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STATE OF WASHINGTON

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STATE OF WASHINGTON
By_____

No. 343928

Spokane County Superior Court Case No. 15-3-00033-9
The Honorable Raymond Clary
Superior Court Judge

PETITIONER'S RESPONSIVE BRIEF

In Re:

CHANEL LEIGH WELSH, PETITIONER

V.

CHRIS JOHN WELSH, RESPONDENT

Stenzel Law Office
Gary R. Stenzel, WSBA # 16974
Attorney for Appellant
1304 W. College Ave. LL
Spokane, Washington 99201
Stenz2193@comcast.net
(509) 327-2000

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I. FACTS

The parties have three children, Marley who is 4, Saffron who is 2, and Samuel who was born during the pendency of this action on April 14, 2015. The final parenting plan and child support orders were entered on the date of April 1, 2016, when Samuel was only 11 months old. See RP 415-416; & CP 82-88. The two oldest children were not shown to have any significant medical or psychiatric problems in the case, however, Samuel was born with a very difficult and debilitating disease called Cornelia de Lange Syndrome (hereinafter CDLS). RP 420. This condition caused Samuel to have difficulty eating, had to be breast fed for nutrition, growth, and safety. Id. He had 11 different doctors to help with this rare condition, and neurological, ear, nose, throat, sight, hearing, and nutritional issues. Id. The court also found that Samuel's condition required a lot of parental time and would "get worse over time" because of CDLS. Id. The court also found that Ms. Welsh took Samuel to his health care appointments, which were obviously many, and that for right now it was not in his best interests because of his problems to allow for equal visits with his parents, in fact, equal visits should await his doctor's recommendation. RP 421 & 428-431. Testimony by Ms. Welsh about Samuel confirmed the need to wait for allowing equal time for Samuel until his doctor recommends the same because of the extensive needs that needed to be met for Samuel and the difficulties in coordinating the same with his father. See RP 65-90, & 428-431. The judge ordered a parenting plan that was equal for the two

older children, however, their handicapped baby Samuel was treated differently than the other two older children and it was ordered that he not spend any overnight visits with his father with Samuel until his doctor's recommended it. See CP 125-130 & RP 421-429.

As a result of this somewhat unusual parenting plan based on Samuel's needs, the Judge also recognized that Ms. Welch could not work full time, until Mr. Welsh would have him the same as the other children. Id. The child support order was unusual because it flowed with the parenting plan as to the care of Samuel that affected the mother's income earning ability. RP 431; see also CP 82-88/125-130.

The court found that Ms. Welsh should be imputed 32 hours of work when Samuel's time with his father increased, making for a more reasonable order of support for this young child. See RP 416-417. Although the father has appealed the court's failure to impute 32 hours of wasges to the mother, the court specifically found that Ms. Welsh "works less than full-time in order to be available to the children and attend to the special needs of Samuel . . .". Id. at lines 15-23. This was found to be proper since it assured "adequate income in the mother's home." Id. This then translated into a transfer payment to Ms. Welsh of $1,220.00 from Mr. Welsh. CP 82-88.

Mr. Welsh has appealed the order of child support stating that Judge Clary errored in ordering this child support under the circumstances of this case. Ms. Welsh defends the judge's ruling in many ways, with the

caveat that this ruling really epitomized how the law regarding a deviation should work; that Judge Clary did the right thing in recognizing that Ms. Welsh spent a lot of time helping Samuel with this terrible syndrome, which in turn meant she could not work as much and needed financial help.

II. LAW AND ARGUMENT

A. The Judge properly applied the case law on residential deviations by focusing on the net financial affect on the mother's finances that would occur if a deviation was granted, given her need to care for their severely handicapped baby boy, Samuel.

Recent case law on the issue of a deviation for residential time indicates that the most important factor to consider is whether or not the proposed deviation would adversely affect the finances in the one of the parent's homes more than the other home. The case of *In re Parentage of A.L.,* 185 Wn.App. 226, 340 P.3d 260 (Div. 3 2014) made the following ruling in an almost identical case where the father had equal time and the mother was on welfare:

> After determining the standard calculation and nominating the obligor, the trial court, if requested, considers whether it is appropriate to deviate upward or downward from the standard calculation. RCW 26.19.011(4), (8). The court has discretion to deviate from the standard calculation based on such factors as the parents' income and expenses, obligations to children from other relationships, and the children's residential schedule. RCW 26.19.075(1). If the court considers a deviation based on residential schedule, it must follow a specific statutory analysis:
>
> 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).

[¶27] 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). *Id.*

As can be seen, this Division of the Court of Appeals made it clear that residential credit deviations are to only be allowed an equal parenting plan if the court finds that the deviation would not adversely affect one of the parent's financial circumstances. *In re: parentage of A.L.,* Supra.

In this case, the court's oral ruling, which was incorporated within the Order of Child Support section 3.7, wherein it sets forth the reason for denying a deviation, indicated clearly why the court did not deviate from the standard calculation. CP 84 & RP 428-431. To reiterate, the deviation was denied because the mother had to remain a part-time worker because of Samuel's significant health problems with CDLS. *Id.* When Samuel is allowed to spend as much time with the father as he has

with the other children, this will allow the mother to work fulltime, because Samuel therapeutic needs will be shared. *Id.*

Although the facts are not the exact same as in the *A.L.* case, the same reasoning was used by the courts as the Judge used in this case. Suffice it to say this completely overshadows the father's reason for this appeal, since the Judge in this case did exactly what he should have done, based on *A.L.*'s instructions regarding a deviation in equal custodial situations.

B. The Judge properly decided to not impute full time income to the mother at this time, based on the fact that her failure to work full time was not voluntary, and was based entirely on the fact that she had to take care of their baby Samuel, which he saw in his discretion, took away from her ability to work full time.

The statutes on imputation are at RCW 26.19 et. seq. That statute states that a court "shall impute income" to a parent who is voluntarily unemployed or voluntarily underemployed. See RCW 26.19.071. That statute specifies at (6) that "[t]he 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." RCW 26.19.071(6). The parent wishing not to be imputed must provide a "reasonable explanation" of their reason for not working full time or being underemployed. See *Goodell v. Goodell*, 130 Wn.App. 381, 122 P.3d 929 (2005). If that reason is sufficient the court can in their discretion not impute full time wages to that parent. *Id.*

Further research of the meaning of the terms voluntary underemployment shows that the difference between whether the underemployment is voluntary or not is crucial in imputing income. In the case of *In re Marriage of Brockopp*, 78 Wn.App. 441, 898 P.2d 849 (Div. 2 1995), the court, in a footnote indicated that whether the underemployment is voluntary or not hinged on the idea of whether it was their "free choice" or not. The court said in footnote #5:

> "Voluntary unemployment" is not defined in the child support statute. In *In re Marriage of Blickenstaff*, 71 Wash.App. 489, 493, 859 P.2d 646 (1993), we found the usual and ordinary meaning of that term to be unemployment that is brought about by one's own free choice and is intentional rather than accidental, and that one who is unemployable cannot be "voluntarily unemployed".

In this case, Ms. Welsh was not voluntarily underemployed due because it was not her "free choice" to do so. She had a proverbial "ox in the mire" that forced her to take substantial work time to care for their very ill child, Samuel. The Judge recognized this and accommodated for it by indicating that as long as the mother had to care for Samuel full time, she could not work full time, and that this was not of her choosing, it was a necessity. RP 421-431. Therefore, it was not of her <u>free choice</u> that she was underemployed while solely caring for their youngest child. The Judge's decision was a very well thought out and ordered coordination between the support orders and the parenting plan. To overturn this trial court's child support ruling, this court "must find the trial court abused its discretion such that it ruled on untenable or

manifestly unreasonable grounds". *In re Marriage of Curran*, 26 Wn.App. 108, 110, 611 P.2d 1350 (1980). These grounds are far from being unreasonable or untenable since the decision was made in order to make sure Samuel was cared for, and it is absolutely appropriate, and should be affirmed.

III. CONCLUSION

The court's ruling regarding imputation of income and denying a deviation because of a equal parenting schedule was and is not an abuse of discretion. It was in fact a well thought out decision that should be affirmed since the father has not shown any abuse of discretion by the judge in these two particular issues.

Dated: 4-3-17

Gary R Stenzel, WSBA #16974
Attorney for the Petitioner/Mother
Stenz2193@ccomcast.net

Declaration of Service

I Gary R Stenzel, did hereby serve the office of Robert Cossey with this Responsive Brief on the date stamped on the front of this brief. I make this statement under penalty of perjury on this 3rd day of April 2017.

Gary R Stenzel, WSBA #16974