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**Division II**  
**State of Washington**  
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Court of Appeals NO. 50986-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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CINDY YEN CHOW  
Petitioner/Appellant,

v.

JAKE CHRISTOPHER COBUN  
Respondent/Respondent.

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APPELLANT'S OPENING BRIEF

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Appeal from the Superior Court of Pierce County,  
Cause No. 16-3-03869-6  
The Honorable Susan K. Serko, Presiding Judge

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## **I. INTRODUCTION**

This appeal is from the trial court's decision to deviate downward from the standard calculation of child support where equity did not require deviation, where there was no evidence presented of increased or decreased expenses of the parties based on the number of days the child spends with Mr. Cobun, and the trial court's written findings were insufficient to support deviation.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court abused its discretion in allowing "a slight residential credit to the Father of \$100.00."<sup>1</sup>

2. Error is assigned to Finding of Fact No. 3 of the Amended Child Support Order, which states:

The Child Support Schedule Worksheets attached or filed separately are approved by the court and made part of this Order.<sup>2</sup>

3. Error is assigned to Paragraph 10 of the Amended Child Support Order, which indicates that the total monthly child support amount is \$462.38 after applying a deviation.<sup>3</sup>

4. Error is assigned to Paragraph 9 of the Final Order and Findings for a Parenting Plan, Res. Sched. and/or Child Support and

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<sup>1</sup> CP 307.

<sup>2</sup> CP 305.

<sup>3</sup> CP 307.

Paragraph 9 to the Amended Child Support, which both state:

Based on RCW 26.09.035, the Court will allow a slight deviation of Father's child support obligation, based on the following:

-Parents' relatively equal income;

-The number of days the child spends with the father ( $\approx 1/3$  of each month) which the Court determines to be significant;

-The circumstances of each household: 1 parent/1 child (when child is with that parent); and

-The fact that neither parent has insufficient income to support his/herself while contributing to support the child.

The Court is allowing a residential credit to the Father of \$100.00. . . . Worksheets are enclosed for attachment to the Final Child Support Order.<sup>4</sup>

5. Error is assigned to the trial court's use and entry into the court file of the unapproved "Residential Schedule Credit Using Formula" worksheet.<sup>5</sup>

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The trial court erred in granting deviation where it would not be inequitable to deny the request for deviation. Assignment of Errors No. 1, 2, 3, 4, and 5.

2. The trial court erred in using and entering into the record an unapproved "Residential Schedule Credit Using Formula" worksheet in

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<sup>4</sup> CP 303; CP 307.

<sup>5</sup> CP 317.

making its decision to grant deviation. Assignment of Errors No. 2 and No. 5.

3. The trial court erred in failing to comply with its mandatory duty under RCW 26.19.075(1)(d) to consider evidence of the increased expenses to Mr. Cobun and the decreased expenses to Ms. Chow resulting from the residential schedule. Assignment of Errors No. 1, 2, 3, 4, 5.

#### IV. STATEMENT OF THE CASE

Mr. Cobun asked the trial court for a deviation from the standard calculation of his child support obligation based on a “Residential Schedule Credit Using Formula” worksheet.<sup>6</sup> The court granted a deviation in the amount of \$100.<sup>7</sup> The **only** evidence presented to the court regarding increased/decreased expenses of the parents based on the residential schedule was Mr. Cobun’s testimony during trial:

Q. And is it your understanding that that's a formula for reduction or a deviation in your support based upon the number of overnights in your proposal?

A. Right; that's correct.

Q. And are you asking the Court for that deviation?

A. Yes.

Q. And what does that change the transfer payment to?

A. Transfer payment credit. Transfer payment is 244.69 after credit.

Q. All right. I take it that based upon your -- let me back up.

I take it based upon the proposed parenting plan, your proposed parenting plan, would you have added cost

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<sup>6</sup> 8/09/17 RP 125, lines 7-15.

<sup>7</sup> 11/17/17 RP 9, lines 23-24.

for Parker in the sense of you would have to transport him more to school, provide more school lunches, kind of all the things that go with being a parent sometimes?

A. For sure; yeah, absolutely.

Q. And I take it that as a result of that, would Ms. Chow theoretically have a deduction in the amount of expenses she would have?

A. Absolutely, yeah. When I got -- you know, when this all happened I got nothing for Parker. I went out and had to buy everything for him all over again, all of his toys, all of his clothes, all of his everything.<sup>8</sup>

## V. ARGUMENT

### A. Standards of Review

This Court reviews a decision to grant deviation for abuse of discretion.<sup>9</sup> Discretion is abused when it is exercised on untenable grounds or for untenable reasons.<sup>10</sup> A discretionary decision is based on untenable grounds if the underlying factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct legal standard.<sup>11</sup> This Court reviews de novo whether a trial court's ruling rests on an erroneous understanding of the law.<sup>12</sup> This Court reviews the application of law to facts de novo.<sup>13</sup>

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<sup>8</sup> 8/09/17 RP 125, lines 10-25; page 126, lines 1-8.

<sup>9</sup> *In re Marriage of Griffin*, 114 Wash.2d 772, 776, 791 P.2d 519 (1990).

<sup>10</sup> *In re Marriage of Littlefield*, 133 Wash.2d 39, 46-47, 940 P.2d 1362 (1997).

<sup>11</sup> *Grandmaster Sheng-Yen Lu v. King Cty.*, 110 Wn. App. 92, 99, 38 P.3d 1040, 1043 (2002) (internal citations omitted).

<sup>12</sup> *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

<sup>13</sup> *State v. Corey*, 181 Wn.App. 272, 276, 325 P.3d 250, review denied, 181 Wn.2d 1008, 335 P.3d 941 (2014).

**B. The trial court abused its discretion in granting a deviation.**

1. No facts in the record and no findings by the trial court support a conclusion that it would be inequitable to deny deviation.

RCW 26.19.076(1)(d) provides, in pertinent part:

The court may deviate from the standard calculation if the child spends a significant amount of time with the parent who is obligated to make a support transfer payment.<sup>14</sup>

However, such discretion has been limited by the courts:

“[d]eviation from the standard support obligation is appropriate **when it would be inequitable not to do so.**”<sup>15</sup> While, in appropriate circumstances, a trial court may grant a deviation from the standard child support calculation under RCW 26.19.075, a deviation is an “exception to the rule and should be used **only** when it would be inequitable to do otherwise.”<sup>16</sup>

“To adequately exercise its discretion, the trial court must take into consideration all factors bearing on the children's needs and the parents' ability to pay.”<sup>17</sup> In this case, the Court's Findings regarding deviation merely acknowledge the parents' “‘relatively equal income,’” the number

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<sup>14</sup> RCW 26.19.075(1)(d).

<sup>15</sup> *In re Marriage of Pollard*, 99 Wn. App. 48, 55, 991 P.2d 1201, 1205 (2000) (citing *In re Marriage of Burch*, 81 Wash.App. 756, 760, 916 P.2d 443 (1996)) (emphasis added).

<sup>16</sup> *In re Marriage of Oakes*, 71 Wn.App. 646, 652 n. 4, 861 P.2d 1065 (1993) (emphasis added).

<sup>17</sup> *Matter of Marriage of Eierdam*, 199 Wn. App. 1030 (2017) at \*1 (unpublished; this Court may accord “such persuasive value as it deems appropriate.” GR 14.1(a)) (citing *In re Marriage of Pollard*, 99 Wn. App. 48, 52–53, 991 P.2d 1201 (2000)).

of days spent with Mr. Cobun (“≈ 1/3 of each month”), the identical “circumstances of each household” (“1 parent/1 child (when child is with that parent”)), and include a single factual finding that both parents have sufficient income to support themselves “while contributing to support the child.”<sup>18</sup>

There are no facts to support a conclusion that a denial of the father’s request for a deviation downward from the standard calculation would be inequitable, and the trial court made no comment or finding that it would be inequitable not to grant a deviation from the standard calculation.<sup>19</sup> Deviations should not “become routine,” but “should be used only when it would be inequitable to do otherwise.”<sup>20</sup> Because no evidence was presented and no finding was made that it would be inequitable to deny deviation, trial court abused its discretion in granting deviation.

2. The trial court abused its discretion by relying on an unapproved worksheet in deciding to grant a deviation downward.

Before 1991, the Washington Child Support Guidelines allowed for a residential credit if a child resided overnight with both parents more

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<sup>18</sup> CP 303, ¶ 9.

<sup>19</sup> CP 303.

<sup>20</sup> *In re Marriage of Oakes*, 71 Wn. App. 646, 652 fn 4, 861 P.2d 1065 (1993).

than 25 percent of the time, i.e., more than 91 nights,<sup>21</sup> and a separate official worksheet provided space for determining the residential credit for each parent.<sup>22</sup>

However, the legislature did not retain this “formula” as a basis to deviate from the standard calculation following the 1991 addition of statutory deviations,<sup>23</sup> and there is no longer an approved worksheet for application of a residential schedule “formula” as a basis for deviation.

RCW 26.19.075(1)(d) now provides that a court “may deviate from the standard calculation if the child spends a significant amount of time with the parent who is obligated to make a support transfer payment,” and has added a specific prohibition and an additional mandatory procedure to be followed by a court considering deviation based on the residential schedule:

The court may not deviate on that basis if the deviation will result in insufficient funds in the household receiving the support to meet the basic needs of the child or if the child is receiving temporary assistance for needy families. When determining the amount of the deviation, the court **shall** consider evidence concerning the increased expenses to a parent making support transfer payments resulting from the significant amount of time spent with that parent and shall consider the decreased expenses, if any, to the party receiving the support resulting from the significant amount

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<sup>21</sup> Helen Donigan, *Calculating and Documenting Child Support Awards Under Washington Law*, 26 GONZ. L.REV. 13, 45 (1991).

<sup>22</sup> *Donigan, supra*, at 45.

<sup>23</sup> See RCW 26.19.075(1)(d); *In re Marriage of Schnurman*, 178 Wash.App. 634, 639–41, 316 P.3d 514 (2013), *review denied*, 180 Wash.2d 1010, 325 P.3d 914 (2014).

of time the child spends with the parent making the support transfer payment.<sup>24</sup>

The term “shall” in a statute imposes a mandatory duty unless a contrary legislative intent is apparent.<sup>25</sup>

In this case, the trial court utilized an unapproved electronically produced “Residential Schedule Credit Using Formula” worksheet based on an “overnight threshold selected” of 91 nights<sup>26</sup> to guide its decision on whether to grant deviation and as a tool to arrive at the amount of the deviation. This document is not included in the mandatory forms and worksheets, but rather, is part of *SupportCalc*, a commercial software product.

RCW 26.09.100(3) prohibits use of “worksheets that vary from the worksheets developed by the administrative office of the courts.” Here, the trial court used<sup>27</sup> and attached an unapproved worksheet to the Worksheets entered on January 10, 2018.<sup>28</sup> The court erred in relying on *SupportCalc*’s “Residential Schedule Credit Using Formula” worksheet to decide that a deviation would be granted or to determine the amount of

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<sup>24</sup> RCW 26.19.075(1)(d) (emphasis added).

<sup>25</sup> *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994).

<sup>26</sup> CP 300.

<sup>27</sup> 11/17/17 RP 8, lines 20-23.

<sup>28</sup> CP 300; CP 317.

the deviation downward.<sup>29</sup> This was a violation of RCW 26.09.100(3), and thus, an abuse of the court's discretion.

3. The court's findings of fact do not support the deviation downward.

Under RCW 26.19.075(1)(d), the court must consider evidence concerning the increased expenses to a parent making support transfer payments resulting from the significant amount of time spent with that parent. The court is also required under the statute to consider the decreased expenses, if any, to the party receiving the support resulting from the significant amount of time the child spends with the parent making the support transfer payment.<sup>30</sup> Here, the trial court arbitrarily granted a deviation downward in the amount of \$100 in the absence of any such evidence whatsoever.<sup>31</sup>

Aside from his general assertion that the residential schedule would "absolutely" increase his expenses and "absolutely" decrease the expenses of Ms. Chow,<sup>32</sup> Mr. Cobun provided no evidence of increased expenses for him

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<sup>29</sup> See *Choate v. Choate*, 143 Wn. App. 235, 242, 177 P.3d 175 (2008) (trial court's reliance on worksheets ("Whole Family Formula Deviation") that varied from worksheets developed by the administrative office of the courts without findings showing consideration of all household circumstances constituted error.)

<sup>30</sup> RCW 26.19.075 (1)(d) (emphasis added).

<sup>31</sup> See 11/17/17 RP page 8, lines 20-25; page 9, lines 1-25; page 10, lines 1-16.

<sup>32</sup> 8/09/17 RP 125, lines 10-25; page 126, lines 1-8.

or decreased expenses for Ms. Chow based on the residential schedule. This case is thus much like *State v. Sigler*, in which the court wrote:<sup>33</sup>

In the revised order of child support the court stated the reason for the deviation was that the father had the child 40.5 percent of the time. The evidence does support a finding that the child spent that amount of time with the father. The State argues that the court did not list any facts which indicate how much the father spends on the child when she is in his care which would justify the reduction in support. The court does fail to enter such findings, and gives no indications how the decrease was calculated. Although Mr. Sigler states how much money he spends on Kristina while she is in his care, the findings and conclusions entered by the judge do not reflect this. Thus, the deviation fails for this reason, as well as for noncompliance with RCW 26.19.075(1)(d).<sup>34</sup>

In this case, the Court's findings of fact are necessarily silent regarding increased or decreased expenses based on the residential schedule because no such evidence was presented by Mr. Cobun. There are no facts in the record to support a deviation in the amount of \$100. "An unsupported deviation is . . . an abuse of discretion."<sup>35</sup> Because the trial court failed to comply with RCW 26.19.075 (1)(d) and because the deviation it granted is unsupported, the trial court abused its discretion.

## VI. CONCLUSION

Without any evidence of increased expenses for Mr. Cobun or decreased expenses for Ms. Chow as a result of the residential schedule,

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<sup>33</sup> *State v. Sigler*, 85 Wn. App. 329, 338, 932 P.2d 710 (1997).

<sup>34</sup> *Id.*

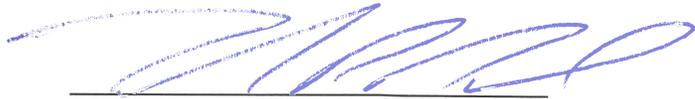
<sup>35</sup> *Choate v. Choate*, 143 Wn. App. 235, 243, 177 P.3d 175 (2008).

the trial court used an unapproved electronic worksheet to calculate a deviation from the standard calculation. After finding the deviation amount generated by the unapproved “Residential Schedule Credit Formula,” the court then arbitrarily “opted” to grant a deviation downward in the amount of \$100.00. This deviation is not supported by facts or findings.

This Court should rule that the trial court abused its discretion in granting deviation and remand for entry of amended final without any deviation from the standard calculation.

DATED this 9<sup>th</sup> day of April, 2018.

Respectfully submitted,

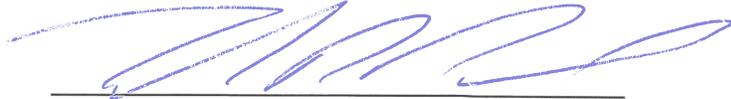


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Certification

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