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NO. 50986-5

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

CINDY YEN CHOW
Petitioner/Appellant,

v.

JAKE CHRISTOPHER COBUN
Respondent/Respondent.

APPELLANT'S REPLY BRIEF

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

Through her undersigned attorney, Appellant Cindy Y. Chow presents this Reply Brief for the Court's consideration.

II. ARGUMENT

A. Deviation from the standard calculation remains “the exception” to the rule.

Respondent characterizes the trial court's discretion in “awarding or denying a deviation” as “vast.”¹ However broad that discretion may be, it should rarely be used. “We note. . . that deviation from the standard support obligation **remains** the exception to the rule and should be used only where it would be inequitable not to do so.”² Contrary to Respondent's argument at page 8 of her Brief, this principle is not based on the “narrow issue” before the *Oakes* court. In fact, as the *Oakes* language makes clear, the principal preexisted the *Oakes* decision.

B. As a matter of law, the trial court abused its discretion by using a worksheet that varies from the worksheets developed by the administrative office of the courts.

At page 10 of her Brief, Respondent asserts that “[t]he court performed a calculation using a residential formula based upon the number of overnights the father has under the final parenting plan,” but “did not

¹ Response brief, page 13.

² *In re Marriage of Oakes*, 71 Wn. App. 646, 652 fn 4, 861 P.2d 1065 (1993) (emphasis added). See also *Burch v. Burch*, 81 Wn. App. 756, 761-762, 916 P.2d 443 (1996); *In re Marriage of Pollard*, 99 Wn. App. 48, 55, 991 P.2d 1201, 1205 (2000); *In re Marriage of Selley*, 189 Wn. App. 957, 960, 359 P.3d 891 (2015).

adopt that calculation.” In fact, the court stated that the “residential schedule credit formula” is “what [it] used in order to make [its] deviating decision.”³ Respondent also asserts that Ms. Chow provided “no law to support” her position that use of the “residential schedule credit formula” and inclusion of the SupportCalc worksheet as part of the Worksheets constituted an abuse of discretion. RCW 26.19.035(3)⁴ provides:

Worksheets in the form developed by the administrative office of the courts shall be completed under penalty of perjury and filed in every proceeding in which child support is determined. **The court shall not accept incomplete worksheets or worksheets that vary from the worksheets developed by the administrative office of the courts.**

Emphasis added. The prohibition against accepting “worksheets that vary from the worksheets developed by the administrative office of the courts” is repeated in Paragraph 4 of the Definitions and Standards set out in the Appendix to Chapter 26.19 RCW. The term “shall” in a statute imposes a mandatory duty unless a contrary legislative intent is apparent⁵; thus, the court had a mandatory duty not to accept -- much less utilize -- the SupportCalc worksheet.

In this case, the court not only accepted a worksheet that varied from worksheets developed by the administrative office of the courts, but

¹¹ 11/17/17 RP 8, lines 20-23.

⁴ Appellant erroneously cited RCW 26.09.100(3) as the source of this language in her Opening Brief, with apologies to the Court and to Respondent.

⁵ *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994).

used it to “make [its] deviating decision” and entered it into the court file. The court violated RCW 26.09.036(3), and therefore, abused its discretion.

C. The amount of the deviation granted by the trial court is factually baseless.

1. The deviation was granted solely on the basis of the residential schedule.

At page 12 of his Response Brief, Mr. Chow asserts that “[t]here 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.” To the contrary, Mr. Chow himself testified that he was “asking the Court for [a] deviation” that was “based upon the number of overnights in [his propos[ed parenting plan].”⁶ The court granted a deviation solely on the basis of the residential schedule.⁷

2. The amount of the deviation is not based on the evidence presented to the court.

After using the SupportCalc “formula” to make the decision to grant a deviation on the basis of the residential schedule, the Court explained how it arrived at the amount of the deviation:

THE COURT: You also need to do the residential schedule credit using the formula, which I did as well -- which you -- maybe you did it. I don't remember.

THE JUDICIAL ASSISTANT: I did it.
(The Judicial Assistant prints out worksheets.)

⁶ 08/09/17 RP 125, lines 7-15.

⁷ See 11/17/17 RP 8, lines 12-25; page 9, lines 1-8; CP 234.

THE COURT: Okay. So let me tell you what it says. It is different, Mr. Patrick; it is different.

MR. PATRICK: Does it come out to 562.38?

THE COURT: It does, **but it doesn't come out to 562.38 on the original residential schedule credit formula, and that's what I used in order to make my deviating decision.** In the original worksheets, the amount on the residential credit calculation is 641.96 less the residential credit of 214.00 for 427.72; but I determined I wasn't going to give that much of a residential credit.

MR. PATRICK: I'm following you.

THE COURT: On this worksheet, the bottom line is 562.38, not the 600 number; and the residential credit is 214.24 for a net of 348.14. I am not going to give him that much of a residential credit. I am going to give him some residential credit and **I'm going to give him a hundred dollars because this calculation has now all been done.**⁸

The court's decision on the amount of the deviation constituted an abuse of discretion because:

a trial court is required to enter written findings of fact supported by the evidence when it enters an amount for support which deviates from the standard calculation. RCW 26.19.035(2); *In re Marriage of Sacco*, 114 Wash.2d 1, 4, 784 P.2d 1266 (1990). The failure to enter findings is an abuse of discretion and subject to reversal. *In re Marriage of Glass*, 67 Wash.App. 378, 384, 835 P.2d 1054 (1992).⁹

⁸ RP 8, lines 12-25; page 9, lines 1-8 (emphasis added). "The legislature did not retain this formula for residential credit against child support with the 1991 addition of statutory deviations." *In re Marriage of Schnurman*, 178 Wn. App. 634, 640, 316 P.3d 514 (2013).

⁹ *State on Behalf of Sigler v. Sigler*, 85 Wn. App. 329, 338, 932 P.2d 710, (1997).

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

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.

Emphasis added.

RCW 26.19.076 (1)(d) imposes a mandatory duty on a trial court determining the amount of a deviation: it must “consider evidence” of the increased/decreased expenses that would result from the residential schedule. In this case, the parties presented no evidence whatsoever of increased or decreased expenses that would result from the residential schedule. In other words, the trial court had **no basis** for “determining the amount of the deviation.” Instead, as the record reveals, the court arbitrarily selected the tidy sum of \$100, which amount is **not supported by any evidence in the record.**

At pages 10-11 of Mr. Cobun’s Brief, he argues that the trial court “did not abuse its discretion by calculating a nominal deviation for Mr. Cobun” because it heard the parties’ testimony regarding finances, and reviewed their financial declarations, proposed child support worksheets,

and financial information. However, the trial court did not “calculate” the amount of the deviation granted because it had no figures upon which to base a calculation. None of the evidence identified by Mr. Cobun included the amounts expended or saved because of the residential schedule. The \$100 deviation is not based upon the court’s consideration of the evidence described in RCW RCW 26.19.076(1)(d), contrary to the mandate of that statute.

At page 11 of his Brief, Mr. Cobun mischaracterizes the facts of the *Sigler* case, writing “[t]he 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.” What the *Sigler* Court actually wrote was this:

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).**¹⁰

¹⁰ *Sigler*, 85 Wn. App. at 338, 932 P.2d 710.

Likewise, in this case the court's findings related to the deviation include "the number of days spent with Mr. Cobun ($\approx 1/3$ of each month)".¹¹ As set out above, "the number of days spent with Mr. Cobun" was the sole basis for seeking and granting a deviation in this case.

In *Sigler*, the father actually provided evidence about "how much money he spends on Kristine while she is in his care," but the *Sigler* trial court entered no findings that reflected this information. Like the court in *Sigler*, Judge Serko "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." In this case, Mr. Cobun did not even provide that information to the court.

As in *Sigler*, the deviation in this case "fails" for two reasons: (1) the court's failure to set out specific findings regarding how much Mr. Cobun spends while his son is in his care, and (2) the failure to comply with RCW 26.19.075(1)(d). As in *Sigler*, this Court should reverse the trial court's grant of a deviation from the standard calculation.

D. This appeal is not "frivolous."

Under RAP 18.9(a), this Court may award attorney fees as sanctions, terms, or compensatory damages when a party files a frivolous

¹¹ CP 303, ¶ 9.

appeal.¹² An appeal is frivolous if, “considering the action in its entirety, it cannot be supported by any rational argument based in law or fact.”¹³ An unsuccessful appeal is not automatically frivolous.¹⁴ “[A]ll doubts as to whether an appeal is frivolous are resolved in favor of the appellant.”¹⁵

Ms. Chow has presented both factual and legal support for her claim that the trial court erred in granting the deviation in the amount of \$100, and has made valid arguments based on the law and facts. This appeal is not frivolous and there is no basis for sanctions, terms, or compensatory damages under RAP 18.9.

Mr. Cobun also quotes RCW 26.26.625(3) to support his request for attorney’s fees, followed by three sentences stating:

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.

Chapter 26.26 RCW is the Uniform Parentage Act. RCW 26.26.625 is titled “Order adjudicating parentage.” RCW 26.26.625(3) provides:

Except as otherwise provided in subsection (4) of this section, the court may assess filing fees, reasonable

¹² *Advocates for Responsible Development v. Western Washington Growth Management Hearings Bd.*, 170 Wn.2d 577, 580, 245 P.3d 764 (2010).

¹³ *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 785, 275 P.3d 339, review denied, 175 Wn.2d 1008 (2012).

¹⁴ *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 220, 304 P.3d 914, review denied, 178 Wn.2d 1022 (2013).

¹⁵ *Kinney v. Cook*, 150 Wn. App. 187, 195, 208 P.3d 1 (2009).

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. (Emphasis added.)

RCW 26.26.625 does not apply to this action. Attorney's fees are not available to Mr. Cobun under this statute. This Court should decline to award fees to Mr. Cobun.

III. CONCLUSION

Because the trial court abused its discretion in granting a deviation in the amount of \$100, the Court should reverse the trial court's grant of the deviation. The Court should decline Mr. Cobun's request for attorney's fees because this appeal is not "frivolous," and because Chapter 26.26 RCW does not apply to this case.

Respectfully submitted this 25th day of June, 2018.



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Certification

I hereby certify under penalty of perjury under the laws of the State of Washington that on June 25, 2018 I transmitted the original document above to the Washington State Court of Appeals, Division II by the e-filing portal, and delivered a copy of this document via EMAIL to andrew@hellandlawgroup.com to:

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