

FILED

OCT 28 2010

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DIVISION III
STATE OF WASHINGTON
BY _____

NO. 289184-III

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OF THE STATE OF WASHINGTON

MARIA RICCIARDELLI (FKA BRO),

Respondent,

vs.

THOMAS ILMAR BRO,

Appellant.

REPLY BRIEF OF APPELLANT

Thomas M. Smith
WSBA #0687
Attorney for Appellant

Thomas M. Smith
Attorney at Law
P.O. Box 1360
Spokane, WA 99210
(509) 327-9902

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I. INTRODUCTION

With strictly limited exceptions, state law prohibits a child support award that reduces the obligor's net income below the self-support reserve of one hundred twenty-five percent of the federal poverty level. Appellant Thomas Bro's child support payment unquestionably violates this prohibition. In claiming the contrary, Respondent Maria Ricciardelli misstates Mr. Bro's child support transfer payment by half and applies the wrong self-support reserve. The trial court awarded Ms. Ricciardelli \$219.50 per child for a total monthly payment of \$439, or \$5,268 per year. Mr. Bro, with a family of at least three, is entitled to a self-support reserve of \$22,887.50 per year. Requiring Mr. Bro to pay this amount reduces his net income below the self-support reserve by more than \$10,750 annually. This violates state law and constitutes an abuse of the trial court's discretion.

Indeed, Mr. Bro should not have to pay child support at all. The trial court also erred in naming Mr. Bro the "obligor" where he shares equal custody with the children's mother and where the court found the parties' incomes substantially similar. While the court retains discretion to deviate from the standard support calculation, as Ms. Ricciardelli claims, the court abused that discretion here, where the shared custody arrangement and the parties' substantially similar incomes virtually

demand such a deviation. This court should reverse the support award on both of these grounds.

II. ARGUMENT

A. **Mr. Bro's Child Support Transfer Payment Reduces His Net Income Below the Statutory Self-Support Reserve. Ms. Ricciardelli Misstates Mr. Bro's Payment and Applies the Wrong Standard in Claiming the Contrary.**

With two narrowly drawn exceptions, a court may not impose a child support award that reduces the obligor's net income below the self-support reserve of one hundred twenty-five percent of the federal poverty level.¹ In an abbreviated attempt to argue this point, Ms. Ricciardelli asserts, citing no legal authority, that the "Federal Poverty Guideline analysis...has been abandoned in favor of the 1.12 Self Support Reserve analysis." Response Brief of Respondent ("Brief of Respondent"), p.5.

¹ The only exceptions to this rule are the presumptive fifty dollar minimum support payment and cases where it would be "unjust" to apply the self support reserve given the circumstances. The relevant statute provides:

(b) The basic support obligation of the parent making the transfer payment, excluding health care, day care, and special child-rearing expenses, shall not reduce his or her net income below the self-support reserve of one hundred twenty-five percent of the federal poverty level, except for the presumptive minimum payment of fifty dollars per child per month or when it would be unjust to apply the self-support reserve limitation after considering the best interests of the child and the circumstances of each parent. Such circumstances include, but are not limited to, leaving insufficient funds in the custodial parent's household to meet the basic needs of the child, comparative hardship to the affected households, assets or liabilities, and earning capacity....

See RCW 26.19.065(2)(b).

Ms. Ricciardelli's claim is confusing and wrong. RCW 26.19.065(2)(b) defines the self-support reserve, which it bases on the federal poverty level. RCW 26.19.065(2)(b).

As of January 2009, in which the current guidelines took effect, the respective federal poverty levels for families of one, two, and three are \$10,830, \$14,570 and \$18,310, per year.² One hundred twenty-five percent of those amounts are \$13,537.50, \$18,212.40 and \$22,887.50 per year, respectively.³

Ms. Ricciardelli correctly notes that the trial court imputed a monthly net income of \$1,450.00 per month to Mr. Bro. Ms. Ricciardelli misstates, however, Mr. Bro's child support transfer payment and its impact on his income. Ms. Ricciardelli incorrectly argues Mr. Bro must pay \$219.50 per month, thus reducing his monthly income to \$1,231.00. Brief of Respondent, p.2. That is wrong. The trial court imposed a monthly payment of \$219.50 per child, making his total payment of \$439.00. (CP 109-110)⁴ That payment reduces Mr. Bro's net monthly income to \$1,011,⁵ or \$12,132 per year. The trial court thus imposed a child support payment on Mr. Bro that reduces Mr. Bro's net income

² As of that date, the federal poverty level for a family of one in the 48 contiguous states was \$10,830 per year. *Federal Register*, Vol. 74, No. 14, January 23, 2009, pp. 4199-4201.

³ \$10,830, \$14,570 and \$18,310 multiplied by 1.25, or one hundred twenty-five percent.

⁴ All parenthetical "CP" notations refer to page numbers from the Clerk's Papers.

⁵ \$1,450.00-\$439.00 = \$1,011.00.

below the statutory self-support reserve for a family of one by more than \$1,400 per year.⁶

The trial court's error is even worse than that, because Mr. Bro's is hardly a family of one.⁷ Mr. Bro is married and cares for two children for half of every year, making his a family of at least three by any reasonable interpretation. As explained above, the federal poverty levels for families of two and three are \$14,570 and \$18,310, per year, respectively. One hundred twenty-five percent of those amounts are \$18,212.40 and \$22,887.50 per year, or \$1,517.70 and \$1,907.29 per month. Mr. Bro's support payment thus reduces his monthly net income below these amounts by \$506.70 and \$896.29, respectively. While the larger number is the appropriate basis of comparison, either number places Mr. Bro's entire support payment in plain violation of Washington law. The trial court abused its discretion when it imposed a payment that reduces Mr. Bro's income well below the statutory self-support reserve.

B. The Court Abused Its Discretion by Designating Mr. Bro an "Obligor", Imposing a Child Support Payment on Him, and Refusing to Deviate from the Standard Calculation Where Both Parents Equally Share Custody of Their Children.

Whether or not a court deviates from the standard child support calculation, it must enter findings and conclusions that support its

⁶ One hundred twenty-five percent of the self-support reserve for a family of one equals \$13,537.50 per year. $\$13,537.50 - \$12,132.00 = \$1,405.50$.

decision. RCW 26.19.035(2).⁸ It failed to do that here. The trial court cannot justify imposing an exorbitant support payment on a father whose income is substantially similar to the mother's and who shares equal custody with her. Both of those facts counsel strongly in favor of eliminating Mr. Bro's support payment. While Mr. Bro recognizes the court's discretion in determining whether to deviate from the standard support calculation, the court abused that discretion here—by imposing a high support payment where circumstances counsel strongly against it.

Washington law recognizes shared custody of children as a compelling reason to deviate from the standard child support calculation. It allows courts to deviate if the children spend substantial time with the parent who would normally pay child support. RCW 26.19.075(1)(d). Whether or not a court deviates, however, the law does not require one parent—known as the “obligor”—to pay child support to the other.⁹ *In*

⁷ Ms. Ricciardelli incorrectly assumes that the self-support reserve for a family of one, or \$1,128, is the applicable standard. It is not, as demonstrated here.

⁸ “(2) *Written findings of fact supported by the evidence.* An order for child support shall be supported by written findings of fact upon which the support determination is based and shall include reasons for any deviation from the standard calculation and reasons for denial of a party's request for deviation from the standard calculation. The court shall enter written findings of fact in all cases whether or not the court: (a) Sets the support at the presumptive amount, for combined monthly net incomes below five thousand dollars; (b) sets the support at an advisory amount, for combined monthly net incomes between five thousand and seven thousand dollars; or (c) deviates from the presumptive or advisory amounts.” RCW 26.19.035(2).

⁹ “Nothing in RCW 26.19.075 requires that each parent make a payment to the other or assumes that the parent with the greater presumptive support obligation will be responsible for a net transfer payment. Instead, RCW 26.19.075(2) merely affirms that absent a basis for deviation, each parent will pay the amount of the standard calculation

re Marriage of Holmes, 128 Wn. App. 727, 738, 117 P.3d 370, 375 (2005). Historically, courts require a support transfer payment where the children reside mostly with the non-obligor parent. *State ex rel. M.M.G. v. Graham*, 123 Wn. App. 931, 939, 99 P.3d 1248, 1252 (2004), *aff'd in part, rev'd in part on other grounds, State v. Graham*, 159 Wn. 2d 623, 152 P.3d 1005 (2007);¹⁰ *see also Holmes*, 128 Wn. App. at 738, 117 P.3d at 375 (“Child support payments have historically been the obligation of the noncustodial parent”). The custodial parent fulfills his obligation by caring for the children. The legislature has not changed that presumption. *Holmes*, 128 Wn. App. at 739-41, 117 P.3d at 375-76.

Mr. Bro, fully employed when the divorce became final, petitioned for modification of the original child support award for good reason: he was now unemployed, looking for work, and unable to pay child support because of his reduced income. (CP 1-16, 19-50, 158-174) Ms. Ricciardelli’s repeated emphasis on Mr. Bro’s “purposeful underemployment” fails to justify the trial court’s child support award. While the trial court did state that Mr. Bro was “voluntarily

to the other, *if that parent is obligated to make a transfer payment.*” *Holmes*, 128 Wn. App. at 738, 117 P.3d at 375 (emphasis in original).

¹⁰ “This process for determining child support obligations is readily applicable to divorced family situations where the children reside a majority of the time with one residential parent. In those situations, the obligor parent is the one with whom the children do not reside a majority of the time and that parent makes a transfer payment to the parent with whom the children primarily reside.” *Graham*, 123 Wn. App. at 939, 99 P.3d at 1252.

underemployed,”¹¹ it took that into account when it made the award, imputing his income as \$1,450 per month instead of his actual gross income of \$1,206. (CP 58-59, 108) In other words, the trial court imputed an income to Mr. Bro that exceeds his actual income and is substantially similar to Ms. Ricciardelli’s; it then proceeded to impose a support obligation on Mr. Bro that reduces his imputed net income well below hers—and reduces his *actual* net income even lower than that.

Ms. Ricciardelli’s emphasis on Mr. Bro’s additional “financial resources”— apparently referring to help from his parents¹²—is likewise misplaced. Mr. Bro’s parents are not a source of income for Mr. Bro, nor did the court count them as one. Rather, they have helped Mr. Bro meet financial obligations he can no longer meet on his own. If anything, his parents’ generosity points up the need to relieve Mr. Bro of making support payments to an ex-wife whose income is substantially similar to his. (CP 58-59, 108)

To its credit, the trial court recognized the need to modify Mr. Bro’s child support payment based on his “significantly lower” income. (CP 105) Even so, the court abused its discretion. Mr. Bro should not have to pay child support to Ms. Ricciardelli when the children reside with him half of the time and the parents earn substantially similar

¹¹ The court appears to have based this finding in part on the reasoning that Mr. Bro

incomes. The trial court abused its discretion by failing to account for these circumstances when it awarded Ms. Ricciardelli child support. Its order should not stand.

C. Ms. Ricciardelli Has No Ground for Claiming Attorney Fees.

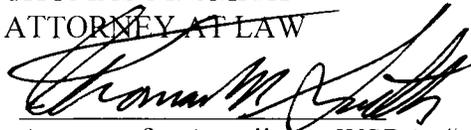
Ms. Ricciardelli concludes by requesting \$5,000 in attorney fees. Ms. Ricciardelli cites no legal ground for this request. Failure to do so can justify denial of such a request. *State v. Graham*, 159 Wn. 2d 623, 637, 152 P.3d 1005, 1012-13 (2007). Mr. Bro's appeal is entirely legitimate and rests on solid legal ground. No basis for a fee award exists. The Court should deny it.

III. CONCLUSION

The trial court cannot justify imposing a child support payment that reduces Mr. Bro's income below the statutory self-support reserve where the parties share equal custody and have substantially similar incomes. Given these circumstances, the court's child support order constitutes abuse of discretion and warrants reversal.

Dated: October 7, 2010

Respectfully submitted,
THOMAS M. SMITH
ATTORNEY AT LAW



Attorney for Appellant, WSBA # 687

could "get a job at McDonald's." (CP 58, ll.16-18)

¹² Brief of Respondent, p.3.