

FILED

OCT 31 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 343928

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

CHANEL LEIGH WELSH, Petitioner

and

CHRIS JOHN WELSH, Appellant

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE RAYMOND F. CLARY

BRIEF OF APPELLANT

Robert Cossey
Attorney for Respondent
Robert Cossey & Associates, P.S.
902 N. Monroe
Spokane, WA 99201
(509) 327-5563

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I.

ASSIGNMENTS OF ERROR

1. The trial court erred by entry of ¶ 2.20 of the Findings of Fact & Conclusions of Law, *i.e.* “The Order of Child Support signed by the court on this date, and the child support worksheet, which has been approved by the court, are incorporated by reference in these findings.” (CP 147).
2. The trial court erred by entry of ¶ 3.11 of the Decree of Dissolution, *i.e.* “Child support shall be paid in accordance with the Order of Child Support signed by the court on this date.” (CP 151).
3. The trial court erred by entry of ¶ 3.3 of the Order of Child Support, *i.e.* “Net income of \$2,159.00 until Samuel joins Marley and Saffron on same schedule or earlier if mother starts working 32 hours a week.” (CP 138).
4. The trial court erred by entry of ¶ 3.5 of the Order of Child Support, *i.e.* “ The obligor parent shall pay the following amounts per month for the following child(ren) ... Total Monthly Transfer Amount \$1,220.00.” (inclusive) (CP 139).

5. The trial court erred by entry of ¶ 3.6 of the Order of Child Support, *i.e.* “Standard Calculation ... \$1,220.00 per month” (CP 139).
6. The trial court erred by entry of ¶ 3.7 of the Order of Child Support, *i.e.* “The child support amount in paragraph 3.5 does not deviate from the standard calculation at this time. Upon Samuel joining the same schedule as his siblings, a deviation to be imposed due to the shared schedule. The factual basis for these reasons is as follows: see court’s oral ruling incorporated herein.” (CP 139).
7. The trial court erred by entry of ¶ 3.8 of the Order of Child Support, *i.e.* “Does not apply. A deviation was ordered upon Samuel joining Marley and Saffron on the shared schedule.” (CP 139).

ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Whether the trial court erred in failing to impute the mother full-time employment due to her voluntary underemployment?
2. Whether the trial court erred in ordering a deviation under RCW 26.19.075 for the mother resulting in a full-time calculation of only 20 hours per week?
3. Whether the trial court erred by indicating in the Order of Child Support that no deviation was ordered at the present time, even though the court effectively granted the mother a deviation?
4. Whether the trial court erred in failing to grant a deviation downward under RCW 26.19.075 to the father for the equal residential schedule?

II
STATEMENT OF THE CASE

This appeal arises from a Summons and Petition for Dissolution that was originally filed on January 6, 2015. (CP 1-8). A contested trial was held before the Honorable Judge Raymond F. Clary on October 6, October 7 and October 9, 2016 (RP 1-411) where both parties were represented by counsel. Judge Clary gave his oral ruling to the parties on March 8, 2016. (RP 412-436). Final pleadings were entered on April 1, 2016. (CP 125-152).

The parties in this case were married on March 14, 2010. (CP 145). During the marriage they had three children, Marley, Saffron and Samuel. (CP 125-130). Mr. Welsh raises issues on appeal pertaining to the court's determination of child support. Mrs. Welsh testified that she worked part-time and this was a choice she made. (RP 145-146). When asked if she was choosing to work only part-time, she stated "[a]bsolutely, I am." (RP 146). She also confirmed that she could work 32 hours per week but was choosing not to do so. (RP 148). Mr. Welsh testified that he worked 32 hours per week, from Friday night to Monday morning. He testified that working 32 hours per week was customary in the field and that he

expected Mrs. Welsh to work only 32 hours per week as well to be considered full-time employment. (RP 332-333).

Mr. Welsh went on to request a deviation if the court granted the shared schedule which he was requested. (RP 333). He stated the reasons for that request including increased costs due to paying half of their food, housing and utilities, and the mother's ability to make sufficient income to cover their costs if the children lived with him an equal amount of time. (RP 333-334).

The trial court ruled that the father should have equal parenting of the two oldest children, Marley and Saffron, and that the equal parenting of the youngest child would commence "[w]hen Samuel's primary care doctor approves..." (RP 429). When determining child support, the court based the standard calculation on full-time employment of 32 hours per week for each parent. (RP 430). This resulted in standard calculation of "\$4,410.72 for [the father] and \$3,555 for [the mother]." (RP 430). The trial court then granted a deviation to the mother setting the support amount based on "mother working part-time of 20 hours or more, and father working 32 hours." (RP 430). This deviation also affected the proportional shares of child support and thus the uninsured health care costs (RP 431-432). The court did not discuss

in granting this deviation how the care of Samuel actually increased the mother's expenses. (RP 430-431).

Mr. Welsh's request for downward deviation was denied "until Samuel's health care provide approves of him being on the same schedule as Marley and Saffron." (RP 431). The court did not make findings as to insufficient income in the mother's home should Mr. Welsh's request for a deviation be granted, or findings as to increased costs in the father's home by having equal residential time. (RP 430-431).

III

STANDARD OF REVIEW

The proper standard of review is whether the Findings of Fact are supported by substantial evidence and whether the trial court made an error or law that may be corrected on appeal. In re Marriage of Stern, 68 Wn.App. 922, 928, 846 P.2d 1387 (1993). Substantial evidence is “evidence sufficient to persuade a fairminded person of the truth of the declared premise.” In re Marriage of Hall, 103 Wn.2d 236, 247, 692 P.2d 175 (1984). A trial court’s decision regarding child support is reviewed for abuse of discretion. In re Marriage of Pollard, 99 Wash.App. 48, 991 P.2d 1201, 1203 (2000).

IV

ARGUMENT

A. THE TRIAL COURT ERRED BY FAILING TO IMPUTE FULL-TIME INCOME TO THE MOTHER DESPITE HER VOLUNTARY UNDEREMPLOYMENT AND BY ESSENTIALLY GRANTED AN UPWARD DEVIATION TO THE MOTHER BY SO FAILING TO IMPUTE.

It is well established that a parent may not avoid her child support obligation by voluntarily remaining unemployed or underemployed. In re Marriage of Pollard, 99 Wash.App. 48, 991 P.2d 1201, 1202 (2000) citing

In re Marriage of Foley, 84 Wash.App. 839, 843, 930 P.2d 929 (1997). In fact, RCW 26.19.071(6) specifically mandates that, “[t]he court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed.”

The fact that a parent stays at home to raise children is not considered gainful employment for purposes of determining a support calculation. See In re Marriage of Pollard, 99 Wash.App. 48, 991 P.2d 1201, 1204 (2000). The court already determined that neither parent would be held to a standard of 40 hours per week for the calculation of full-time employment, but rather 32 hours per week, presumably because this was determined to be the customary and standard definition of full-time in both parties’ occupational fields. (RP 430).

Essentially, the court granted an upward deviation to the mother even though she had never requested one. This not only denied the father the ability to address the issue of an upward deviation to the mother in trial, but is inconsistent with the court’s ruling and the subsequent Order of Child Support entered on April 1, 2016 which sets the mother’s standard calculation at 20 hours per week rather than 32 hours per week. (CP 138). The Order of Child Support specifically states

that, “[t]he child support amount ordered in paragraph 3.5 does not deviate from the standard calculation at this time.” (CP 139).

The court was correct in calculating the mother’s standard calculation to be as set out in the oral ruling:

Herein, the standard calculation shall be calculated based on full-time for 32 hours a week for each parent. As provided above, this results in \$4,410.72 for CJ and \$3,555 for Chanel, and proportional shares of .55, or 55 percent, and .45, or 45 percent before consideration of a deviation under RCW 26.19.075. (RP 430).

Although the trial court “may deviate from the standard calculation after consideration of the following expenses: ... (iii) Special needs of disabled children” pursuant to RCW 26.19.075(c), the trial court in this case did not address any increased expenses based on Samuel’s special care needs. When ruling on the issue of the expenses for the child, Samuel, the court said only, “... Samuel’s special needs were demonstrated to be extraordinary. For an indefinite period of time he will need his mother’s care. This, in turn, limits her ability to work, in my opinion.” (RP 431). Nowhere did the court address that the special needs of Samuel created increased expenses to the mother.

It was established by the mother’s testimony that Samuel had been left in the care of third parties outside of her home while she

worked without adverse effect. (RP 167-168). The court ruled that “... both parents have in the past demonstrated the ability to parent and there is no reason to find they are not likely to do so in the future.” (RP 428). Further, the court ruled that, “[i]f the parent who is scheduled to have the children is unable to provide that direct care for more than three hours and day care will be necessary, then the other parent shall have the opportunity to provide day care to reduce day care costs.” (CP 130). Because the father testified that he would be able to provide care from Tuesday to Friday every week (RP 328-329), and must be utilized as a care provider under this order, the mother will not incur any childcare expense for Samuel when she is working. Furthermore, she is able to work 32 hours from Tuesday to Friday without any adverse effect on her ability to provide for her son since Mr. Welsh testified he is available to provide care on those days. (RP 328-329).

The trial court erred in granting an upward deviation in the standard support calculation to the mother by not imputing her at 32 hours per week for voluntarily underemployment. A deviation from the standard support obligation “is appropriate when it would be inequitable not to do so.” In re Selley v. Selley, 189 Wash.App. 957, 359 P.3d 891, 893 (2015) citing In re Marriage of Pollard, 99 Wash.App. 48, 55, 991 P.2d

1201 (2000). The trial court erred by making no findings of the increased expenses to the mother of caring for Samuel in violation of the requirements of RCW 26.19.075(c). There was no evidence that the medical expenses for Samuel were increased despite his special care needs and the father was ordered to pay the full amount of what did exist in outstanding medical costs leaving no increased financial burden to the mother. (CP 150).

B. THE TRIAL COURT ERRED BY FAILING TO GRANT THE FATHER'S REQUEST FOR DOWNWARD DEVIATION OF CHILD SUPPORT TO BEGIN IMMEDIATELY DUE TO EQUAL RESIDENTIAL TIME WITH TWO OF THE THREE CHILDREN. DEVIATION SHOULD HAVE BEEN ALLOWED AT LEAST ON A PARTIAL BASIS BEGINNING IMMEDIATELY RATHER THAN WAITING UNTIL ALL THREE CHILDREN SHARED EQUAL RESIDENTIAL TIME.

Mr. Welsh properly requested a deviation to begin immediately pursuant to RCW 26.19.075(d) which states as follows:

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 ... 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(d).

Once the court has determined the basic child support obligation, the court must allocate the support obligation between the parents. RCW 26.19.080(1). It is only after this has been completed that “if requested, a court considers whether a deviation from the standard calculation is appropriate.” In re Selley v. Selley, 189 Wash.App. 957, 359 P.3d 891, 893 (2015). A requested deviation is appropriate “when it would be inequitable not to do so.” Id. at 893. Further, “the trial court is required to enter findings that specify the reasons for any deviation or denial of a parent’s request for a deviation.” Id. at 893.

In this case, the court ordered that the father have equal residential time with the parties’ two older children. (CP 126). The father was granted equal residential time with the youngest child “when [his] primary care doctor approves”. (CP 126). Mr. Welsh requested a deviation pursuant to RCW 26.19.075(d) if he were granted equal time with the children. (RP 333). However, the court only granted a deviation to begin upon all three children residing with the father equally. (CP 138). The trial court made no findings as to the economic impact on the father of having two children equally and therefore incorrectly denied the

father's request for the deviation to being immediately, or to be partial based on two of the three children living with him equally until the third child joined the same schedule.

At no time did the trial court consider the decreased expenses to the Respondent by Mr. Welsh taking on equal parenting time of the two older children, as well as the decreased expenses in childcare by his taking on the daytime care of the youngest child with special needs. Although Ms. Welsh still has more hours per week with the youngest child, she did not thereby incur any more considerable financial costs, and instead saves the costs of outside childcare. Similarly, the trial court did not expressly consider the increased costs to Mr. Welsh by having equal parenting time with two out of the parties' three children.

Although the trial court stated that the denial of Mr. Welsh's request for a downward deviation based on residential time was "[i]n order to assure adequate income in mother's home" (RP 431), the court had already given the mother an unrequested upward deviation by allowing her full-time income to be set at only 20 hours a week instead of the standard 32 hours per week. Because the mother had already received the benefit of reduced weekly hours, the trial court had no additional economic basis to find that the father should not receive a

deviation himself on the basis of the residential schedule. Even if the cursory statement by the trial court that the father's request for deviation was denied to assure adequate income to the mother's home was a sufficient finding concerning the mother's financial situation, the findings fall short of giving a sufficient basis regarding the father's altered financial situation due to having equal residential time with two of the three children and thus should be overturned.

Additionally, the standard which the trial court is to abide by in determining whether a deviation may be granted is whether "the deviation will result in insufficient funds in the household receiving the support to meet the basic needs of the child." RCW 26.19.075(d). The trial court in this case did not make a finding that the mother would be left with insufficient funds. He only referenced that the father's request for a RCW 26.19.075(d) deviation was denied "to assure adequate income in mother's home." (RP 431). This is not the correct standard for the trial court to consider. Whether the mother has adequate income is a different analysis than whether she has insufficient funds to meet the basic needs of the children.

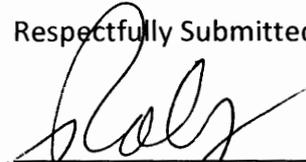
V
REQUEST FOR ATTORNEY FEES

Mr. Welsh requests that this court award his attorney fees on appeal pursuant to RAP 18.1 and RCW 26.09.140. Under this statute, the Court of Appeals may, in its discretion, award attorney fees and costs incurred on appeal from a dissolution proceeding. In exercising its discretion, the Court of Appeals considers the arguable merit of the issues on appeal and the parties' financial resource. In re Marriage of King, 66 Wn. App. 134, 139, 831 P.2d 1094 (1992). Mr. Welsh has shown that his issues have merit on appeal and his financial resources are not extensive. It is therefore respectfully requested that he be granted attorney fees on appeal, or at least a portion thereof.

**VI
CONCLUSION**

It is therefore respectfully requested that this Court of Appeals reverse and remand this case for the bases set out in this brief.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'R. Cosey', written over a horizontal line.

Robert R. Cosey WSBA # 16481
Attorney for Appellant

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON DIVISION III**

In re:
CHRIS WELSH,

Appellant,

and
CHANEL WELSH,

Respondent.

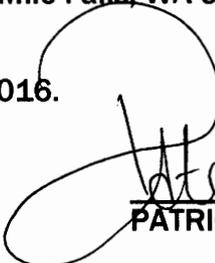
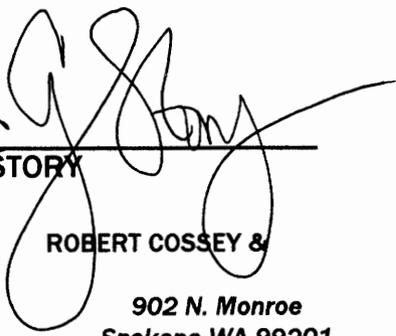
No. 343928
AFFIDAVIT OF MAILING

I, Patricia Story, under penalty of perjury under the laws of the State of Washington, declare that on October 31, 2016, I deposited in the United States Mail, first class postage affixed, by regular mail the following document to the individual listed in this Affidavit at the below last known addresses: **BRIEF OF APPELLANT**

**Chanel Welsh, Petitioner
C/O Gary Stenzel
Attorney at Law
1304 W College Ave
Spokane, WA 99201**

**Chris Welsh
17827 N. South Bank
Nine Mile Falls, WA 99026**

Dated this 31st day of October, 2016.

PATRICIA STORY

ROBERT COSSEY &

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