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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS DIVISION III OF THE STATE OF
WASHINGTON

ASHLEY EIERDAM

Respondent,

and

BENJAMIN EIERDAM

Appellant.

No. 34090-2

Respondent's Brief

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Mr. Eierdam's Issues

There are five issues listed by Mr. Eierdam in his assignment of error/Law and Argument Section. (Appellant's brief, page 1). While there are five issues listed, there are really only two issues law raised, namely the deviation granted-denied and the claim that findings did not support the statutory requirement. (Appellant's brief page 1).

Statement of Facts

The Eierdam's married on November 16, 2006 at Coeur d' Alene, Idaho and separated on July 31, 2014. (CP 214) At the time of entry of the final orders, Ms. Eierdam was 25 years old and Mr. Eierdam was 29.

From the marriage, the parties have three children, Ryan, Kimber and Gracie, ages 8, 5 and 3 at the time final orders were entered. (CP 217) Ms. Eierdam was 16 when she gave birth to the first child and 19 at the time of the birth of the second child. (RP 45)

Trial proceeded on financial issues before Judge Linda Tompkins, Judge of the Spokane County Superior Court.

The court issued a child support order imputing Ms. Eierdam at minimum wage and Mr. Eierdam at his actual wages.

The Court denied Mr. Eierdam's request for a deviation to less than \$160.00 a month. The deviation had been sought due to Mr. Eierdam having shared placement of the children.

This appeal followed. Within the appeal is the request for the Court to "take a closer look at how child support is determined between the parents" in shared custody cases. (Appellant's brief, page 1).

Legal Argument

RCW 26.19.001 in part instructs that the "legislature intends...to insure that child support orders are adequate to meet the child's basic needs and to provide additional child support commensurate with the parents income, resources, and standard of living. Child support should be equitable apportioned between parents."

RCW 26.09.003 encourages judicial officers to exercise discretion and flexibility on a case by case basis to meet the best interests of children.

When entering an order of child support, the trial court begins by setting the basic child support obligation. RCW 26.19.011(1); State ex rel M.M.G. v. Graham, 159 Wn.2d 623, 627, 152 P.3d 1005 (2007). This obligation is determined from the statute's economic table, which is based on the parents' combined monthly net income, as well as the number and age of their children. RCW 26.19.011(1), .020. The trial court next

allocates the child support obligation between the parents based on each parent's share of the combined monthly income. RCW 26.19.080(1). The court then determines the standard calculation, which is the presumptive amount of child support owed by the obligor parent to the obligee parent. RCW 26.19.011(8); Graham, 159 Wn.2d at 627. (quoted in Parentage of A.L 185 Wn, App. 226, 340 P.3d 260 (2014))

Court's failure to deviate

Mr. Eierdam posits that Court erred when it deviated Ms. Eierdam's child support obligation to zero and did not deviate his obligation from the standard calculation of \$765.00. (Appellant's brief page 5-6) The problem with this position is the Court would not be deviating from Ms. Eierdam's obligation under a shared schedule as Ms. Eierdam is the obligee.

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. RCW 26.19.075(1)(d).

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); *Graham*, 159 Wn.2d at 627–28. A court's decision to deviate from the standard calculation for child support based on residential time is discretionary, but the court cannot deviate if it will result in insufficient funds in the household receiving the support, or if the child is receiving TANF. RCW 26.19.075(1)(d); *In re Marriage of Rusch*, 124 Wn.App. 226, 236, 98 P.3d 1216 (2004), abrogated on other grounds by, *In re Marriage of McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007). After determining the standard calculation and any deviations, the trial court then orders one parent to pay the other a support transfer payment. RCW 26.19.011(9).

The residential schedule deviation was added to the child support schedule in 1991. Laws of 1991, 1st Spec. Sess., ch. 28, § 6. Before 1991, the Washington Child Support Guidelines allowed for a residential credit if the child resided overnight with both parents more than 25 percent of the time. Helen Donigan, *Calculating and Documenting Child Support*

Awards Under Washington Law, 26 Gonz. L.Rev.. 13, 45 (1991). A separate worksheet provided space for determining the residential credit for each parent. Donigan, *supra*, at 45. This special worksheet also applied to cases where parents split residential time. Donigan, *supra*, at 45–46. The legislature did not retain this formula for residential credit against child support with the 1991 addition of statutory deviations. See RCW 26.19.075(1)(d); *In re Marriage of Schnurman*, 178 Wn.App. 634, 639–41, 316 P.3d 514 (2013), review denied, 180 Wn.2d 1010, 325 P.3d 914 (2014). The change in legislation suggests an intent to afford wider discretion to the trial court when considering a deviation for residential credit.

While no appellate decision has come out and expressly stated such, all cases, commencing with Judge Applewick’s decision, leads to the reasonable conclusion that when there is a shared parenting plan, the obligor will be the parent who makes more

In 2007, the Court issued *In State ex rel. M.M.G v. Graham*, 159 Wn.2d 623, 152 P.3d 1005 (2007). The Washington Supreme Court decided a custody case in which the parents evenly shared residential placement of their children. The father's income exceeded the mother's revenue by over \$4,000 per month, and the trial court named the father as the obligor, requiring that he make a transfer payment to the mother.

On appeal, the father in Graham argued that chapter 26.19 RCW did not adequately guide trial courts in determining parents' child support obligations when the parents shared equal custody and urged the court to adopt a new standard. The Supreme Court disagreed, and stressed that RCW 26.19.075 already provided trial courts with the discretion to deviate from the standard calculation, based on the residential schedule deviation found in RCW 26.19.075(1)(d). Graham, 159 Wn.2d at 636. Relying on RCW 26.19.075(1)(d), the Supreme Court explained, “[b]ecause the statute explicitly gives the trial court discretion to deviate from the basic child support obligation based on the facts of a particular case, a specific formula is neither necessary nor statutorily required to ensure the parents' child support obligation is properly allocated.” Graham, 159 Wn.2d at 636. The court in Graham clarified that the trial court must still use the standard child support schedule and statutory deviations in cases of shared custody. Graham, 159 Wn.2d at 636.

Mr. Eierdam is requesting that this Court engage in a review of what the state Supreme Court expressly rejected. Specifically, Mr. Eierdam is requesting this Court “take a closer look at how child support is determined between parents” with the changes to the parenting plan. (Appellant’s brief, page 1)

Next, Division One of the Court of Appeals addressed a case of shared custody in *In re Marriage of Schnurman*, 178 Wn.App. 634, 636, 316 P.3d 514 (2013), review denied, 180 Wn.2d 1010, 325 P.3d 914 (2014). In *Schnurman*, the parenting plan dictated that the parents “share equal residential time with the children throughout the year.” *Schnurman*, 178 Wn.App. at 637. The trial court first calculated the parents' child support obligation and found that the father's monthly net income was \$6,338 and the mother's was \$3,380. *Schnurman*, 178 Wn.App. at 637. Although the couple shared custody of their children, the trial court named the father as the obligor and required that he make a transfer payment to the mother. *Schnurman*, 178 Wn.App. at 637. The father requested a downward deviation from the standard calculation, but did not characterize it as a residential credit, instead arguing that the statutory deviations did not apply to cases of shared custody. *Schnurman*, 178 Wn.App. at 637. The trial court dismissed the father's argument, while noting the absence of evidence that the father's shared time with the children would significantly increase his costs to support the children or reduce his wife's expenses to support the children. *Schnurman*, 178 Wn.App. at 637.

Relying on the Supreme Court's holding in *Graham*, the *Schnurman* court specified “that the statutory child support schedule

applies in shared residential situations like here.” Schnurman, 178 Wn.App. at 638 (citing Graham, 159 Wn.2d at 626). After describing the general child support determination process, the court explained the deviation procedure. Schnurman, 178 Wn.App. at 640. The court noted that a trial court may deviate when children share residential time equally between parents, but “a deviation would still be discretionary and should focus on the legislature's primary intent to maintain reasonable support for the children in each household.” Schnurman, 178 Wn.App. at 641 (citing State ex rel. M.M.G. v. Graham, 123 Wn.App. 931, 933, 99 P.3d 1248 (2004)). As in Graham, the court refused to set forth a formula for 50/50 shared custody obligation determinations. Schnurman, 178 Wn.App. at 642. The court explained that the child support schedule still applies in cases of shared custody; thus, RCW 26.19.075(1)(d) already provides trial courts with the discretion to deviate based on residential time, precluding the need for a specialized formula. Schnurman, 178 Wn.App. at 642.

The Eierdam case is just like Schnurman. There is a shared custody of the children. The Court determined the incomes of the parties and the Court denied a deviation. (Mr. Eierdam was seeking a deviation to \$158.35, RP 156) Of note, in the Eierdam case, Mr. Eierdam was awarded all three children for tax exemption purposes thereby affording him a substantial benefit, which was a consideration of the court. (CP

208). In fact, such an award would cause Mr. Eierdam to pay zero federal income tax as compared to the \$254.51 he was assigned. (CP 197) In 2014, Mr. Eierdam received a refund of \$5,378.00. (RP 117-118)

As in Schnurman, Mr. Eierdam failed to demonstrate, in support of his request for deviation, how his expenses increased while having the children half of the time and how Ms. Eierdam's expenses decreased. In fact, there were no figures offered as to his increased water, gas, etc. See RP 157-158). There is a just a blanket claim but no financial support for the claim was presented.

Next in the line of cases is In Re Parentage of A.L. 185 Wn. App. 226, 340 P. 3rd, 260 (Div. 3 2014). In this case, Judge Fearing authored the opinion in a modification of child support action regarding TANF benefits paid. Id. In A.L. the Court held that when one parents earns more than the other parent in a shared schedule and one parent is on public assistance, the wage earning parent is not excused from paying child support. . Id The instant case is a not a modification of child case but the same principles apply.

Revisiting the child support formula for Shared Schedule

Mr. Eierdam suggests that somehow with amendments to the parenting act encouraging more shared schedules that it is up to the judicial branch to create a new methodology-approach to ordering child

support. (Appellant's brief, page 6) It is submitted that this not a function of the judicial branch, but of the legislature and the Court should decline the invitation to create a formula.

Alleged Failure to Properly Impute Income to Ms. Eierdam

RCW 26.19.071 governs the standards for determination of income.

Section 6 of this statute reads as follows:

(6) **Imputation of income.** The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. The court shall determine whether the parent is voluntarily underemployed or voluntarily unemployed based upon that parent's work history, education, health, and age, or any other relevant factors. A court shall not impute income to a parent who is gainfully employed on a full-time basis, unless the court finds that the parent is voluntarily underemployed and finds that the parent is purposely underemployed to reduce the parent's child support obligation. Income shall not be imputed for an unemployable parent. Income shall not be imputed to a parent to the extent the parent is unemployed or significantly underemployed due to the parent's efforts to comply with court-ordered reunification efforts under chapter 13.34 RCW or under a voluntary placement agreement with an agency supervising the child. In the absence of records of a parent's actual earnings, the court shall impute a parent's income in the following order of priority:

- (a) Full-time earnings at the current rate of pay;
- (b) Full-time earnings at the historical rate of pay based on reliable information, such as employment security department data;
- (c) Full-time earnings at a past rate of pay where information is incomplete or sporadic;
- (d) Full-time earnings at minimum wage in the jurisdiction where the parent resides if the parent has a recent history of minimum wage earnings, is recently coming off public assistance, aged, blind, or disabled assistance benefits, pregnant women assistance benefits, essential needs and housing support, supplemental security income, or disability, has recently been released from incarceration, or is a high school student;
- (e) Median net monthly income of year-round full-time workers as derived from the United States bureau of census, current population reports, or such replacement report as published by the bureau of census.

As the statute make clear, a court would need to find Ms. Eierdam was voluntarily underemployed purposely to reduce her support obligation. This could not be the case as she would be the obligee parent under any scenario.

Even if it did apply, in examining the record, Ms. Eierdam is a high school graduate with some classes taken at Spokane Falls Community College, but no degree. (RP 41-42)

At the time of the trial, Ms. Eierdam was employed as a caregiver at Moran Vista making \$9.48 an hour. (RP 43-44)

Prior to that, Ms. Eierdam had been employed with Alorica from March 16th, 2015 to September, 2015. (RP 44)

Prior to Alorica employment, Ms. Eierdam worked at Super One, a grocery store. (RP 44) She worked for that employer for about three months. (RP 44) She also worked at Pizza Rita when she was 18.

Prior to that, Ms. Eierdam was a stay at home parent. (RP 45)

Ms. Eierdam lost employment with West due to the results of a mental health evaluation she submitted to. (RP 46-47)

Ms. Eierdam testified to the effect of sitting in a cubicle had on her emotional health. She had a psychological evaluation (RP 49) and that confirmed she was better suited to work around people, in a caregiving

capacity. (RP 50) This psychological evaluation had been in a court order.

Mr. Eierdam portrays the leaving of the \$12.00 an hour employment due to Ms. Eierdam being “bored” when there was medical support for her leaving.

Ms. Eierdam testified she was receiving \$230.00 a month in food stamps. (RP 54)

Under cross examination from Mr. Eierdam’s attorney, it was discussed that Ms. Eierdam was not working 40 hours a week at the \$12.00 an hour job. (RP 72-74) and that she only worked part time at Super One, (RP 75)

Ms. Eierdam admitted to having to rely upon her family for the basic necessities of life. (RP 88)

The Court in its ruling (RP 228), went through the education and work history of Ms. Eierdam Judge Tompkins found that Ms. Eierdam did not work outside the home during the marriage. (Having been married at 16). Judge Tompkins further recognized that from a historical perspective, there was no real history of making \$12.00 an hour for Ms. Eierdam, but only minimum wage. (RP 230) The Court imputed Ms. Eierdam at full time, minimum wage. (RP 230, lines 22-23)

Judge Tompkins went on to consider day care costs as well. (RP 231)

Mr. Eierdam complains the Court did not impute Ms. Eierdam at \$12.00 an hour, full time. Turning to the request proffered by Mr. Eierdam would result in the following: \$12.00 an hour at 40 hours a week causes a monthly gross income of \$2,080.00. Applying .0765 for social security and Medicare results in a monthly deduction of \$159.00. Applying a 7 % tax bracket for federal income tax (keeping in mind Mr. Eierdam is awarded all tax benefits) causes \$145.00. This would cause a net income of \$1,776.00. This sum plus Mr. Eierdam's net income of \$2,674.00 causes a total income of \$4,450.00. The three child column calls for \$434.00 per child (middle of \$431.00 and \$438.00) causes a total of \$1,302.00 (as compared to \$1,158.00 in the final worksheet) Mr. Eierdam would have a 60% obligation or \$781.20 or more than the \$765.00 he is assigned under the order of Judge Tompkins.

Mr. Eierdam also overlooks the Court having declined to order the parties to share their day care costs in proportion to their income. (CP 207). The order provides that each parent be 100% responsible for any day care costs they incur on their own behalf. (It is acknowledged there is an error in referencing to "his" after petitioner in that section).

Abuse of Discretion.

Child support awards are review for abuse of discretion.

DewBerry v. George, 115 Wn. App, 351, 367, 62 P 3^d 525 (2003) (citing In re Marriage of Curran, 26 Wn. App. 108, 110), 611 P. 2d 1350 ((1980).

The Court abuses its discretion if its decision rests on unreasonable or untenable grounds. In re Marriage of Dodd, 120 Wn. App. 638, 644, 86 P.3d 801 (2004) quoting In re Marriage of Leslie, 90 Wn. App. 796, 802-803, 954 P. 2d 330 (1998).

There is nothing to support the claim of abuse of discretion after review of the record.

Conclusion

In conclusion, Judge Tompkins correctly denominated Mr. Eierdam as the obligor parent and she correctly denominated Ms. Eierdam as the obligee.

Judge Tompkins was correct in declining to grant a deviation after evaluating the facts of the case.

Judge Tompkins was correct in imputing Ms. Eierdam at minimum wage.

Judge Tompkins did not engage in an abuse of discretion in denying the deviation requested.

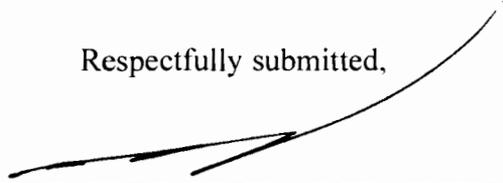
Judge Tompkins' findings are sufficient to satisfy the statutory requirements.

The record amply supports the findings of the court.

The Respondent requests the Court affirm the trial Court.

January 30, 2017

Respectfully submitted,



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