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No. 50986-5-II

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

CINDY Y. CHOW,
Appellant,

v.

JACOB C. COBUN,
Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

I. STATEMENT OF THE CASE.....1

II. ARGUMENT.....4

A. STANDARDS OF REVIEW.....4

B. THE TRIAL COURT PROPERLY APPLIED RCW 26.19.075 TO GRANT MR. COBUN A SLIGHT DEVIATION IN CHILD SUPPORT.5

C. THE TRIAL COURT PROPERLY DETERMINED MR. COBUN’S RESIDENTIAL DEVIATION AND DID NOT RELY ON UNAPPROVED WORKSHEETS.....9

D. THE TRIAL COURT DID NOT ERR IN MAKING FINDINGS IN SUPPORT OF A DEVIATION IN CHILD SUPPORT.....11

E. MR. COBUN SHOULD BE AWARDED HIS ATTORNEY FEES INCURRED AS A RESULT OF THIS APPEAL.....12

III. CONCLUSION.....13

TABLE OF AUTHORITIES

CASES

<i>Bell v. Bell</i> , 101 Wn.App. 366, 4 P.3d 849 (2000).....	5
<i>Chapman v. Perera</i> , 41 Wn. App. 444, 455-56, 704 P.2d 1224 (1985).....	12
<i>In re Marriage of Fiorito</i> , 112 Wn.App. 657, 50 P.3d 298 (2002).....	5
<i>In re Marriage of Griffin</i> , 114 Wn.2d 772, 791 P.2d 519 (1990).....	4
<i>In re Marriage of Harrington</i> , 85 Wn.App. 613, 935 P.2d 1357 (1997).....	5
<i>In re Marriage of Mattson</i> , 95 Wash. App. 592, 976 P.2d 157 (1999).....	5
<i>In re Marriage of Oakes</i> , 71 Wn.App. 646, 652, 861 P.2d 1065 (1993).....	8, 9
<i>In re Marriage of Schumacher</i> , 100 Wn.App. 208, 997 P.2d 399 (2000).....	4
<i>In re Parentage of A.L.</i> , 185 Wn.App. 226, 340 P.3d 260 (2014).....	6
<i>State ex rel. M.M.G. v. Graham</i> , 159 Wn.2d 623, 152 P.3d 1005 (2007).....	7
<i>State v. Sigler</i> , 85 Win. App. 329, 932 P.2d 710.....	11

STATUTES

RCW 26.09.100.....	9
RCW 26.09.140.....	12
RCW 26.19.001.....	5
RCW 26.19.011.....	6
RCW 26.19.075.....	6, 7, 11
RCW 26.26.625.....	13

RULES

RAP 18.9.....	12
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I. STATEMENT OF THE CASE

The trial court's approval of a minor residential credit to the Respondent's child support obligation underlies this appeal. CP 202.

BACKGROUND

The Appellant is Cindy Chow. The Respondent is Jacob Cobun. Ms. Chow and Mr. Cobun have a minor child together, Parker, born in 2013. 08/09/2017 Verbatim Report of the Proceedings (VRP) 12.

Ms. Chow filed a motion to establish child support on October 6, 2016. CP 117-121. Mr. Cobun Counter Petitioned to establish a parenting plan. CP__ (Response to Petition filed 11/02/16).

The matter proceeded to trial on August 9, 2017. VRP 1. At time of trial testimony provided that the father works as a firefighter working a "modified Detroit" schedule which consists of alternating days off. VRP 103-105. Mr. Cobun sought a residential schedule that provided him with substantial time with their child during his blocks of time off from work. VRP 107-108; Exhibit 8; Exhibit 11.

As part of Mr. Cobun's employment with Central Pierce fire he receives monthly pay in the amount of \$7,414.96. Exhibit 14. Mr. Cobun has numerous mandatory deductions as a result of his employment. Exhibit 14. Ms. Chow is employed as an endodontist in

her own private practice that she recently purchased with a \$1.2 million dollar loan. VRP 10; 36-37. Ms. Chow testified that her business pays her a salary of \$8,000 a month. VRP 43. Ms. Chow believed at that she earned about the same income as Mr. Cobun. VRP 48.

Mr. Cobun sought a residential credit in the amount of approximately \$238 due to his proposed residential schedule providing him approximately 120 overnights a year. VRP 125-126; Exhibit 14. Mr. Cobun testified that as a result of the parenting plan he will have added costs for Parker. VRP 126. Mr. Cobun also testified that due to the proposed parenting plan he anticipates that Ms. Chow will have a reduction of expenses. VRP 126. Mr. Cobun testified that due to their relative incomes he had no reason to believe that a deviation would result in insufficient funds in Ms. Chow's home. VRP 126.

On 09/06/17 the court issued a letter ruling. CP 200-209. The ruling of the court largely adopted Mr. Cobun's proposed parenting plan and provided him with with significant residential time. CP 200-201. The court found Ms. Chow's gross income to be \$8,000 per a month and Mr. Cobun's income to be \$7,577 a month. CP 202. The

court applied these gross incomes to a child support worksheet to determine that the standard calculation for support was \$641.96. CP 202, 204-208. The court found that:

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 (=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 of the child. The Court is allowing a residential credit to Father of \$141.96. CP 202.

A final Child Support Order was entered on September 22, 2017. CP 221-234. The final Child Support Order contained the exact findings made by the trial court in the trial Court's letter ruling. CP 222-223; CP 202.

On 09/29/17 Mr. Cobun moved for reconsideration of the trial Court's ruling as it related to support. CP 239-241. Specifically Mr. Cobun challenged the inclusion of daycare expenses and credits in the child support worksheets. CP 239.241. The matter came before the court on 11/17/17. CP 285-286. The trial court granted Mr. Cobun's

request and issued new child support worksheets without daycare expenses. CP 285-286. An amended final Order of Child Support was entered 01/09/18. CP 287-300. The amended final Order of Child Support provided Mr. Cobun with a minimal child support deviation of \$100 a month for the reasons previously set forth in the trial Court's letter ruling as well as in the written findings. CP 222-223; 288-289.

Ms. Chow timely appealed the trial Court's minor deviation for a residential credit.

II. ARGUMENT

A. STANDARD OF REVIEW

Trial courts are afforded considerable discretion in setting and modifying child support orders, which orders we seldom disturb on appeal. *In re Marriage of Griffin*, 114 Wn.2d 772, 776, 791 P.2d 519 (1990); see also: *In re Marriage of Schumacher*, 100 Wn.App. 208, 211, 997 P.2d 399 (2000). To prevail a party appealing a trial court's decision bears the heavy burden of showing that the trial court's decision to deviate from the standard calculation of child support was a manifest abuse of discretion. *Griffin*, 114 Wn.2d at 776. A manifest abuse of discretion exists if a trial court exercises its discretion on

untenable grounds. *In re Marriage of Harrington*, 85 Wn.App. 613, 624, 935 P.2d 1357 (1997). "This court will not substitute its own judgment for that of the trial court where the record shows that the trial court considered all relevant factors and the award is not unreasonable under the circumstances." *In re Marriage of Fiorito*, 112 Wn.App. 657, 664, 50 P.3d 298 (2002).

The Washington State Legislature created a support schedule that is intended "to insure that child support orders are adequate to meet a child's basic needs and to provide additional child support commensurate with the parents' income, resources, and standard of living." RCW 26.19.001. "A Division Two case recently summed up the goal of child support as follows: '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 children whose parents are divorced.' *Bell v. Bell*, 101 Wn.App. 366, 4 P.3d 849, (Div. 1 2000) quoting *In re Marriage of Mattson*, 95 Wash.App. 592, 599-601, 976 P.2d 157 (1999).

B. THE TRIAL COURT PROPERLY APPLIED RCW 26.19.075 TO GRANT MR. COBUN A SLIGHT DEVIATION IN CHILD SUPPORT.

After determining the standard calculation and nominating the obligor, the trial court, if requested, considers whether it is appropriate to deviate upward or downward from the standard calculation. RCW 26.19.011; *In re Parentage of A.L.*, 185 Wn.App. 226, 340 P.3d 260, (Div. 3 2014). RCW 26.19.075(1)(d) provides in part:

Residential schedule. 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. 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 of time the child spends with the parent making the support transfer payment.

It is undisputed that RCW 26.19.075 vests the trial court with discretion to deviate child support based upon the residential schedule of the parties. The court is prohibited from deviating the

schedule if it would result in insufficient funds in a parent's home. RCW 26.19.075. Mr. Cobun testified during trial that he had no reason to believe that granting a deviation would result in insufficient funds in Ms. Chow's home. VRP 126. Mr. Cobun's testimony was not refuted on this issue. Similarly, the court found the both parties have substantial incomes available to them. CP 222-223. There is no evidence presented that granting a deviation would result in insufficient funds in Ms. Chow's home.

The trial court must enter written findings of fact supporting the reasons for any deviation or denial of a party's request for deviation. RCW 26.19.075(3); *State ex rel. M.M.G. v. Graham*, 159 Wn.2d 623, 627-28, 152 P.3d 1005 (2007). In the present case the court weighed all evidence presented. The trial court properly calculated the basic transfer payment without consideration of any deviation. CP 287-300. After weighing all evidence presented during trial, the court made the following specific findings:

- Parents' relatively equal income;
- The number of days the child spends with the Father (=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 of the child. CP 288-289; CP 303.

The findings clearly indicate that the court considered not only the standard transfer payment but also the financial resources and child rearing expenses presented at time of trial. Both parties submitted financial declarations detailing their expenses at time of trial. Exhibit 3; Exhibit 15.

Ms. Chow appears to take the position that the court must make a specific finding that a denial of a deviation would be inequitable. Brief of Appellant at 6. The Respondent is not aware of any settled law or statute that supports this position. The Appellant appears to rely on Note 4 contained *In re Marriage of Oakes*, 71 Wn.App. 646, 652, 861 P.2d 1065 (1993). *Oakes* is highly distinguishable from the case at hand. *Oakes* dealt exclusively with a split custody situation where each parent primarily had custody of one child. The Court opined that the specific issue before it was not an issue contemplated by the legislature and therefore equities may require a deviation from time to time. *Oakes*, at 652. The *Oaks* Court added dicta in a footnote that provides:

[4] This is not to say that deviations should become routine. They remain the exception to the rule and should be used only when it would be inequitable to do otherwise. We are confident that the trial courts can return to the first principles of dissolution law and exercise their discretion to achieve an equitable result in these cases.

In re Marriage of Oakes, 71 Wn.App. 646, 861 P.2d 1065, (Div. 1 1993).

Clearly the *Oakes* court decided a narrow issue that is not relevant to the matter currently before the court. The evidence presented to the court establishes a basis for the Court's findings and adoption of a slight residential credit and should not be disturbed on appeal.

C. THE TRIAL COURT PROPERLY DETERMINED MR. COBUN'S RESIDENTIAL DEVIATION AND DID NOT RELY ON UNAPPROVED WORKSHEETS.

The Appellant assigns error to the trial Court's use of worksheets. Br. of App. 7. The Appellant relies on RCW 26.09.100(3) to support this argument. RCW 26.09.100(3) reads: (3) Upon motion of a party and without a substantial change of circumstances, the court shall modify the decree to comply with subsection (2) of this section as to installments accruing subsequent to entry of the court's order on the motion for modification. It is unclear to the Respondent how this provision supports the Appellant's position.

In the present case the trial Court used the standard approved child support worksheets to calculate the basic support obligation. CP 287-300. The court performed a calculation using a residential formula based upon the number of overnights the father has under the final parenting plan. CP 300. The court did not adopt this calculation and provided Mr. Cobun less of a deviation than the calculation provides. CP 288. Mr. Cobun provided his own calculation, which was not adopted by the trial Court, as part of Exhibit 14.

The Appellant argues that using the formula for a residential credit is an abuse of discretion. Br. of App. at 9. However, the Appellant provides no law to support their position. The evidence in the present case provides that the court heard testimony from both parties regarding finances, reviewed both parties financial declaration, reviewed proposed child support worksheets and calculations, review financial pay information, and considered the overall resources available to each party when the court independently determined the appropriate amount of a deviation. VRP 125-126; Exhibit 2, 3, 4, 5, 6, 12, 13, 14, 15. The trial court did

not abuse its discretion by calculating a nominal deviation for Mr. Cobun.

D. THE TRIAL COURT DID NOT ERR IN MAKING FINDINGS IN SUPPORT OF A DEVIATION IN CHILD SUPPORT.

The trial court properly considered the evidence presented and RCW 26.19.075(1)(d) in making its determination of a residential credit. The court set forth specific findings in both the Final Child Support Order and Judgment and Findings Establishing Residential Schedule. CP 287-300; 301-304. On reconsideration the court decreased the deviation due to the basic support amount decreasing. 11/17/17 VRP 9. There is nothing in the record to suggest that the court's findings changed in any manner.

The Appellant argues that the court failed to make specific findings as required by RCW 26.19.075(1)(d). The Appellant basis that argument on *State v. Sigler*, 85 Win. App. 329, 932 P.2d 710. The issue in *Sigler* appears to be that the court's findings consisted exclusively of a finding that the child was with the father 40.5% of the time. *Sigler*, 85 Win. App. at 337. In the present case the trial Court's findings demonstrate that the court looked at a wide array of evidence in considering whether a deviation was appropriate and the amount

of the deviation. There is nothing in the record to suggest that the deviation was based only on the fact that Mr. Cobun has substantial time with the child. The findings of the trial court support the minimal deviation granted by the trial court.

E. MR. COBUN SHOULD BE AWARDED HIS ATTORNEY FEES INCURRED AS A RESULT OF THIS APPEAL.

This appeal is frivolous.

RCW 26.09.140 provides that

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs. The court may order that the attorneys' fees be paid directly to the attorney who may enforce the order in his or her name.

RAP 18.9 provides, in pertinent part: "The appellate court on its own initiative or on motion of a party may order a party or counsel . . . who . . . files a frivolous appeal . . . to pay terms . . . to any other party who has been harmed by . . . the failure to comply or to pay sanctions to the court."

"An appeal is frivolous if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists." *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224 (1985) (citations omitted).

The law is well settled regarding deviations for support. The law provides trial courts with vast discretion in awarding or denying a deviation. No evidence has been presented that the trial court abused its discretion in providing Mr. Cobun a very minor deviation. The amount in controversy in the present case is very minimal considering Ms. Chow's income. Mr. Cobun should be awarded his reasonable attorney's fees for the necessity of having to respond.

RCW 26.26.625(3) provides:

(3) Except as otherwise provided in subsection (4) of this section, the court may assess filing fees, reasonable attorneys' fees, fees for genetic testing, other costs, and necessary travel and other reasonable expenses incurred in a proceeding under this section and RCW 26.26.500 through 26.26.620 and 26.26.630. The court may award attorneys' fees, which may be paid directly to the attorney, who may enforce the order in the attorney's own name.

Mr. Cobun has incurred significant legal fees defending this action.

Mr. Cobun has a need for assistance with legal fees and Ms. Chow has the financial ability to pay Mr. Cobun's fees. Mr. Cobun respectfully moves this court for an award of fees and costs.

III. CONCLUSION

Judge Serko was vested with wide discretion to weigh evidence presented at trial and determines what, if any, deviation was appropriate in this matter. The trial Court made specific findings supporting the deviation awarded. The deviation is relatively minor. There is no evidence presented to show that the trial Court abused its discretion in allowing a minor deviation to Mr. Cobun and as such the trial Court's ruling should be affirmed.

Mr. Cobun has been forced to spend significant funds defending this frivolous appeal. The appeal is not grounded in law or fact. In addition, Mr. Cobun has a financial need for assistance with his legal fees and Ms. Chow has the financial ability to pay those fees. Mr. Cobun should be awarded his fees and costs incurred on appeal.

DATED this 1st day of June, 2018.

RESPECTFULLY SUBMITTED,



Andrew Helland, WSBA #43181
Attorney for Jake Cobun

Declaration of Transmittal

Under penalty of perjury under the laws of the State of Washington I affirm the following to be true:

On this date I transmitted the original document to the Washington State Court of Appeals, Division II by the e-filing portal, and delivered a copy of this document via e-mail to:

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Signed at Tacoma, Washington on this 1st day of June, 2018.



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