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STATE OF WASHINGTON

47181-7-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

BY SW
DEPUTY

JENNIFER J. ZACAPU

Appellant,

v.

ANDRES ZACAPU-OLICER,

Respondent.

RESPONSE BRIEF

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I. INTRODUCTION

This dispute turns on whether the trial court should consider Respondent's six stepchildren when ordering a downward deviation from the standard calculation of child support. The parties have one minor child, of whom Appellant is the custodial parent. Respondent's six stepchildren reside with him and his wife.

When the parties divorced in May 2012, they had two minor children. One child, Andrea, resided with Respondent, and one child, Dylon resided with Appellant. Since then, Andrea was emancipated. As such, the State of Washington moved the court for an adjustment of child support. The parties did not dispute the calculated income. Respondent requested a downward deviation to account for his family of eight living in his home. On a motion for revision, the trial court ordered the downward deviation.

On appeal, Appellant argues that the trial court improperly considered the duty to support stepchildren as a basis to order a downward deviation. To the contrary, the trial court properly calculated the standard support obligation, considered the children residing in Respondent's household for whom he owes an obligation, and exercised discretion when it ordered the downward deviation. For these reasons, the trial court should be affirmed.

II. RESTATEMENT OF ISSUES ON APPEAL

1. Did the trial court properly exercise discretion when it applied a deviation from the standard calculation of child support? **Yes.**

III. RESTATEMENT OF FACTS

On September 8, 2014, the State of Washington Department of Social and Health Services' Division of Child Support ("DSHS") moved for an order adjusting the support provisions between the parties. CP 87. The motion was initiated under RCW 26.09.170(9) because a party to the order in a nonassistance case requested review and more than 24 months had passed since the order was entered. CP 88.

Two changes in circumstances underscored the request for an adjustment of child support: one of the parties' two minor children had turned 18, and Respondent had remarried and was supporting six stepchildren. During the proceedings to adjust child support, neither party disputed the income calculated by DSHS. CP 96; 88-94.

When the parties divorced in May 2012 they had two minor children: Andrea who resided with Respondent, and Dylen who resided with Appellant. CP 95-96. Respondent paid \$127.41 per month from May 2012 until that amount was adjusted by the court. CP 120. At the time, Respondent's child support obligation for Dylen was set at \$127.41. By September 2014, Andrea had turned 18 and had graduated from high

school. CP 96. At the time of these proceedings, Dylen was 10 years old. CP 165.

Also since dissolution, Respondent remarried. CP 95-96. Respondent's wife has six children. All six of Respondent's stepchildren reside with him and his wife. *Id.* The parties' son Dylen spends regular residential time with Respondent. CP 123.

In September 2014, Respondent's gross monthly income was \$4,753.00, and his net monthly income was \$3,745.00. CP 96. He paid medical insurance for Dylen and his stepchildren. CP 96. The proportional calculation for the monthly premium for Dylen was correctly calculated by DSHS at \$52.00 per month. *Id.* Respondent did not dispute the calculation of Appellant's gross income at \$2,450.00 per month and her net income of \$2,047.00.

Based upon the parties' incomes and the one minor child, Respondent's standard support obligation was calculated at \$524.00 per month. CP 92. Due to his obligation to support his entire household, including his stepchildren, Respondent requested a downward deviation in child support. CP 95-99. He offered the whole family method of calculating support as guidance for this deviation. *Id.* Respondent proposed a transfer payment of \$241.09, based upon the whole family formula. CP 100-06. Appellant opposed the downward deviation and

argued that even if he had remarried, “that does not mean that he has a duty of support for these step-children.” CP 115.

Living with Appellant is the parties’ minor son, Dylon, the parties’ adult daughter, Marissa, and Marissa’s child. CP 118. Marissa works outside of Appellant’s home. *Id.* Appellant did not include Marissa’s income in opposition to the deviation of the standard calculation. Further, Appellant included Marissa and Marissa’s child’s expenses when calculating her household expenses. CP 116-118. It was believed that three other adults resided in Appellant’s household, for which she offered no income information. CP 120. Appellant offered no evidence that her household expenses changed in any way between May 2012 and September 2014. CP 120.

On December 1, 2014, the commissioner entered an Order adjusting child support, but rejected Respondent’s request for a downward deviation. CP 129-144. Monthly support was set at the standard calculated amount of \$524.00. *Id.*

On December 10, 2014, Respondent moved for revision. CP 145-146. On revision, he argued that the trial court should consider his obligation to support six stepchildren. His income must support a household of eight people, and the standard calculation left insufficient funds to support the basic needs of his household. *See* CP 147-150.

On March 20, 2015, the trial court entered a Final Order of Child Support on revision. CP 164-178. The trial court granted Respondent's request to enter a downward deviation, and ordered incremental payments of support. CP 167. For the months of November 1, 2014 through January 31, 2014, Respondent's support obligation was set at \$325.50. CP167. Thereafter, support was set at \$350.00. CP 167. In granting a downward deviation, the trial court stated the factual basis for support was as follows:

The Respondent is the stepparent of six (6) children of his wife, Maria Zacapu. These children reside with Respondent and his Wife. Pursuant to RCW 26.19.075(e), (sic), the Court may deviate from the standard calculation when a parent has children from other relationships to whom the parent owes a duty of support. The Court FINDS a deviation is appropriate in this case because Respondent has a duty of support to his step-children pursuant to RCW 26.16.205. The Court considered the parties financial declarations and further FINDS that if a deviation is not granted there will be insufficient income in Respondent's household for his family of eight. If Respondent's marital situation changes, this deviation may be reviewed.

CP 167.

Appellant appealed the March 20, 2015 Order of Child Support and the trial court's downward deviation.

IV. RESPONSE ARGUMENT

A. This Court reviews the trial court's deviation under the abuse of discretion standard.

The standard of review for the trial court's deviation from the standard calculation of child support is abuse of discretion. *In re Marriage of Case*, 88 Wn. App. 662, 967 P.2d 982 (1997) (citing *In re Marriage of Griffin*, 114 Wn.2d 772, 791 P.2d 519 (1990); *In re Marriage of Glass*, 67 Wn. App. 378, 835 P.2d 1054 (1992)). "In considering appeals regarding the setting of child support [the Court has] relied on the rule that trial court decisions in dissolution proceedings will seldom be changed on appeal. The spouse who challenges such decisions must show the trial court manifestly abused its discretion." *In Matter Marriage of Griffin*, 114 Wn.2d at 776. The trial court's decision will not be reversed unless it rests on unreasonable or untenable grounds. *In re Marriage of Dodd*, 120 Wn. App. 638, 644, 86 P.3d 801 (2004).

B. The trial court properly considered the obligation to support stepchildren living in Respondent's household when it ordered a deviation of child support.

The trial court correctly determined that Respondent has a legal obligation to support his stepchildren. The trial court considered the expenses of Respondent's eight person household as part of the totality of the circumstances. Appellant, without authority, argues that there is no basis to consider the obligation to support stepchildren when entering a

deviation. Appellant can offer no evidence to support that the trial court abused its discretion when it ordered a deviation.

Appellant argues that the trial court should have disregarded Respondent's obligation to his stepchildren. She advances the argument that the six children living with Respondent should not be considered when the trial court ordered a deviation of support for one child. This position presumes that (1) stepchildren are not equal to natural born children and (2) that Respondent has no legal obligation to support the stepchildren living in his home. Both premises are wrong. *See State v. Gillaspie*, 8 Wn. App. 560, 507 P.2d 1223 (1973) ("the law has been developing toward the integration of stepchildren into the family with rights equal to those of natural children.")

A stepparent has an obligation to provide support for a stepchild living in the stepparent's home. *In re Marriage of Farrell*, 67 Wn. App. 361, 835 P.2d 267 (1992) (a stepparent's obligation to support the stepchild arises from both common law under *loco parentis*, and statute RCW 26.16.205); *see also Van Dyke v. Thompson*, 95 Wn.2d 726, 729, 630 P.2d 420 (1981) (under the common law, stepparents standing in *loco parentis* to a stepchild are legally obligated to support and educate the child.). The statutory support obligation continues until the marriage is

terminated. *See Stahl v. Dep't of Social and Health Svcs.*, 43 Wn. App. 401, 717 P.2d 320 (1986).

The family expense statute, RCW 26.16.205, “is not a child support statute, but rather, a statute that makes both parties to a marriage equally responsible for the necessary expenses of the family,” which includes stepchildren. *Harmon v. Dep't of Soc. and Health Services*, 134 Wn.2d 523, 951 P.2d 770 (1998).¹ The family support statute provides:

The expenses of the family and the education of the children, including stepchildren, are chargeable upon the property of both spouses or both domestic partners, or either of them, and they may be sued jointly or separately. When a petition for dissolution of marriage or state registered domestic partnership or a petition for legal separation is filed, the court may, upon motion of the stepparent, terminate the obligation to support the stepchildren. The obligation to support stepchildren shall cease upon the entry of a decree of dissolution, decree of legal separation, or death.

RCW 26.16.205.

Undisputedly, Respondent's wife is the custodial parent, and he is the custodial stepparent for six children. Appellant further argues that Respondent has no support obligation for his stepchildren because he is not acting as a de facto parent in loco parentis. Brief p. 13. Not only does this argument fail to recognize the statutory obligation to support the

stepchildren, but it mischaracterizes the nature of a loco parentis relationship in this context. Respondent is standing in loco parentis because he intends to have the children reside with him permanently and intends to take on the responsibility of the custodial stepparent. *Compare In re Montell*, 54 Wn. App. 708, 775 P.2d 976. He has a legal obligation both as the stepparent acting as loco parentis, and under RCW 26.16.205 to pay for his stepchildren's support.

Appellant further argues that Mr. Zacapu is not acting in loco parentis because some of the stepchildren's natural fathers are ordered to pay support.² This argument was raised and rejected in *Groves v. State, Dep't of Soc. and Health Services*, 42 Wn. App. 84, 709 P.2d 1213 (1985).

¹ This means that a person cannot actively seek child support under this statute, but it does not negate a legal obligation to support stepchildren residing in one's home.

² Appellant places significant emphasis throughout her briefing on the fact that she is the custodial parent of the parties' natural son, and that the parties' adult daughter resides with her as well. She seems to argue that Respondent has a greater obligation to his natural children and that the court should diminish or disregard his decision to remarry and assume the responsibility of his stepchildren. This position is contrary to public policy. As recognized in *Harmon*, revisions to the statute to allow a downward deviation for the support of other children is guided in part on "the principle that the child support schedule "should not create extraneous negative effects on the major life decisions of either parent. The schedule should avoid creating economic disincentives for remarriage. . . ." 134 Wn.2d at 540.

“Finally, Groves also argues that he should not be held liable for child support because the children’s natural father is paying support. We disagree. . . . Liability for child support is joint and several between natural parents and stepparents.” *Id.* at 87.

Appellant’s effort to rely on *Harmon* for the proposition that Respondent does not have any obligation for his stepchildren is misplaced. *Harmon* did not remove the obligation of a custodial stepparent to provide for the support of the stepchild. Rather, it affirmed that the obligations of a stepparent are not equal to a parent, meaning that the obligation terminates: “we believe the Legislature intended only to distinguish between parents and stepparents to the extent that the obligation, once assumed, would not continue for stepparents beyond the termination of marriage. The parent’s obligation for the support of a child continues and is not dependent on the continuation of the marital relationship.” 134 Wn.2d at 542. This by no means releases a custodial stepparent from providing support for the stepchildren.

The trial court properly determined that Respondent had an obligation to support his stepchildren when considering the downward deviation from the standard calculation of support. The parties’ household circumstances justify the modest deviation arrived at by the trial court. Those undisputed circumstances are that Respondent has a household

consisting of eight people where Appellant has one minor for which she is responsible.

C. The trial court properly awarded the deviation when Appellant offered insufficient evidence that the deviation would not provide adequate resources for the child.

RCW 26.19.075(1) lists reasons the trial court may deviate from the standard calculation of child support. This statutory section, however, is not an exhaustive list. *In re Marriage of Goodell*, 130 Wn. App. 381, 122 P.3d 929 (2005). The trial court still retains the discretion to grant such deviation, which the court of appeals rarely disturbs. *Id.*

The trial court may deviate from the standard calculation based upon consideration of other children in the payor's household for whom that parent is financially responsible: "A trial court may deviate from the standard of child support calculation based upon one parent's financial obligations to children from another relationship who live with him, provided he is fulfilling his obligations to them." *State ex rel. JVG v. Van Guilder*, 137 Wn. App. 417, 154 P.3d 243 (2007). When either or both parent has children from other relationships, deviations "shall be based on consideration of the total circumstances of both households." RCW 26.19.075(1)(e)(iv); *Van Guilder*, 137 Wn. App. at 424. A trial court abuses its discretion by failing to consider the total financial circumstances of both households when one parent has children from another marriage

living in the household and requests a downward deviation. *Van Guilder*, 137 Wn. App. at 425-26, 431.

Notably, RCW 26.19.075(1)(e) does not have any limitation that the children from the other relationship must be natural children. Instead, the statute states: “The court may deviate from the standard calculation when either or both of the parents before the court have children from other relationships to whom the parent owes a duty of support.” The “duty of support” used in RCW 29.19.075(1)(e) means all support obligations, “not merely payments of court-ordered child support.” *Fernando v. Nieswandt*, 87 Wn. App. 103, 940 P.2d 1380 (1997). *See e.g. Burch v. Burch*, 81 Wn. App. 756, 916 P.2d 443 (1996). In *Burch*, after the trial court improperly used children from a later relationship to calculate the standard support obligation, the court of appeals remanded with instruction to calculate the standard support obligation by statute and then consider a downward deviation for “*both* children from the later relationship,” which included a natural child and a stepchild. The trial court in this case properly calculated the standard calculation and then in its discretion made a proper downward deviation. As stated above, Respondent owes a duty of support to his stepchildren who live with him, and this duty was properly considered by the trial court.

Appellant's argues, "the downward deviation the Court ordered left the mother and Dylen with insufficient funds to live on." Brief p. 15. This argument misstates the standard the trial court considers when ordering a downward deviation. The court considers whether the deviation will leave insufficient funds to meet the basic needs of the child, not the child *and the mother*. Notably, "RCW 26.19.075(1)(e) does not mention insufficient funds in the custodial parent's household as a limiting factor in the deviation determination." *Van Guilder*, 137 Wn. App. at 426. The requirement that child support meets a child's basic needs arises from the legislative intent as set forth in RCW 26.19.001. *Id.* Appellant offered no evidence, other than bare assertions, that the child support, after the downward deviation was calculated, left insufficient funds to meet the child's basic needs. Moreover, Appellant's argument on appeal, that the court left *her* and the child with insufficient funds to live on, highlights her perception that the child support payment serves as a sort of maintenance payment to *her* rather than a payment for the support of the child.

In addition, Appellant's argument regarding the downward deviation and the sufficiency of funds in her household ignores material facts. First, even with the downward deviation, the monthly amount Appellant receives in support of one child has increased from \$127.00 to \$350.00 per month. In addition, Appellant includes the income of adults

living in Respondent's home, but fails to include the income of her adult daughter, who she admits lives in her home.³ She further includes the expenses of supporting her daughter and grandchild in her financial declaration (rent, utilities, food for four people). CP 114-18. The residence of the parties' adult daughter and grandchild in Appellant's home increases her household expenses voluntarily. Ironically, Appellant argues that the trial court abused its discretion by considering Respondent's legal obligation to support the *minor* children in his home, and yet, she asks the court to consider her voluntary decision to support her adult daughter and grandchild to find insufficient funds in her household. Appellant provided no evidence that the child support ordered by the trial court would leave her home with insufficient funds to pay for the basic needs of the parties' one minor child, such that the trial court abused its discretion in ordering the downward deviation.

V. CONCLUSION

Respondent owes a duty to support his stepchildren. The court also considered the circumstances of both parent's households in granting

³ The trial court is to consider all income and resources of the parties, new spouses, new domestic partners, and other adults in the household. RCW 26.19.075(2).

a deviation that varied from the standard calculation but still significantly increased the transfer payment. The trial court properly considered this obligation when it ordered the downward deviation. There was no abuse of discretion. This Court is respectfully requested to affirm the trial court.

RESPECTFULLY SUBMITTED this 20th day of July, 2015.

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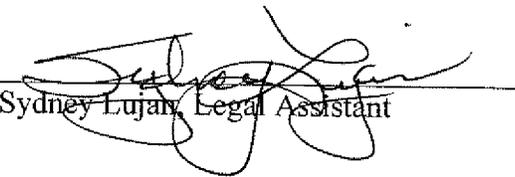
CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July, 2015, I served a true and correct copy of Respondent's Brief upon counsel of record, via the methods noted below, properly addressed as follows:

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DATED this 24th day of July, 2015.


Sydney Lujan, Legal Assistant