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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
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No. 35940-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ELAINE IRENE CHOATE, Appellant

v.

FREDERICK LEWIS CHOATE, Respondent

REPLY BRIEF OF RESPONDENT

Frederick L. Choate

Respondent Pro Se

16824 128th Ave East
Puyallup, Washington 98374
(253)840-0514

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I. Assignments of Error

As the Respondent in this case, I am not asking for review, therefore as per RAP 10.3 (b), I am not listing any assignments of error. I will address the assignments of Error from Appellant's Brief in the Argument section of this brief.

II. Statement of the Case

The Appellant has provided a statement of the case in her brief, however, the five pages of text presented are done so in an argumentative fashion, rather than a simple statement of the actual case. It is my understanding that this section is to be written without argument as per RAP 10.3 (5). Given that the Appellant has presented this section more as an argument for her case rather than a fair statement of the facts and procedure, I will provide what I feel is a fair statement of the case.

In the Notice of Appeal dated February 9, 2007,(CP 232) the Appellant indicated that she believes the transfer payment should be \$720.90, and that a whole family deviation should have been denied based on her belief that the lower court did not consider the income of Rayanne Sasser. The Appellant is appealing the whole family

deviation that the lower court granted to me and she is basing that appeal on a belief that the lower court did not consider all incomes of my household. This appeal is very simply about the Standard of Review found in RCW 29.19.075, and the cited cases.

In December of 2006, the Respondent filed a motion to modify the child support order (December 12, 2007 Motion to Modify Child Support Order CP 2), as allowed by the uncontested September 29 order. That motion was not heard until January 5, 2007, where it turned out that some paperwork failed to get filed properly, and the motion was re-noted and heard on February 2, 2007 (January 22 Note for Motion Docket, CP 211). A child support order was put into place using the laws of Washington State, and the numbers entered into those calculations were directly off of pay-stubs and W-2 tax information. A residential credit was requested, but denied, however a whole family deviation was granted based on the third minor that the Respondent is responsible for. All household income was provided on every financial declaration that was provided by the Respondent, and the lower courts took all factors into consideration (RP 26, lines 19-25 and RP 27, lines 1-8). By viewing the court record, and reviewing the Verbatim Report of Proceedings, it is clear that the lower court upheld

the standard of review by taking all things into consideration, including all the factors listed in RCW 26.19.075.

The lower court did adjust the Respondents gross monthly income, basing it on an average of all of 2005 and 2006 wages taken from W-2 forms provided (RP 25, Lines 20-24). The lower court gave extensive explanation as to how the Respondent's income was derived in her earlier rulings, and how it would be derived for use with the ruling she just made (RP 23-27). The lower court allowed both parties nearly a week to put the numbers together, based on her instructions, and present them on February 7, 2007 (RP 26, Lines 10-17). The lower courts ruling on February 2, 2007 did not nullify any earlier rulings, it simply allowed the whole family deviation to be placed into effect (RP 30, lines 14-16).

On February 7, 2007, the only orders that were presented to the lower court, were those prepared by the Respondent. The Appellant was not present, although her attorney Mr. MaGee was. Mr. MaGee made no argument nor presented orders contrary to what the Respondent had provided (February 8, 2007 Order of Child Support, CP 216-229). Since the Appellant was not present to sign the order, the lower court allowed the Appellant to present the signed order to

her the following day, at which point the child support order was signed (February 8, 2007 Order of Child Support, CP 216-229).

If it pleases the Court, this is a fair, and accurate statement of this case, provided without argument.

III. Argument

The Appellant's first assignment of error should be stricken, as it is not an argument presented within the Notice of Appeal filed February 9, 2007. However, I have presented argument in the case the Courdoes not strike this section.

In response to the Appellants first argument (Brief of Appellant, page 17 (V) (A)), the standard of review here is stated within the Appellants own reference to the Bell case; "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)."

The Appellant states correctly that in this case the court was found to have abused its discretion only because it failed to include overtime information.

In this case, however, the lower court did include all overtime, as well as vacation pay and holiday pay, by using the actual W-2

information provided it (RP 25, lines 19-24). The lower court did not abuse it's discretion by choosing between two conflicting sources of financial estimates. Both estimates included overtime.

The court also reviewed the materials that were provided (RP 23, line 9), which included an attachment to my declaration of January 4, 2007 that indicated a pay rate of \$21.50 per hour currently (CP 160). That attachment also shows that since my return hire date at Corliss Resources in February of 2004, where I was paid \$20 per hour, that I have only received a pay increase of \$1.50. This pay increase is not an extraordinary amount given the time lapse of nearly 3 years. The lower court was fair and equitable when using it's discretion on calculating an average monthly gross income.

With regards to the argument about producing pay-stubs, the lower court clearly invites counsel to ask for a January 1st payment period, but again references very recent W-2's that I provided (RP 24, lines 4-13). Appellants counsel did not pursue that invitation.

The Appellant's second assignment of error should be stricken, as it is not an argument presented within the Notice of Appeal filed February 9, 2007. However, I have presented argument in the case the Court does not strike this section.

In response to the Appellant's second argument (Brief of Appellant, page 17 (V) (B)), the same standard of review as stated above is applicable. The lower court did not abuse its discretion when choosing one estimated income over the other for the Appellant. Furthermore, the Appellant offers no legal basis for this argument, and the citation of the Bell case at 379 refers to a footnote where the appellant of that case was denied her equal protection claim involving the award of fees, and has no relevance to this situation.

In response to the Appellant's third argument (Brief of Appellant, page 17 (V) (C)), the standard of review is stated within RCW 29.19.075 (1) (e) (iv), "When the court has determined that either or both parents have children from other relationships, deviations under this section shall be based on consideration of the total circumstances of both households. All child support obligations paid, received, and owed for all children shall be disclosed and considered." In this case, the lower court clearly adheres to this standard of review (RP 26, lines 20-25; RP 27, lines 1-8). The lower court clearly and specifically states that after reviewing the statutory factors of 29.19.075 the request for the whole family deviation was granted.

The Appellant's reference to Ms. Sasser's income are not relevant to this argument. As dictated by RCW 26.19.071, I disclosed the income of Rayanne Sasser, as she is an adult living in my household, on every financial declaration that I presented. However, the Appellant has provided nothing to prove to this Court that Ms. Sasser and I are living meretriciously. There is nothing in the Clerks Papers or the Verbatim Report of the Proceedings that support such a claim. Ms. Sasser is responsible for her debt and bills, just as I am responsible for mine. All the argument shown in the Appellant's Brief regarding Ms. Sasser's income is not relevant. It was made very clear by the lower court that the total circumstances of each household were considered (RP 26, lines 20-25; RP 27, lines 1-8).

In response to the Appellant's fourth and fifth arguments (Brief of Appellant, page 17 (V) (D) and (E)), I again assert that the standard of review is provided within the Appellants own citation. 'Deviations based on children from other relationships "shall be based on consideration of the total circumstances of both households" and "all income and resources of the parties before the court, new spouses, and other adults in the households shall be disclosed and considered..."' (Bell at 375, citing RCW 26.19.075 (1)(e)(iv) and RCW 26.19.075

(2)). The lower court reviewed the documents provided (RP 23, Lines 9-10), which included a financial declaration that included the disclosure of Ms. Sasser's income as well as all my expenses (January 18, 2007 Financial Declaration Respondent CP 205-210), and again based her decision on the standard of review set forth in so many cases, as well as the RCW.

In this situation, contrary to the Bell case, Ms. Sasser has a known job and income. This information was disclosed to the Appellant during a pre-trial deposition in the form of pay-stubs and other documents as well as oral testimony during the deposition, however, the Appellant never called Ms. Sasser as a witness, nor was her deposition presented at trial. The Appellant does, however, make many references through out the court record, as well as within his own brief, as to how much money Ms. Sasser makes (Brief of Appellant page 7). In the Bell case the housemate is being referenced, and it is clear the Samuel failed to disclose his housemates income (Marriage of Bell 101 Wn. App.366, 379). That is not the case in this situation, as it is clearly known from the financial declarations and was disclosed as to what Ms. Sasser's income was. The lower court also knew this information, and it was considered as stated above.

The Appellant also refers to *Goodell v. Goodell*, 130 Wash.App.381, 122 P.2d 929 (2005). The Appellant misstates the facts for this reference when she states “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.” (Brief of Appellant, page 26). What is really being said in *Goodell v. Goodell*, is that Scott provided the income amounts, as well as occupations of both he and his wife, but he failed to provide his households expenses as well as whether or not his new wife received child support for her other child. Nothing about the *Goodell v. Goodell* case represent any valid argument in regards to this case, as 1) Ms. Sasser and I are not married, and 2) Ms. Sasser’s income has been disclosed.

As to the Appellant’s argument that the lower court erred in failing to make specific findings as to the reasons for the deviation, the lower court stated “And if you require specific findings I believe I spoke to that issue when I gave me ruling prior. And whatever I said before stands.” (RP 30, lines 14-16). The Appellant failed to designate prior rulings as part of the Clerks Papers, and also failed to provide the verbatim transcripts of the previous rulings, therefore failing in her burden of proof on this topic.

In response to the Appellant's sixth argument (Brief of Appellant, page 17 (V) (F)), I believe the Standard of Review is that found in *Goodell v. Goodell*, 130 Wash. App 381, 122 P.2d 929 (2005) at 388 "The trial court has broad jurisdiction to modify child support provision. In *Re Marriage of Dodd*, 120 Wn. App. 638, 644, 86 P.3d 801 (2004). We apply an abuse of discretion standard and " 'cannot substitute [our] judgement for that of the trial court unless the trial court's decision rests on unreasonable or untenable grounds.'" *Dodd*, 120 Wn. App. At 644 (quoting *In re Marriage of Lislle*, 90 Wn. App. 796, 802-03, 954 P.2d 330 (1998))."

In this case the lower court did review the materials that were provided (RP 23, line 9), which included an attachment to my declaration of January 4, 2007 that indicated a pay rate of \$21.50 per hour currently (CP 160). Within that attachment, it shows a pay increase of only \$1.50 over the period of nearly 3 years. This pay increase is not an extraordinary amount. The lower court had access to over 26 weeks of pay-stubs for the year 2006 (RP 23, lines 22-25, RP 24, lines 1-3), and was clearly aware of my earnings, pay rate, as well as how much overtime I was working, and clearly addresses Appellant about the pay stub issue and invites Appellant to make argument about

getting the January 1st payment period (RP 24, lines 4-13) which the Appellant did not do. The lower court used her discretion and judgment and it was not unreasonable or untenable. By using the W-2 that was presented, all overtime, bonus pay, vacation pay, as well as holiday pay and advances were considered in the average monthly gross.

In response to the Appellant's seventh argument (Brief of Appellant, page 17 (V) (G)), the Standard of Review can be found in the Goodell reference at 394, paragraph 32, "RAP 18.1 allows this court to award fees and costs where it is statutorily allowed. Under RCW 26.09.140 the court may award fees based on the financial need of the requesting party and the other party's ability to pay. Here, Cathie still has approximately \$44,000 in cash or stocks and bonds. Her financial declaration also indicates that she began employment at Labor Ready, Inc., on May 4, 2005. The stability of her financial assets and her employment do not indicate financial need warranting an award of attorney fees under RCW 26.09.140. Thus, we deny her fees and costs on appeal." The Appellant has worked full time for well over two years, and currently is employed by Glacier Northwest, where she was hired at \$14 per hour in August of 2006 (Brief of

Appellant, page 4). The Appellant has not paid any money toward any attorney fees from the start of this case, and it is evident that her mother, Lois Smith, is covering her costs and supposedly allowing the Appellant to pay her back over time in the amount of \$300 per month (CP 169, paragraph 5.11), which clearly shows a lack of need for fees. In addition to that, both parties presented signed financial declarations showing that both parties are at a deficit at the end of the month. As the Goodell case states at 394 paragraph 32, "RAP 18.1 allows this court to award fees and costs where it is statutorily allowed. Under RCW 26.09.140 the court may award fees based on the financial need of the requesting party and the other party's ability to pay."

There is no surplus in either parties households. The lower court recognized that neither party has a lot of money (RP 27, lines 9-19), and urges both parties to stop wasting our limited resources fighting over this issue. Fees should not be awarded in this case based on the standard of review cited above, as well as the frivolous nature of this appeal.

IV. Conclusion

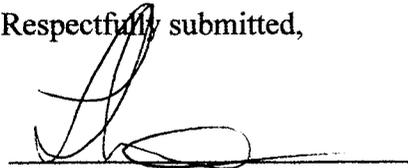
The Notice of Appeal filed in this case cited the precise nature of this appeal, and that being the award of the whole family credit given

to the Respondent, and the Appellants opinion that the lower court failed to properly consider Rayanne Sasser's income and expenses. This appeal is very simply about the whole family deviation and Rayanne Sasser's income. The standard of review here is very simple, and is stated in nearly every child support case out there, and that standard is listed in RCW26.19.075. It is very clear from the Report of the Proceedings, as well as the Clerks Papers requested by the Appellant that the lower court satisfied this standard, and was very specific in doing so. Attorney fees are not appropriate given the facts of both parties respective household circumstances, and the availability of the Appellant to receive money from her mother to pay her fees, as well as the lack of ability for Respondent to pay.

If it pleases the Court, I thank the Panel for reviewing my brief, and I respectfully ask that this appeal be denied.

Dated the 31st day of July, 2007 at Puyallup Washington.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'F. Choate', is written over a horizontal line.

Frederick L. Choate
Respondent, PRO SE

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY Frederick L. Choate
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COURT OF APPEALS DIVISION II OF THE
STATE OF WASHINGTON

In re:		Div. II Case No. : 35940-5
ELAINE IRENE CHOATE	Appellant,	Pierce County No. : 05-3-02428-2
And		Declaration of Service
FREDERICK LEWIS CHOATE	Respondent.	

I hereby declare that on August 3, 2007, I hand delivered the following:

- Reply Brief of Respondent
- Copy of this declaration

To those persons and /or entities listed below:

Law Offices of James H. MaGee
1530 S Union Ave St 9
Tacoma Washington 98401

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated August 3, 2007 at Puyallup, WA

/s/ Frederick L. Choate
Frederick L. Choate, Respondent Pro Se