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NO. 38778-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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SHEILA M. SKUSEK nka HERMAN,

Appellants

vs.

FREDERICK SKUSEK,

Respondent.

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APPEAL FROM PIERCE COUNTY SUPERIOR COURT  
97-3-01414-9

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STATE OF WASHINGTON  
BY [Signature]  
DEPUTY  
COURT OF APPEALS  
DIVISION II

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**REPLY BRIEF OF APPELLANT**

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VAN SICLEN, STOCKS, & FIRKINS  
John S. Stocks  
Attorneys for Appellants

Address:  
721 45<sup>th</sup> St NE  
Auburn, WA 98002-1381  
(253) 859-8899  
e-mail: [jstocks@vansiclen.com](mailto:jstocks@vansiclen.com)

 ORIGINAL

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## A. INTRODUCTION

The standard of review herein should be *de novo* because the decision below was based only on written materials and not on testimony. Although some older Washington cases have held that review in such situations should be for review of discretion, more recent cases hold that where the record consists only of written materials and documentary evidence, the appellate court stands in the same position as the trial court and should conduct review *de novo*. See *In re Marriage of Landry*, 103 Wn.2d 807, 699 P.2d 214 (1985) (abuse of discretion); *Progressive Animal Welfare Soc'y v. Univ. of Wn.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994) (de novo); *In re Marriage of Flynn*, 94 Wn. App. 185, 190, 972 P.2d 500 (1999) (de novo). Regardless, review of the trial court's conclusions of law is always *de novo*. *In re Marriage of Dodd*, 120 Wn. App. 638, 86 P.3d 801 (2004).

The trial court here should be reversed for both abuse of discretion and incorrect conclusions of law. The court abused its discretion when it adopted the father's worksheets and deviated from standard income calculations without issuing written findings of fact. *In re Marriage of Choate*, 143 Wn. App. 235, 243, 177 P.3d 175 (2008). This is reversible error. *Id.* The Court also failed, despite mandatory statutory language, to consider two years of Mr. Skusek's income before determining that

income was “nonrecurring.” This is also a reversible abuse of discretion. Additionally, although the Court had no discretion under Pierce County Local Rule 7 to grant revisions that the father did not specifically request, such relief was granted anyway—a clear error of law. The court also erred in deviating from the statutory income calculations due to “the bad economy” when no evidence regarding the economy was before the court or whether the alleged “bad economy” affected the father’s income. The court also erred in setting the effective date of the child support modification in July, 2008 when Mr. Skusek had already admitted, in pleadings which were never amended, that the modification should start in January, 2008. Finally, the court erred in not awarding Ms. Herman attorney fees.

Therefore, the trial court should reverse and order the appropriate child support and relief requested herein.

## **B. ARGUMENT**

- 1. The standard of review is *de novo*. Case law on parenting plans is inapposite because policy considerations favoring finality do not apply in the child support context.**

Respondent argues that abuse of discretion should be the standard of review on a child support modification that was based entirely on documentary evidence. Resp. Brf. at 9-14. The Respondent places great stock in the policy argument that in domestic relations cases, the

“emotional and financial interests affected by such decisions are best served by finality,” and cites the “child’s weighty interest in finality.” *Id.* at 13 (citing *In re Parentage of Jannot*, 149 Wn.2d 123, 127-28, 65 P.3d 664 (2003)). *Jannot* was a parenting plan case. *Jannot*, 149 Wn.2d 123. These policy considerations simply do not apply in a child support modification—children have no “weighty interest” in being supported less well than they should be.

In addition, the statutory scheme makes clear that there is no interest in finality in the child support context. With child support modifications, the legislature contemplates various and continuing modifications and adjustments to a child support obligation over the minority of the child’s life, including adjustments based on time alone without a showing of a substantial change in circumstances, and additionally, modifications based on changes in the incomes of the parties, the age of a child, or other changes in the schedules/worksheets themselves. (See generally, RCW 26.09.170). The standards for a child support modification (or even child support adjustments) set forth in RCW 26.09.170 are far less burdensome than those set forth for RCW 26.09.260, again indicating that finality is a value in the parenting plan context, but not in the child support context. Standard child support adjustment rules also argue against finality as a policy value in this

context—adjustments are allowed every two years if the incomes of the parties have changed. RCW 26.09.170(9)(a). The child support statutes simply do not embrace finality as an inherent value in child support determinations.

Washington law is at worst ambiguous on whether review of a child support case based on documentary evidence should be *de novo* or for review of discretion. Most of the cases cited by Respondent are, like *Jannot*, parenting plan cases where there is a strong interest in finality, or child support cases where the trial court considered testimony as well as documentary evidence. See, e.g. *In re Marriage of Rideout*, 150 Wn.2d 337, 77 P.3d 1174 (2003) (contempt case based on one parent’s violation of parenting plan); *but see Landry*, 103 Wn.2d 807 (child support case based on documentary evidence reviewed for abuse of discretion). In cases decided after *Landry*, this state’s courts have repeatedly held that, where the trial court’s decision was based on written submissions, review is *de novo*. See, e.g. *PAWS*, 125 Wn.2d at 252 (1994); *Flynn*, 94 Wn. App. at 190. *Flynn* is not, as Respondent claims, an “outlier.” It is a recent family law case that correctly applies the standard announced in *Progressive Animal Welfare Society*. Where the record consists “only of affidavits, memoranda of law, and other documentary evidence,” the appellate court stands in the same position as the trial court and should conduct review de

novo. *PAWS*, 125 Wn.2d at 252 (citing *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 35-36, 769 P.2d 283 (1989); *Smith v. Skagit Co.*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969); *Brouillet v. Cowles Pub'g Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990); *Dawson v. Daly*, 120 Wn.2d 782, 788, 845 P.2d 995 (1993)). In our case, there is no dispute that the hearing was conducted without testimony. Therefore, absent the special weight on finality appropriate to parenting plan decisions, the standard of review here, too, should be *de novo*.

Even if Respondent were correct that this court should grant deference to the trial court's findings of fact, this Court's review of the revision court's conclusions and application of law is *de novo*. *Dodd*, 120 Wn. App. 638 (noting that conclusions of law are reviewed *de novo*).

**2. The trial court erred in adopting the father's worksheets, excluding interest and side job income, and doing so without issuing written findings of fact.**

Respondent argues that it was not reversible error for the trial court, first, to adopt the father's worksheets and exclude income from interest and side jobs, and, second, to do so without issuing written findings of fact. Resp. Brf. at 14-22. In fact, the trial court must be reversed on both of these grounds.

First, in adopting the father's worksheets wholesale, the revision court exceeded the scope of its review. Under Pierce County Local Rule

7(g), motions for revision must “state with specificity any portion of the commissioner’s order...to be revised,” and “[a]ny portion not so specified shall be binding as if no revision motion has been made.” PCLR 7(g)(3). Here, the father sought revision only on interest income, “side job” income, the long-distance transportation allowance, and the failure to grant an incremental increase. CP 467-68. Mr. Skusek did not seek revision of his income figures as ruled on by the Commissioner in the first hearing. In adopting Mr. Skusek’s proposed worksheets wholesale, the revising court also revised his base income figures—a revision Mr. Skusek did not seek. By rule, the Commissioner’s determination of Mr. Skusek’s income was binding and “un-revisable.” Such a revision is error of law because it violates the mandatory language of PCLR 7(g)(3), which requires that portions of the commissioner’s order on which review is not specifically sought “shall be binding as if no revision motion has been made.” PCLR 7(g)(3) (emphasis added). The trial court had no discretion to grant revisions not sought by Mr. Skusek. When counsel pointed this out to the revising Judge, the Court did not respond except to say, “I have ruled, counsel.”

Second, the trial court must be reversed because it failed to enter written findings of fact to support its exercise of discretion in deviating from the standard income calculation. *In re Marriage of McCausland*, 159

Wn.2d 607, 619, 152 P.3d 1013 (2007) (Holding that under RCW 26.19.020, an extrapolation of child support is an abuse of discretion if not supported by written finding of fact: “only the entry of written findings of fact demonstrate that the trial court *properly exercised its discretion*,” reversal partly on that basis) (emphasis in original); *Choate*, 143 Wn. App. at 243 (Holding, after *McCausland*, that a deviation in calculation of child support under RCW 26.19.075 is also an abuse of discretion if not supported by written findings of fact.); See also *In re Marriage of Shellenberger*, 80 Wn. App. 71, 73-74, 906 P.2d 968 (1995). It is reversible error and abuse of discretion to fail to issue written findings of fact regarding any deviation from the standard calculation, as well as any imputation or deviation. RCW 26.19.075(3) (“The court shall enter findings that specify reasons for any deviation...from the standard calculation made by the court.”) (emphasis added).

Here, the trial court deviated from the standard support calculation when it accepted Mr. Skusek’s argument that his side jobs should be treated as nonrecurring income. See RCW 26.19.075(1)(b) (characterizing classification of second job income as nonrecurrent as a “deviation.”). As a deviation, that calculation had to be supported by written findings of fact under RCW 26.19.075(3) as interpreted by *Choate*. It was not, and must be reversed on that basis.

Respondent cites *In re Marriage of Crosetto* for the proposition that oral findings are sufficient to support a deviation under RCW 26.19.020 or RCW 26.19.075. *Crosetto*, 82 Wn.App. 545, 560, 918 P.2d 954 (1996). *Crosetto* is a Division 2 case decided in 1996, and was implicitly overruled as to RCW 26.19.020 by *McCausland*, a Washington Supreme Court case from 2007, and implicitly overruled as to RCW 26.19.075 by *Choate*, a Division 2 case from 2008. *McCausland*, 159 Wn.2d at 619; *Choate*, 143 Wn. App. at 243. *McCausland* and *Choate*, not *Crosetto*, bind this Court.

Finally, the revision court erred by failing to consider two years of income before making a final determination that Mr. Skusek's side job income was "nonrecurring." RCW 26.19.075(1)(b) grants the court discretion to deviate from the standard calculation by determining that income is not recurring, but such a determination "shall be based on a review of the nonrecurring income received in the previous two calendar years." RCW 26.19.075(1)(b) (emphasis added). It was Mr. Skusek's burden to produce such evidence as the party seeking a deviation on his income. Here, the court failed to review nonrecurring income for two years, partly because it was not provided by Mr. Skusek. While the statute gives the court discretion to determine that income is not recurring, the statute's language is mandatory as to what must be considered—two years

of nonrecurring income, not one. This is reversible error because, like in *McCausland*, the revision court failed to follow a mandatory procedure. *McCausland*, 159 Wn.2d at 619. Under *McCausland*, a trial court's violation of mandatory procedural language in the child support statutory scheme gives rise to reversible abuse of discretion. *Id.* Also, given Mr. Skusek's lack of full disclosure about these side jobs, the revision court's failure to insist on two years of evidence also rewarded Mr. Skusek for being intransigent.

**3. The trial court erred by deviating from the statutory income calculations due to a "bad economy" rather than on any evidence produced by Mr. Skusek.**

In a child support action, all parties are required to provide verification of income. RCW 26.19.071(2). The support calculation must be based on a consideration of that income. Here, the trial court discounted Mr. Skusek's income from side jobs based on an ad-hoc analysis that, because the economy is bad and Mr. Skusek works in a construction-related industry (as did the judge's brother), Mr. Skusek's past income from side jobs should be considered nonrecurrent. RP II: 12 ("I do think the economy has substantially altered conditions....My brother worked construction.") This is, to say the least, not the process envisioned by the statutory scheme. Mr. Skusek presented no evidence on the state of the economy, and what income evidence he did present showed that he was

still getting side jobs. At most, his reduction in work was a result in a self-imposed, voluntary reduction in hours worked so that he could vacation and retire at an early age. The children he is required to support should not receive less support because of that decision. The revision court's determination here is an abuse of discretion because it is not based on evidence properly before the court.

Essentially, the court took loose judicial notice of the state of the economy a year after the petition was filed, and proceeded from there. Judicial notice is only appropriate for facts not subject to reasonable dispute. ER 201. Mr. Skusek's actual income and income potential were subject to dispute, and the court erred by assuming that, based on his industry, his income would be non-recurring.

Respondent says that such a procedure is authorized by *In re Marriage of Payne*. Resp. Brf. at 22 (citing *Payne*, 82 Wn. App. 147, 916 P.2d 968 (1996)). *Payne* does not stand for the proposition that a judge may adjust child support without evidence. In *Payne*, the court applied a downward adjustment because the father had recently moved to be closer to his daughter, and did so based on evidence presented by the father: "the court relied on affidavits from the father's employer supplying his anticipated hourly wage and work schedule." *Payne*, 82 Wn. App. at 152. Here, Mr. Skusek failed to come forward with any similar evidence

meeting his burden of production, and as a result the revision court's determination is unsupported by any evidence properly in the record and must be reversed for abuse of discretion.

**4. The revision court erred by changing the effective date of the change in child support because the original start date had been stipulated to by the parties.**

The revision court erred in changing the effective date of the child support modification, for two reasons.

First, as with the adoption of Mr. Skusek's worksheets, in changing the effective date, the revision court granted Mr. Skusek a revision that he did not specifically seek when filing his motion for revision. Under Pierce County Local Rule 7(g), motions for revision must "state with specificity any portion of the commissioner's order...to be revised," and "[a]ny portion not so specified shall be binding as if no revision motion has been made." PCLR 7(g)(3). Although Mr. Skusek did seek an incremental increase on revision, he did not seek any change in the start date of the modification. CP 467-68. In granting Mr. Skusek a later start date, the revision court gave Mr. Skusek a revision he did not specifically seek. Such a revision is error of law because it violates PCLR 7(g)(3)'s requirement that portions of the commissioner's order on which review is not specifically sought "shall be binding as if no revision motion

has been made.” PCLR 7(g)(3) (emphasis added). The trial court had no discretion to grant revisions not sought by Mr. Skusek.

Alternately, the revision court abused its discretion in setting the effective date of the child support modification July, 2008 rather than January, 2008. CP 501-02. While Respondent correctly notes that the effective date of a child support modification is a matter of discretion for the trial court, it is abuse of discretion for the court to base its decision on unreasonable or untenable grounds. *Dodd*, 120 Wn. App. at 644. Here, Mr. Skusek had admitted in his Response that the start date for any modification should be January 16, 2008. CP 39-40. Admissions are binding on parties throughout the litigation, and here, the admission was never amended. No arguments were presented by either party, nor the State, based on the admission in the pleadings that the start date should be January 16, 2008. The court’s conclusion was based on untenable grounds.

**5. Ms. Herman should have been awarded attorney fees because she made a showing of her need and of Mr. Skusek’s ability to pay, and because Ms. Herman’s expenses of litigation were increased by Mr. Skusek’s intransigence in discovery.**

Ms. Herman should have been awarded attorney fees because of the parties’ relative ability to pay. Ms. Herman has no liquid assets and several creditors. CP 69-71. Mr. Skusek has been cashing in CDs, has many unexplained substantial deposits, while taking trips and vacations,

including listing over \$13,000 in liquid assets. CP 376. He also lists very few creditors. CP 378. Therefore, Ms. Herman has made a showing of her need and of Mr. Skusek's ability to pay. Failure to grant attorney's fees under these circumstances was error.

Regardless of the parties' relative resources, Ms. Herman should be awarded that portion of her attorney fees attributable to Mr. Skusek's intransigence in discovery. *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992). When intransigence is established, the financial resources of the spouse seeking fees are irrelevant. *Id.* Mr. Skusek's conduct throughout the litigation was characterized by delay, and by an outright refusal to provide important information, resulting in prejudice to Ms. Herman and increased litigation costs for her. *See* Appellant's Opening Brief, Statement of Case. Discovery abuse is a form of intransigence. *In re Marriage of Wallace*, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002); *Gamache v. Gamache*, 66 Wn. 2d 822, 829-30, 409 P.2d 859 (1965) *Eide v. Eide*, 1 Wn. App. 440, 445-46, 462 P.2d 562 (1969). Failure to disclose information has been cited as a basis for an award of attorney's fees for intransigence, and contrary to Respondent's assertions, there is no requirement that the wronged party first run up her legal fees further by filing a motion to compel. *See Wallace*, 111 Wn. App. 697.

At the time of the hearing on December 8, 2008, Ms. Herman had paid \$2,648.90 in fees and costs to date and had a balance of \$1,394.00 through November. CP 141. Her attorney estimated another \$750 to \$1,000 to finalize this through hearing, for a total of around \$4,792.90 in total fees and costs through the 12/8/08 hearing. CP 141. After the 12/8/08 hearing, substantial additional fees have been incurred for the revision hearing and now this appeal. Most of her attorney's time was spent on trying to track down and analyze Mr. Skusek's income figures and bank statements. CP 141. These fees and costs were necessary and reasonable to represent Ms. Herman in this matter. CP 141.

**6. Ms. Herman should also receive her attorney fees on appeal based on the parties' relative ability to pay and the merit of the issues on appeal.**

Attorney fees are granted in the appellate court's discretion under RCW 26.09.140. As below, the court considers the parties' relative ability to pay, but also considers the merit of the issues raised on appeal. *In re Marriage of Leslie*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998). The argument regarding the parties' relative ability to pay is made above, and weighs for an award of attorney fees to Ms. Herman. The arguments on appeal are also meritorious. There were serious procedural irregularities below that affect the fairness of the award. It is not proper for a trial court determining child support to fail to make written findings of fact in

support of a deviation, and it is dangerous for such a court to make determinations based on no evidence, as the court below did when it revised downward partly based on the “state of the economy.” The procedural safeguards in RCW 26.09 and 26.19 exist specifically to ensure that child support determinations do not become a catch-as-catch-can determination in which the rights and well-being of children are prejudiced.

**C. CONCLUSION**

The revision court abused its discretion and committed multiple errors of law in calculating the father’s income, adopting his worksheets, setting the effective date of the child support modification, and failing to award attorney’s fees. This Court should reverse.

DATED this 28<sup>th</sup> day of August, 2009.

VAN SICLEN, STOCKS & FIRKINS



John S. Stocks, WSBA#21165  
Attorneys for Appellant  
Van Siclen, Stocks & Firkins  
721 45<sup>th</sup> St. N.E.  
Auburn, WA 98002  
253-859-8899

I certify that I caused one copy of the foregoing to be served on the following interested parties on August 28, 2009 by delivering the same via legal messenger, to the below named parties as follows:

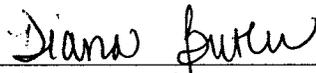
Susan Wills Kirkpatrick  
Pierce County Prosecutor's Office  
949 Court E  
Tacoma, WA 98402

Joseph J.M. Lombino  
Lombino Martino, P.S.  
1119 Pacific Avenue, Suite 900  
Tacoma, WA 98402

Emmelyn Hart-Biberfeld  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188

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BY \_\_\_\_\_  
DEPUTY  
COURT OF APPEALS  
DIVISION II

DATED this 28<sup>th</sup> day August, 2009, at Auburn, Washington.

  
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Diana M. Butler