 monthly net. In contrast correct figures are \$2,287.37 monthly gross and \$2,048.73 monthly net as set forth in Ms. Choate's January 3, 2007 Financial Declaration and as explained in her Supplemental Reply Memorandum of January 2, 2007, and as supported with her paystubs provided as Sealed Source Financial Documents on January 2, 2007.

By entering the modification on February 8, 2007, the Court ignored Respondent Mr. Choate's own Financial Declaration of January 12, 2007. Respondent Mr. Choate's January 12, 2007, Financial Declaration states under penalty of perjury that he enjoys a monthly gross income of \$4,927.67, and a monthly net income of \$4,070.93.

Nevertheless, the court disregarded Mr. Choate's own Financial Declaration and set his income at a significantly lower \$4,845.72 monthly gross and \$3,664.79 monthly net. Mr. Choate's net income is thus understated by \$406.14 monthly, according to Mr. Choate's own admission in his January 12, 2007 Financial Declaration.

The order of February 8, 2007, should be vacated and remanded with direction to re-calculate child support (1) without a discretionary deviation for Respondent Mr. Choate's additional dependent due to income of other adults in the household (2) utilizing net income of no more than \$2,048.73 for Appellant Ms. Choate and (3) utilizing no less than monthly net income of \$4,070.93 for Respondent Mr. Choate.

II. Assignments of Error

No. 1 - The lower court erred in failing to set Respondent Mr. Choate's income at a monthly net of at least \$4,070.93.

No. 2 - The lower court erred in failing to set Appellant Ms. Choate's net income at \$2,048.73.

No. 3 - The lower court erred in granting a deviation to Respondent Mr. Choate for his new child, as the economic situation in Appellant's home is much worse than in that of Respondent Mr. Choate's home.

No. 4 - The lower court failed to enter findings which specify the reason for the deviation granted to Respondent Mr. Choate.

No. 5 - The lower court erred in failing to consider the income and expenses of Respondent Mr. Choate's co-resident, Ms. Rayanne Sasser in granting a deviation to Respondent Mr. Choate because no evidence was presented by Respondent Mr. Choate that Ms. Sasser had expenses which precluded her from contributing her income to the household.

No. 6 - The lower court erred in granting a modification of support on February 8, 2007, as Respondent Mr. Choate had not complied with Standard #5 of the Child Support Schedule, as an insufficient income history was provided by failure to provide sufficient recent paystubs so as to verify changes in income and employment levels.

Issues Pertaining to Assignments of Error

No. 1 - Should the Respondent's net income be set at a significantly lower \$4,845.72 monthly gross and \$3,664.79 monthly net,

even though the Respondent's own January 12, 2007, Financial Declaration, prepared with the assistance of counsel, recites that his true monthly gross income is \$4,927.67, and that his current monthly net income has risen to \$4,070.93?

No. 2 – Should the Appellant's income be set at \$2,426.67 monthly gross and \$2,147.03 monthly net pursuant to Respondent's request for modification, even though her pay stub Sealed Source Financial Documents filed on January 2, 2007, together with her Supplemental Reply Memorandum of January 2, 2007 and Financial Declaration of January 3, 2007, all verify her that her income is much lower at \$2,287.37 monthly gross and \$2,048.73 monthly net?

No. 3 – Should a deviation be granted to Respondent Mr. Choate due to his new issue, conceived during the divorce proceedings, even though the economic deficit situation in Appellant's household is much worse than that of the Respondent's, as the Appellant presently suffers with a \$484.44 monthly household expense deficit under the deviation?

No. 4 – Should the lower court grant Respondent Mr. Choate's request for a deviation due to an additional child without entering findings that specify the reasons for grant of such deviation?

No. 5 – Should a child support deviation be granted to Respondent Mr. Choate on account of his additional issue of his meretricious

relationship, even though the Respondent admits that \$2,000.00 monthly additional household income exists due to the co-resident mother of his new child, Ms. Sasser, yet no explanation or even allegation is made by the Respondent that Ms. Sasser's income is unavailable to assist with the expenses of Respondent's household?

No. 6 – Should a child support modification and deviation have been permitted to the Respondent, even when he Respondent failed to comply with Standard 5 of the Child Support Schedule, Washington State Child Support Schedule Definitions and Standards, which would require that current pay stubs be provided to verify income and deductions?

III. Statement of the Case

The lower court directed that Mr. Choate's income be the average of his 2005 and 2006 gross income figures. (RP 25, lines 22-23).

The court's ruling resulted in Respondent Mr. Choate's income being set too low, at only \$4,845.72 monthly gross, and monthly net of \$3,664.79. (February 8, 2007 Child Support Worksheet, CP 224; Order of Child Support, CP 2, Line17).

Respondent Mr. Choate had already acknowledged and advised the lower court that his income had increased by completing a Financial Declaration filed on January 12, 2007. Respondent Mr. Choate's Financial Declaration recited monthly gross income of \$4,927.67 and

monthly net income of \$4,070.93. (Financial Declaration of Respondent, CP 188, lines 10-22).

Appellant Ms. Choate produced nine (9) pay stubs relevant to her new job at Glacier Northwest. The pay stubs cover almost the entirety of her history at Glacier Northwest. Eight of the Nine pay stubs were for full time employment. (Sealed Source Documents of January 2, 2007, CP (unnumbered)).

Consistent with the approach taken by the court with respect to Mr. Choate's pay, (e.g. averaging his income over his time of employment at the same employer), Ms. Choate similarly calculated her income over the eight "full time" pay periods that she had been employed at Glacier Northwest. Appellant excluded the pay period ending August 15, 2006, because it only contained 14 hours of employment. Thus, Appellant included the eight (8) pay periods including the period August 31, 2006 through the pay period ending December 15, 2006. (Sealed Source Documents of January 2, 2007 CP (unnumbered attachments); Supplemental Petitioner's Reply Memorandum of January 2, 2007, CP 91-92; Petitioner's Proposed Child Support Worksheets of January 2, 2007, CP, page 93).

Inconsistently, the court did not recalculate the Appellant's gross income, and incorrectly found, contrary to all evidence presented and

explained in the Supplemental Petitioner's Reply Memorandum of January 2, 2007, that the Appellant enjoyed a monthly gross income of \$2,426.67. (Supplemental Petitioner's Reply Memorandum of January 2, 2007, CP 91-92; RP 26, line 4).

Thus with respect to the Appellant, the court seems to have adopted the same income figures from the Court's September 29, 2006 Child Support Order and Child Support Worksheets. In the modification, the Court did not reconsider nor recalculate Appellant's income, yet did recalculate the Respondent's income. (RP 25, lines 19-25; RP 26, lines 1-9).

The court also granted a deviation to Respondent, lowering the support obligation from \$722.30 monthly to \$585.87. (RP 27, lines 5-8).

Ms. Choate was at a \$348.01 monthly deficit with support set at \$722.30 per the September 29, 2006, Order. With the \$136.43 downward deviation of February 8, 2007, it is clear that Appellant Ms. Choate is now at a \$484.44 monthly deficit per her Financial Declaration filed January 3, 2007. (Appellant's Financial Declaration of January 3, 2007, CP 100, see footnote).

Moreover, Appellant's monthly deficit would be even worse than the present \$484.44 monthly if monthly debt payments of \$150.00 to her friend Craig Stewart and \$300.00 to her mother Lois Smith had not been

temporarily suspended. But for these forbearances of Mr. Craig Stewart and Ms. Lois Smith, Appellant Ms. Choate's monthly deficit would be \$934.44. (Appellant's Financial Declaration of January 3, 2007, CP 100, see footnote; RP 9, lines 15 – 25; RP 10, lines 4-5).

Appellant argued that Respondent's Financial Declaration of January 12, 2007, substantially overstated his expenses by including \$1,000.00 monthly for daycare and \$100.00 monthly for supplies, including tobacco. Namely, as to daycare, a "high" month of daycare was \$687.96. A more normal month was \$550.00 to \$560.00. (Respondent's Financial Declaration of January 12, 2007, CP 190, lines 7 and 9; Appellant's Financial Declaration of January 3, 2007, CP 103, see footnote; RP 7, lines 18-19)

The Respondent admitted that Ms. Sasser has substantial income, of \$2,000.00 monthly. (Financial Declaration of Respondent, CP, page 2). The court did not make any findings as to the income of Ms. Sasser, no findings were made as to what quantity of Ms. Sasser's income was available to Respondent's household. (RP 30, lines 7-16). The court claimed that there was not a requirement to make any specific findings when granting a deviation request. (RP 30, lines 11-14).

The court also ruled that Respondent Mr. Choate did not need to provide current pay stubs when seeking a modification and deviation, in

response to Appellant's assertions to the contrary at the motion, and in briefs. (RP 24, lines 4-13).

The Appellant had briefed the court on January 2, 2007, that Mr. Choate had not complied with the requirements of the Washington Child Support Schedule Definitions and Standards, which require current pay stubs to verify income. (Reply Memorandum of January 2, 2007, CP 36). By the hearing of February 2, 2007, one month later, Respondent Mr. Choate had still not provided pay stubs, although he did provide a 2006 W-2.

Respondent Mr. Choate's W-2 only provided gross pay over the entire year, and did not break out his current pay rate nor disclose what proportion of his reported taxable income was related to overtime compensation, perquisites and bonuses. Thus no current income information was before the court for co-resident Ms. Sasser, nor Respondent Mr. Choate at the time of the hearing on February 2, 2007 (RP 15, lines 11-18; RP 24, lines 4-13).

As usual, the Respondent again tried to interest the court with rather shopworn allegations that Appellant was not honest at trial. (RP 3, lines 16-17; January 4, 2007 Declaration of Respondent, CP 118, lines 7 - 18) As usual, the Respondent was again unsuccessful on this point, as the

lower court again refused to make any such finding that Appellant was dishonest or not forthcoming at trial. (RP 23 – 30).

IV. Summary of Argument

Substantial portions of the February 8, 2007, order should be vacated, with direction that no deviation shall be awarded for an additional dependent, and that Washington State Child Support Schedule Worksheet line #3 income net income should be set at no less than \$4,070.93 monthly net for Respondent and no more than \$2,048.73 monthly net for Appellant.

Also, attorneys' fees for this appeal should be awarded against the Respondent.

V. Argument

A. - The Respondent's net income is erroneously set at an artificially low figure of \$3,664.79, as the correct figure is at least \$4,070.93.

The lower court abused its discretion in directing calculation of Respondent's income as the average gross income of 2005 and 2006 when the Respondent failed and refused to provide any updated pay stubs verifying current rate of pay. The last of Respondent's pay stubs available to Petitioner was for a pay date of June 30, 2006. (PR 25, lines 22-23)

Moreover, the lower court did not consider the Respondent's own sworn testimony in his Declaration dated January 12, 2007, that his income had in fact increased to a monthly gross of \$4,927.67 and monthly net of \$4,070.93. The January 12, 2007, declaration was in fact prepared with the assistance of legal counsel, Respondent's prior attorney.(CP188)

It is not an abuse of discretion when a court chooses between two conflicting sources of financial estimates. *Marriage of Bell, 101 Wn.App. 366, 377, 4 P.3d 849 (2000)*.

In the *Bell* case, the court was found to have abused discretion when it accepted the Respondent's lower estimate of income which did not include current overtime wage information. The Appellant's prevailed because the Court directed that the overtime should have been included in the income calculation.

However, it would be an abuse of discretion to disregard the Respondent's sworn statement of his current gross and net incomes, and such was the case at hand. (CP188)

Moreover, it was an abuse of discretion to allow the modification without even allowing the Appellant to have access to current income information about the Respondent's pay rate and overtime. By the time of the hearing, the income information held by Appellant was over seven (7) months old, dating back to June 30, 2006.

The court should not have averaged 2005 income information that was already two years old with 2006 information, as this would tend to misrepresent and depress income below that currently enjoyed by Respondent Choate. Clearly, what the Respondent was earning in January 2005 was no longer relevant to what he was earning in January 2007. (RP 24, lines 4-13).

The Court failed to give meaning to the requirement that current pay stubs be produced, as recited in the Washington State Child Support Schedule Definitions and Standards:

“2. Verification of income: Tax returns for the preceding two years and current paystubs shall be provided to verify income and deductions. Other sufficient verification shall be required for income and deductions which do not appear on tax returns or paystubs.”

See WSCSS-Schedule 9/2001, Income Standards, Verification of Income #2.

The Respondent’s income should be set at no less than \$4,070.93 monthly net for purposes of entry on line 3 of the Washington State Child Support Worksheet.

B. - The lower court abused discretion in failing to compute Appellant's income in a manner consistent with computation of Respondent's income.

The Appellant did in fact provide current pay stubs relating to her employment at Glacier. In fact, nine (9) pay stubs were provided, of which eight (8) reflect full time employment.

The lower court desired to calculate Respondent's income based upon his historical gross pay at his current employer, spanning 2005 and 2006. Inexplicably, the lower court refused to adopt the same rationale of historical wages with respect to the Appellant's new job at Glacier. (RP 26, line 4)

In contrast, the lower court arbitrarily abused its discretion and decided that the Appellant's pay at Glacier was \$2,426.67 monthly gross. (RP 26, lines 4-5).

In contrast, the Appellant had meticulously explained to the lower court that her pay was rather only \$2,287.37 monthly gross, with \$2,048.37 monthly net. (Supplemental Appellant's Reply Memorandum of January 2, 2007, CP 91-92; Appellant's Financial Declaration of January 3, 2007, CP 100; Appellant's Sealed Source Documents of January 2, 2007 (unnumbered pay stubs)).

The Bell case cited above recognizes that Under the Equal Protection Clause of the Federal Constitution, persons similarly situated must receive like treatment. Gossett v. Farmers Ins. Co., 133 Wn.2d 954, 979, 948 P.2d 1264 (1997). See Bell at 379.

Calculating Respondent Mr. Choate's income on a two year historical average does serve to depress his income to Respondent Choate's benefit. Calculating Appellant Choate's income in a different way from Mr. Choate's income other than her historical average is inequitable and denies to her equal protection. In fact, it is unclear exactly how the Court arrived at \$2,426.67 monthly gross income and \$2,147.03 monthly net income for Ms. Chaote.

However, clearly the Court rejected the same application of the present employment historical average principal when considering Ms. Choate's income, while adopting that principal for Mr. Choate, as Ms. Choate's historical average at Glacier would yield \$2,287.37 monthly gross and only \$2,048.73 monthly net. (CP100; CP 91-92)

C. - Appellant presently suffers with a \$484.44 monthly household expense deficit under the deviation, as the lower court abused its discretion in failing to consider the total circumstances of both households when granting the deviation.

Ms. Sasser, who lives meretriciously with Respondent, has reported income of \$2,000.00 per month on Respondent's Financial Declaration of January 12, 2007. (CP188)

No evidence has been presented by Respondent that some or all of these funds are already expended to pay Ms. Sasser's existing debts and obligations.

The lower court abused its discretion, as once Ms. Sasser's monthly income of \$2,000.00 is added to the Respondent's alleged deficit of \$488.07 monthly as reported in his Financial Declaration of January 12, 2007, there becomes a household surplus of \$1,511.93. If Respondent Mr. Choate's had not been granted a deviation, when his undeviated child support of \$720.90 is further subtracted from this surplus of \$1,511.93, there still remains a \$791.03 monthly surplus in Respondent's household.

Even more, if Appellant Mr. Choate's \$312.04 monthly daycare expense overstatement is remedied and his \$100.00 monthly unnecessary tobacco allowance are removed from his financial declaration, then his surplus climbs by another \$412.04 to \$1,203.07 monthly. (\$791.03

surplus + \$412.04 = \$1,203.07 surplus). Appellant's Financial Declaration of January 3, 2007, indicates that Respondent Mr. Choate's share of daycare expense runs at a high of \$687.96 monthly, not \$1,000.00, as overstated. (\$1,000.00 overstatement - \$687.96 cost = \$312.04 daycare overstatement.) (CP188; CP100)

Also, this figure of \$687.96 for Respondent's share of the daycare is generously well on the high side. Usually, Respondent's share of the daycare is only \$550.00 to \$560.00. (RP 7, lines 18-19), as opposed to the generously large \$687.96 used in calculating the Respondent's monthly household surplus. (CP100)

In contrast to Respondent, Appellant Ms. Choate has absolutely no monthly surplus. (CP100)

Appellant Ms. Choate's unchallenged financial declaration filed January 3, 2007, indicates she is in a substantially negative cash flow position. Even before the downward deviation of monthly child support from \$722.30 monthly per the September 29, 2007 Order to \$585.87 per the February 8, 2007 Order, Ms. Choate was at a \$348.01 monthly deficit. With the downward deviation, Appellant Ms. Choate is now at a \$484.44 monthly deficit per her financial declaration filed January 3, 2007. (CP100)

Moreover, Ms. Choate's monthly deficit would be even worse than the present \$484.44 monthly if monthly debt payments of \$150.00 to her friend Craig Stewart and \$300.00 to her mother Lois Smith had not been temporarily suspended. But for these forbearances of Mr. Craig Stewart and Ms. Lois Smith, Appellant Ms. Choate's monthly deficit would be \$934.44. (CP100)

Child support is designed with the primary goal of preventing a harmful reduction in a child's standard of living, in the best interests of the children whose parents are divorced.

In re Marriage of Mattson, 95 Wn. App. 592, 599-601, 976 P.2d 157 (1999)

By plunging Appellant Ms. Choate even further into a monthly financial deficit abyss, the lower court clearly abused its discretion. The Appellant should not suffer a further monthly shortfall to \$484.44 monthly negative cash flow by way of downward child support deviation of \$135.03 monthly, while the Respondent maintains a household monthly surplus that approaches \$1,203.07 monthly. Appellant's \$348.01 negative cash flow under the undeviated child support order of September 29, 2007, was hardship enough. It is an abuse of discretion to further harm her to a \$484.44 monthly negative cash flow. (CP100)

The Legislature has also instructed that deviations based on a parent's obligations to children from other relationships "shall be based on consideration of the total circumstances of both households."

Bell at 372, citing RCW 26.19.075(1)(e)(iv).

D. and E. - Awarding a deviation based upon an additional dependent was an abuse of discretion because no findings have been made as to the contribution of the dependent's mother, Ms. Sasser, to Respondent's household.

'Deviations based on children from other relationships "shall be based on consideration of the total circumstances of both households" and "[a]ll income and resources of the parties before the court, new spouses, and other adults in the households shall be disclosed and considered..." Again, the court must enter findings that specify the reasons for any deviation or a denial of a deviation request, and "shall exercise discretion in considering the extent to which the factors would affect the support obligation.''

Bell at 375, citing RCW 26.19.075(1)(e)(iv), RCW 26.19.075(2) and RCW 26.19.075(3) and (4).

In the *Bell* case, the lower court abused its discretion by entering an order regarding child support without fully considering the actual and potential income of the Respondent father's housemate.

Likewise, Division II of the Court of Appeals upheld denial of a requested deviation for a new child when the husband petitioning for the change in support failed to produce financial information to the Court, including an updated summary of household income and expenses. *Goodell v. Goodell*, 130 Wash.App.381, 122 P.2d 929 (2005).

“A deviation from the standard support amount is an exception and should only be used where it would be inequitable not to do so. In re Marriage of Burch, 81 Wash.App. 756, 760, 916 P.2d 443 (1996).

Here, the court did not grant Scott a downward deviation of his child support to Cathie because it stated that it lacked sufficient information about Scott’s new family and its economic circumstances. Scott argues that he disclosed his 2002 and 2003 W-2s, his 2004 paystubs, and his 2002 and 2003 joint tax returns with his new wife. The tax returns list Scott and his wife’s income, his dependents, his occupation, and his wife’s occupation. But Scott did not provide a summary of his household’s monthly expenses, nor did he reveal whether his new wife received child support for her other child. [Footnote omitted] It is within the trial court’s discretion to grant or deny a deviation and generally, trial courts are not reversed on such decisions. [Citation omitted] Here the trial court did not abuse its discretion in denying a deviation for Scott’s new child based on its lack of pertinent asset and expense information.”

In re Goodell at 934-935.

Mr. Goodell’s efforts fell short, because he did not provide information on household expenses and did not enlighten the court about how his new wife’s income integrated with those household expenses. Similarly, Mr. Choate has not enlightened the Court at all as to how much, if any, of Ms. Sasser’s income is available to contribute towards the household budget.

Mr. Goodell’s petition for a deviation failed, and so too must Mr. Choate’s petition fail.

The lower court erred in failing to make specific findings as to the reasons for the grant of the deviation.

“What is required under the statute is that this Court consider 26.19.07 factors. This Court has done it. I don’t have to, as you say, make specific findings.”

RP 30, lines 11-14.

The court’s statement is clearly error: findings must be made according to *Bell at 375*.

F. – The lower court disregarded the rule that current pay stubs shall be provided when seeking to modify support.

The lower court abused its discretion in hearing support modification when the Respondent had failed to provide updated pay stub information. The rules specifically require that current pay stubs be produced. A year end W-2 form is insufficient. The last pay stubs received prior to the February 2, 2007, hearing, were seven months old, dating back to June 2006.

Clearly, changes in income received near the end of the year will be “hidden” and subsumed by the earlier periods of earnings at a different level. Consequently, the need and requirement of the rule seem obvious.

The Washington State Child Support Schedule Definitions and Standards recite that disclosure of tax returns and current paystubs is mandatory with the preparation of child support worksheets, and clearly Respondent Mr. Choate has failed in this regard:

2. Verification of income: Tax returns for the preceding two years and current paystubs shall be provided to verify income and deductions.

Other sufficient verification shall be required for income and deductions which do not appear on tax returns or paystubs.

See WSCSS-Schedule 9/2001, Income Standards, Verification of Income #2.

The February 8, 2007, order allowing the child support modification and deviation should be reversed.

G. – Appellant’s motion for attorneys’ fees.

The Appellant Ms. Choate would seek an award of attorneys’ fees and costs against the Respondent. Costs have included at least the filing fee of \$250.00, Clerk’s Papers fee of \$118.00 and a Report of Proceedings transcription fee of \$170.00 and estimated photocopies of \$45.00 (300 at .15 each). In addition, attorneys’ time to date is preliminarily estimated to have consumed no fewer than 13 hours at \$260.00 per hour for an attorney’s fee of at least \$3,380.00. Thus an award against Respondent of \$3,963.00 for fees and costs is sought. Such relief is sought under RCW 26.09.140, as RCW 26.09.140 allows the court to award attorney fees on appeal in any action under chapter 26.09. *Marriage of Bell, 101Wn.App. 366, 379, 4 P.3d 849 (2000).*

Given the household surplus of Respondent Mr. Choate, and the deficit of Appellant, an award of attorneys’ fees and costs of \$3,963.00 against Mr. Choate would be appropriate in this case.

VI. Conclusion

The February 8, 2007 order should be vacated to the extent it awards a deviation to Respondent Mr. Choate with instructions disallowing a deviation.

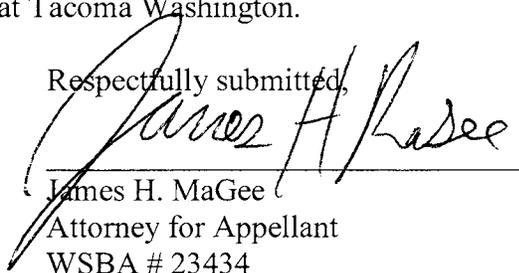
Furthermore, the lower court should be directed to re-calculate the income of the parties by setting Respondent Mr. Choate's Washington State Child Schedule Support line #3 net income at a figure of not less than \$4,070.93 monthly net, and Appellant's monthly net income on line #3 at not more than \$2,048.73 monthly net.

In the alternative, the lower court should be directed to calculate Appellant's and Respondent's income in the same manner, that is, using the same historical period for the Appellant as is used for the Respondent.

Fees and costs of at least \$3,963.00 should be awarded against Respondent Mr. Choate.

Dated this 18th day of June, 2007 at Tacoma Washington.

Respectfully submitted,



James H. MaGee
Attorney for Appellant
WSBA # 23434

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS DIVISION II OF THE
STATE OF WASHINGTON

In re the Marriage of:

ELAINE IRENE CHOATE

Appellant,

vs.

FREDERICK LEWIS CHOATE

Respondent

Div. II Case No.: 35940-5-II

Piece County No. 05-3-02428-2

DECLARATION OF MAILING

I am over the age of majority and not a party interested in the above proceedings and competent to be a witness therein.

I hereby declare that on June 18, 2007 I deposited in the mails of the United States of America, with postage prepaid, a copy of the following documents:

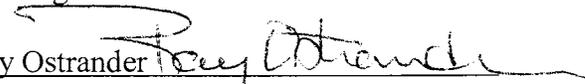
- Brief of Appellant; and
- Copy of this declaration

to those persons and/or entities listed below:

Frederick Choate 16824 128th Ave. E. Puyallup WA 98375

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: June 18, 2007, at Tacoma, Washington.

/s/ Ray Ostrander 
Ray Ostrander, Assistant