

FILED
Court of Appeals
Division II
State of Washington
7/2/2018 8:00 AM
No.: 52037-1-II

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

In re the Marriage of:

KATIE WICKSTROM,

Appellant,

and

VANCE WICKSTROM,

Respondent.

BRIEF OF APPELLANT

Charles P. Shane, WSBA # 33250
Attorney for Appellant

The Law Office of Charlie Shane, PLLC
755 Winslow Way E. Suite 207
Bainbridge Island, WA 98110
Phone (206) 201-3655
Charlie@CharlieShane.com

I. TABLE OF CONTENTS

Contents

I. TABLE OF CONTENTS	1
II. TABLE OF AUTHORITIES.....	2
Cases	2
Statutes	2
III. ASSIGNMENTS OF ERROR	3
IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	3
V. STATEMENT OF THE CASE	4
VI. ARGUMENT	7
VII. CONCLUSION.....	15

II. TABLE OF AUTHORITIES

Cases

<i>In re Marriage of Arvey</i> , 77 Wn. App. 817, 894 P.2d 1346 (1995)..	8,
9, 10, 12	
<i>In re Marriage of Choate</i> , 143 Wn. App. 235, 240, 177 P.3d 175, 177 (2008)	7, 10, 11
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 45, 940 P.2d 1362, 1366 (1997)	7
<i>State ex rel. Stout v. Stout</i> , 89 Wn. App 118, 124, 948 P.2d 851, 854 (1997)	7

Statutes

RCW 26.09.170.....	12
Revised Code of Washington 26.09.140.....	14

III. ASSIGNMENTS OF ERROR

No. 1 The trial court erred by modifying the child support order dated July 31, 2017.

No. 2 The trial court erred by entering Mr. Wickstrom's "Final Order and Findings on Petition to Modify Child Support Order" and "Child Support Order and Worksheet" dated March 18, 2018.

No. 3 The trial court erred in modifying the child support order of July 17, 2017 by granting a deviation without substantial evidence justifying the modification or supporting the deviation.

No. 4 The trial court erred by granting a deviation without written findings based on substantial evidence.

No. 5 The trial court erred in finding the change of circumstances for the modification was unanticipated.

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

No. 1 Presenting declarations only, devoid of any documentation or evidentiary support, is not sufficient evidence to modify a child support order and/or grant a deviation.

No. 2 The “Residential Credit Formula” is not a sufficient factual basis for a deviation.

No. 3 If a guardian ad litem expressly recommends equal residential time with the children if a party is able to move near the other party, and that party is able to move near the other party before trial, the court following the guardian ad litem’s recommendation is a contemplated change of circumstance.

No. 4 If parties come to an agreement regarding child support before a trial to establish a permanent parenting plan, and the parties go to the trial to establish a parenting plan, the court ruling on the parenting plan is an event contemplated by the parties.

V. STATEMENT OF THE CASE

This case arises out of a dissolution. On February 10, 2017, the guardian ad litem for the case filed a report with the court. CP 1-6. The report recommended that the parties share a 50/50 visitation arrangement if the respondent (herein “Mr. Wickstrom”) was able to move closer to the Appellant, Ms. Wickstrom, who now goes by “Carrico” (herein “Ms. Carrico”). *Id.* That same day, the parties had a settlement conference. RP, February 10, 2017. The parties were

able to settle all matters relating to the dissolution, except the parenting plan. *Id.*

Specifically, the parties reached an agreement regarding maintenance, property and debt division, and, most notably, child support. *Id.* The parties put their agreement on the record as a CR 2A agreement. *Id.* The only issue that was still in dispute was the parenting plan. RP, February 10, 2017. Pursuant to the CR 2A agreement, and just before trial on the parenting plan, on July 31, 2017, the findings of fact and conclusions of law, the decree of dissolution, and the child support order and worksheet were entered. CP 8-20, 227-233.

On August 31, 2017, a two-day trial was held. CP 21-26. Mr. Wickstrom was able to move closer to the children at or about trial and the court ultimately followed the guardian ad litem's recommendation and ruled in favor of Mr. Wickstrom, ordering a parenting plan with each party sharing residential time with children equally. CP 21-26, 107-113. The final parenting plan was entered on September 15, 2017. CP 235-48. On November 30, 2017, Mr. Wickstrom filed a petition to modify the child support order. CP 27-32. His petition was based on the trial court's decision to allow a 50/50 residential time parenting plan. *Id.* He sought a residential

credit/deviation, to add a day care provision, to have the starting date of the new support order go back to September of 2017 (two months before the petition was filed), and to apply all child support payments toward the overpayment until it was paid off. *Id.*

Mr. Wickstrom did not seek to change the income figures in the worksheet. See *Id.* and CP 139-154, 249-255. Mr. Wickstrom provided no financial documents to the court. The only thing Mr. Wickstrom supplied to the court in support of his contentions were three declarations. The court ruled that the trial result was unanticipated by the parties and there was a substantial change in circumstances. CP 107-113. The court added a day care provision and applied child support modification retroactively. CP 139-154. The court allowed a deviation, based on a "residential credit formula," in child support dropping the transfer amount from \$1,372.76 to \$357 and dropping even further to \$180 to allow repayment of the overpayment. CP 139-154. In the modified support order, the only fact the court gave in the support order for the deviation was "The residential credit formula." CP 141.

VI. ARGUMENT

The Trial Court Abused its Discretion because it Modified a Child Support Order without Substantial Evidence Supporting its Decision

A child support modification will not be reversed absent a “manifest abuse of discretion” *In re Marriage of Choate*, 143 Wn. App. 235, 240, 177 P.3d 175, 177 (2008).

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the 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 standard.

In re Marriage of Littlefield, 133 Wn.2d 39, 45, 940 P.2d 1362, 1366 (1997)(citations omitted).

The court in *State ex rel. Stout v. Stout*, 89 Wn. App 118, 124, 948 P.2d 851, 854 (1997) succinctly set forth the factual standard for support modifications when it stated: **“In a modification proceeding, a trial court is required to set forth written findings of fact, which must be supported by substantial evidence and justify the court’s conclusion.”**

(Emphasis added). An example of failing to provide substantial evidence in support of a child support modification is found in *In re Marriage of Arvey*, 77 Wn. App. 817, 894 P.2d 1346 (1995)

In *Arvey*, the appellant, Richard, was seeking a modification of a child support order. *Id.* Richard stated that there was a substantial change in circumstance justifying a modification because, inter alia, he became the primary residential parent of Aaron, one of his two children. *Arvey*, 77 Wn. App. at 819, 894 P.2d 1347. The trial court did not find that to be a basis for a substantial change in circumstances because Richard did not present any evidence that the increase in his residential time resulted in a significant increase in his expenses, stating:

With regards to the change in Aaron's residential schedule, there has not been any evidence presented to this Court that indicates that there has been a significant increase in expenses as a result of the change in the residential schedule from approximately 34 percent to 60 percent.

I tried to look through the financial affidavits and even his checking account records to see if I could see any figures that were denominated as being directly due to Aaron. And in terms of the fact that the residential schedule and the change in that residential schedule has made a substantial change in circumstances, I cannot make that finding[.]

Id. at 827, 1352 n. 3.

The court sustained the trial court's decision of not finding a substantial change in circumstances:

Richard voluntarily assumed primary caretaking responsibilities for Aaron, which necessarily included an additional financial burden. In any event, even if we viewed the residential change as being outside the language of the decree, the record is devoid of any documentary evidence, aside from Richard's declaration, showing that the change in residence significantly affected his expenses...Under these circumstances, we therefore find that the trial court did not abuse its discretion by refusing to find a substantial change of circumstances and by denying Richard's petition for modification.

Arvey, 77 Wn. App at 821-822, 894 P.2d 1348-1349

(footnotes omitted).¹

In the case before the court, Mr. Wickstrom presented only declarations and the fact of an increase in residential time in support of his contention that there had been a substantial change in circumstances. See CP 27-32, 36-59, 90-93. Other than Mr. Wickstrom's contentions in his declarations, Mr. Wickstrom's submission to the trial court was devoid of any documentary evidence showing a significant increase in his expenses due to his

¹ Note that the court ultimately did allow a modification but that was because it was a "split custody" arrangement. *Arvey*, 77 Wn. App at 822-827; 894 P.2d 1349-1352. The case before the court is a shared residential arrangement, not a split custody arrangement. CP 235-248.

increase in residential time. This is no different than the *Arvey* case in that in both cases neither party submitted substantial evidence in support of a substantial change of circumstances necessary for a support modification. In fact, it is interesting to note that the trial court *Arvey*, unlike this trial court, at least had checking account statements, in addition to the declarations, before it and it still did not find there to be sufficient evidence of a significant increase in expense due the increase in residential time. *Arvey*, 77 Wn. App at 827, 894 P.2d at 1352 n. 3.

The Court Abused its Discretion by Granting a Deviation Without Written Findings of Fact Supported by Substantial Evidence

“An unsupported deviation is...an abuse of discretion.” *Choate*, 143 Wn. App. at 243, 177 P.3d at 178. The court further stated, “Written findings of fact supported by substantial evidence are required when a trial court deviates from the standard support calculation.” *Id.* at 244, 179. In *Choate*, the trial court mechanically applied “The Whole Family Formula” simply because the father had a child from a new relationship and it granted a downward deviation. *Id.* at 238, 176. Other than acknowledging that there was a new child, the trial court did not make findings of fact supporting the downward

deviation. *Id.* at 240, 176-177. In fact, the only reason the court gave in support of the deviation was “Whole Family Formula applied.” *Id.* at 242, 178. Because the trial court did not enter findings supported by substantial evidence, the court reversed the trial court. *Id.* at 244, 179.

This case is no different than *Choate*. Here, in reference to the deviation, the trial court simply acknowledged that the residential schedule changed to give Mr. Wickstrom significant time with the children. CP 139-154. Like the *Choate* trial court only giving the reason of “Whole Family Formula applied,” here the trial court only gave the reason of “Residential Credit Formula.” CP 141. There are no facts listed in support of the trial court’s decision to apply a deviation. As was discussed *supra*, there was little evidence before the court, let alone substantial evidence, in support of Mr. Wickstrom’s belief that a downward deviation should have been applied.²

In addition, the court has no findings or evidence in support of applying the so called “Residential Credit Formula.” The application

² Without evidence supporting them, Mr. Wickstrom’s declarations are nothing more than unsupported contentions regarding his financial and living situation.

by the trial court of the Residential Credit Formula was completely arbitrary and capricious, devoid of any factual basis or evidence in support of its application. The trial court's application of a downward deviation and the Residential Credit Formula was unsupported and an abuse of discretion.

The Trial Court Erred in Finding that its Decision Regarding the Parenting Plan at Trial was an Uncontemplated Change of Circumstance

“To succeed on a motion to modify child support, the moving party must show a substantial change of circumstances since the entry of the dissolution decree. RCW 26.09.170. The change of circumstances must have been unanticipated at the time the decree was entered.” *Arvey*, 77 Wn. App at 820, 894 P.2d at 1348. In the present case, the parties entered into an agreement regarding child support on February 10, 2017. RP, February 10, 2017. At that time, two facts were contemplated by and unequivocally known to the parties: 1. If Mr. Wickstrom could move closer to the children, the guardian ad litem would recommend an equal shared visitation schedule and 2. The court had yet to rule on the disputed parenting plan. *Id.* Just prior to trial, a child support order reflecting the

agreement was entered, and Mr. Wickstrom was able to move closer to the children. CP 8-20, 21-26; See 107-113. The court then followed the guardian ad litem's recommendation at trial, ordering an equal shared visitation schedule. CP 21-26, 235-248.

The court found that its ruling at trial was an unanticipated change of circumstances. CP 107-113. The court abused its discretion in two regards. First, the parties all contemplated what the recommendation of the guardian ad litem would be as they had the recommendation, in writing, before them when they reached an agreement regarding child support. They contemplated that if Mr. Wickstrom could move near the children at or before trial, that the trial court could, and likely would, follow that recommendation. This is exactly what happened. It makes no sense that the trial court would rule that this was unanticipated, when that recommendation was given to the parties, in writing, well before trial.

Second, even if the court were to disregard the guardian ad litem's explicit recommendation, the event of the trial court reaching a decision regarding the parenting plan was still contemplated by the parties when they reached an agreement regarding child support. At the time the parties reached an agreement, and at the time the child support order was entered, it was clear that the parties disputed the

parenting plan. See RP, February 10, 2017. The parties contemplated that the court would reach a decision at trial regarding that dispute. That contemplated event did indeed occur. Not knowing exactly how an event would unfold, does not change the fact that the parties contemplated an event would happen. Either way, the trial court abused its discretion in finding that its ruling on the parenting plan, and even how it ruled, was an unanticipated event.

Attorney Fees Should be Awarded to the Ms. Carrico Based on Disparity of Income

Revised Code of Washington 26.09.140 allows the court to award attorney fees due to disparity of income. The court should view the incomes on the worksheet as a matter of fact since the worksheets were not disputed by either party. Based on the worksheet, Ms. Carrico's net income is \$2,446 (imputed) and Mr. Wickstrom's net income is \$5,101.06. CP 139-154. Mr. Wickstrom makes over twice the amount of Ms. Carrico's imputed income. Because of the great disparity of income, Ms. Carrico is requesting attorney fees.

VII. CONCLUSION

Ms. Carrico is requesting that the court remand the matter to the trial court to vacate the support order and order on modification of March 16, 2018 and enter a new order denying the modification, finding that there had not been a substantial unanticipated change in circumstances. Further, Ms. Carrico requests an award of fees based on disparity of income.

Dated this 30th day of June, 2018

The Law Office of Charlie Shane, PLLC

A handwritten signature in black ink, appearing to read "Charles P. Shane", written over a horizontal line.

Charles P. Shane, WSBA # 33250
Attorney for Appellant, Katie Carrico FKA
Wickstrom

THE LAW OFFICE OF CHARLIE SHANE, PLLC

June 30, 2018 - 2:31 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52037-1
Appellate Court Case Title: Katie Michelle Wickstrom, Appellant v. Vance Kalynn Wickstrom, Respondent
Superior Court Case Number: 16-3-00557-3

The following documents have been uploaded:

- 520371_Briefs_20180630142809D2934364_6175.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Wickstrom Appellant Brief S.pdf

A copy of the uploaded files will be sent to:

- sarah@sarhsanneslaw.com

Comments:

Sender Name: Charles Shane - Email: Charlie@CharlieShane.com
Address:
755 WINSLOW WAY E STE 207
BAINBRIDGE ISLAND, WA, 98110-2483
Phone: 206-201-3655

Note: The Filing Id is 20180630142809D2934364