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No. 357953

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

ALICIA A. MARROQUIN, Respondent

v.

RAUL MARROQUIN, Appellant

Brief of Respondent

Appeal from Walla Walla County Superior Court
The Honorable M. Scott Wolfram
Superior Court Judge

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I. INTRODUCTION

In this appeal, Mr. Marroquin asserts the lower court erred by declining to permit live testimony under a Mediated Agreement as to the discrete, remaining contested issue involving application of a residential deviation to the child support calculation.

Respondent Ms. Marroquin asserts that the lower court's management of the proceedings was within its discretion and that if there were a real dispute about the terms of the Mediated Agreement, the Appellant should have submitted the question to mandatory arbitration. For the reasons set forth herein, the lower court's decision should be affirmed and Ms. Marroquin should be reimbursed her legal fees.

II. ISSUES PRESENTED

This matter presents the following issues:

- 1.) Whether the lower court erred when it construed the term 'litigate' in the parties' Mediated Agreement as to the narrow question of the residential deviation in the child support calculation, and whether the process used comported with due process protections;

- 2.) Whether the Appellant's failure to resort to arbitration as provided in the parties' Mediated Agreement waived his objection regarding the type of process to be applied to carry out the Mediated Agreement;
- 3.) Whether the lower court abused its discretion in declining to apply a downward deviation to the Appellant's child support calculation under RCW 26.19.075(1)(d); and
- 4.) Whether the Respondent should be awarded attorney fees on appeal?

III. COUNTER STATEMENT OF MATERIAL FACTS

Alicia Anne Marroquin, the Petitioner herein, filed for dissolution on 7/26/16 from her husband, Raul. (CP 1-6.)¹ Within the petition, Ms. Marroquin requested that the parties' assets and debts be divided, that a parenting plan issue, and that the court order child support according to state law for the parties' then three-year-old child. (CP 3-6.)

¹ Herein, references to the clerk's papers will be identified as CP, and references to the Record of Proceedings will be identified as RP.

Attorney Michael M. Mitchell represented Ms. Marroquin. (CP 1.) Attorney Bridie Monahan-Hood represented Mr. Marroquin. (CP 29.) Both are experienced family law attorneys in the Walla Walla area, with Mr. Mitchell having been licensed since 10/27/78, and Ms. Monahan, since 5/21/97. (*See myWSBA.org PersonifyEbusiness/LegalDirectory.*)²

Motions for temporary orders were presented on 8/30/16. (RP 1:12.) During that hearing, the parenting plan schedule and child support calculations were contested, with many of the mother's requests not granted. (RP 1-8.) The court indicated at that time that it was willing to consider a deviation downward in favor of the father on the child support amount if the father would pay for the automobile so the mother's household would have sufficient funds. (RP 11:5-25).

² The attorneys' respective Bar numbers, are of course, throughout the court record. Ms. Monahan-Hood's Bar Number is 26745 and Mr. Mitchell's is 8678. As our State's Bar numbers are chronological, both these Bar numbers demonstrate the length of time each has been licensed in the State. Both Mr. Mitchell and Ms. Monahan-Hood have served in various capacities as officers of the court in Walla Walla county, including commissioner, alternate commissioner, and judge *pro tempore* over the years. The attorney undersigned would respectfully contend that this Tribunal can take judicial notice of this fact per ER 201 although it is not explicitly in the record.

On August 31, 2017, a mediated agreement was reached. (CP 7, 201-05.) The parties had been able to reach an agreement pertaining to all issues except for one section in the child support order. (CP 8, 37, 202-06.) The parties agreed on the parenting plan, the division of assets and liabilities, maintenance, and the amount of the child support transfer payment. (CP 202-06.) Only one narrow issue remained in dispute: whether a residential deviation should apply. (Id.)

The Mediated Agreement left open for ‘litigation’ whether the father should have his child support obligation reduced as a result of his residential time. (CP 201-05.) Specifically, on this point, the Mediated Agreement provided that, “The issue of whether there should be a downward deviation based on the residential schedule shall be *litigated*.” (Id.) (emphasis supplied.)

The Mediated Agreement also provided an arbitration clause, as follows:

In the event there is a dispute as to the meaning and/or construction of any of the terms of this agreement same shall be resolved by W. Scott Lowry as arbitrator. Said arbitration shall be binding.

(CP 203 at para 6.)

Apparently, sometime in October 2017, Mr. Marroquin (through counsel) requested a trial and/or ability to present live testimony as part of the remaining issue involving the requested residential deviation. (CP 172.)³

He did not file a motion for leave to submit live testimony.

On 10/17/17, the court requested to meet with counsel to discuss how to proceed with the remaining narrow issue involving the residential deviation. (CP 164-66.) The judge directed counsel to meet with him at the *ex parte* docket. (CP 165.) Although there was not a written motion on this point, it appears that Ms. Monahan-Hood had somehow conveyed that live testimony would be appropriate under the Mediated Agreement. (Id.) In response, the lower court

clearly indicated that there was no need for a trial with testimony as [Mr. Marroquin] was requesting. The court instructed Ms. Hood to file her client's Declaration and any memorandum she wanted, and [Ms. Marroquin] would have an opportunity to respond.

(CP 165; *see also* RP 15:8-23.) Mr. Mitchell would later explain that he waited for ten days or so to receive something from the

³ There is no formal record of this request by Mr. Marroquin until 12/11/17, when he filed a motion to strike the hearing and request attorney fees. (Id.)

opposing party. (RP 15:17-19.) No documents or motions were forthcoming. (Id.)

Therefore, on 10/26/17, Ms. Marroquin filed a motion for entry of a final child support order. (CP 7-26.) A hearing was noted for 11/27/17 on the standard civil docket. (CP 27.)

In Walla Walla County, the civil law and motion docket is held each Monday. WWSCLR 7(A)(1). Matters requiring a special setting may be noted on the appropriate docket before the proper department, and a hearing time will be set in the same manner as a trial assignment. WWSCLR 7(B)(4).

On October 31, 2017, Mr. Marroquin's proposed pre-trial order was entered. (CP 30.) It acknowledged that the matter had been presented during a "hearing before the undersigned judge". (CP 30.) The order provided as Findings of Fact that the parties had fully agreed on all issues except for whether a downward deviation would apply, that the Mediated Agreement provided the remaining contested matter would be 'litigated'; and that Mr. Marroquin had requested additional discovery and live testimony. (Id.)

The Court concluded that Mr. Marroquin was entitled to discovery he had requested and that it had been supplied already.

(CP 31.)⁴ The Court further concluded that for the sole issue of a downward deviation, live testimony was unnecessary to carry out the Mediated Agreement's mandates. (Id.) Briefing and Declarations were to be timely supplied. (Id.)

Through early November, Mr. Marroquin appeared to continue to request testimony via email to the judge's assistant. (CP 175-80.) A second proposed pre-trial order was proffered. (CP 225.)

Ms. Marroquin responded to this second proposed pre-trial order via counsel by letter dated 11/6/17.⁵ (CP 232.) There, Ms. Marroquin indicated that if there were a genuine dispute as to the meaning of a term within the mediated agreement, then Mr. Lowry must be called upon to arbitrate the matter. (Id.) Ms. Marroquin's counsel further explained that absent a genuine dispute, the term 'litigate' would be given its standard meaning, i.e.,

Litigate can mean many things, but clearly it means that the issue will go to a court to be decided. That is precisely what the court has ordered. The court has simply decided that live testimony is unnecessary at this point. There should also be a finding that the court has previously instructed the parties that testimony is unnecessary at this point and the matter could be noted for hearing. I noted it

⁴ It does not appear that Mr. Marroquin takes the position that any discovery was withheld.

⁵ This letter appears not to have been filed until 12/12/17.

on the court's docket but if the court prefers a special setting, I have no objection to that.

(CP 232.)

On 11/7/17, Mr. Marroquin's counsel, referencing Mr. Mitchell's letter the day prior, suggested that she could return to Mr. Lowry, the former mediator, who could arbitrate this matter. (CP 234.) There was no showing that Mr. Lowry was called upon to arbitrate the question of what the term 'litigate' meant in the mediated agreement.

Instead, on 11/20/17, Ms. Marroquin supplied her memorandum on the point of whether a downward deviation should be applied to Mr. Marroquin's child support obligation. (CP 36-55.) Attached to the briefing was the statutory and appellate authority on which Ms. Marroquin was relying. (CP 41-55.)

Ms. Marroquin also submitted a declaration in support of her position. (CP 56-60.) She asked that the standard child support calculation apply without application of the downward deviation. (CP 57.) She provided additional information regarding the bills she had taken on as part of the division of assets and liabilities and offered further explanation as to why her suggestion

was fair and equitable. (CP 57-60.) She explained that her net earnings were \$4046 per month and that she was not, as was Mr. Marroquin, eligible for overtime benefits. (CP 59.) She explained that Mr. Marroquin was able to afford fairly significant luxury items, such as a boat, a four-wheeler, and flight lessons. These facts were offered to support her stated conclusion that Mr. Marroquin had the means to pay the required amount of child support without a downward deviation. (CP 59-60.)

The matter was continued two weeks to 12/11/17 at Mr. Marroquin's counsel's request. (CP 61, 165, 168.)

Mr. Marroquin filed his briefing on 12/8/17. (CP 62-163.) The bulk involved Ms. Marroquin's financial records, attached as exhibit A.⁶ Mr. Marroquin submitted his own declaration in support of his position. (CP 109.)

On 12/8/17, Ms. Marroquin requested attorney fees through motion. (CP 164-70, 238-41.) She also requested to strike part of Mr. Marroquin's response. (CP 170.)

⁶ All of these documents should be under seal, as they contain confidential banking and financial information. It is unclear from the manner in which Mr. Marroquin filed these documents whether they are, in fact, sealed. (CP 67-68.)

On 12/11/17, Mr. Marroquin brought his own motion to strike the hearing set for that same day and requested attorney fees. (CP 171-80.) Mr. Marroquin's declaration indicated that he was 'disappointed' that he could not supply live testimony, but that he was

willing to put my case on a motion docket. We didn't get a response so decided we better have something filed prior to the hearing that was noted on the motion docket. I feel that Mr. Mitchell has dictated how this whole matter has been handled and I don't feel that I have been afforded due process. I am asking the court to rule on all written material submitted or allow a trial for this unresolved issue of my dissolution.

(CP 181.)

A final parenting plan was entered 12/11/17, as were the Decree and Findings. (CP 183-205.) The matter of child support was set over to 12/12/17 for contested hearing. (CP 206.)

At the contested hearing, Mr. Mitchell explained the mediated agreement and remaining disputed issue. (RP 14-15.) He acknowledged that Mr. Marroquin desired to cross-examine Ms. Marroquin on the deviation issue. (RP 15:6-7.) He explained that Mr. Marroquin had the child only approximately 39-40% of the time, just 4-5% more than the "standard" visitation plan. (RP

17:6-7, RP 34:24-25.)⁷ Ms. Monahan-Hood presented the issue on behalf of her client, reiterating her client's request for a downward deviation for child support. (RP 24-29.)

Mr. Marroquin requested to address the Court directly. (RP 30:4-11.) The Court permitted this. (Id.) Mr. Marroquin only addressed new parenting plan disputes and did not discuss the requested deviation at all. (RP 30:11 - 31:3.)

After the hearing, the court took the matter under advisement. (RP 37.)

The hearing was re-convened on 12/12/17 for the lower court to enter its ruling after reviewing the documents. (RP 38.) The court indicated that the standard calculation would be utilized and that the deviation would be denied. (RP 39:2-4.) A final child support order was entered which put in place the agreed upon transfer payment and denied the requested downward deviation. (CP 207-23; CP 224.)

⁷ Walla Walla County has a default parenting plan, commonly referred to as the "Rule 18" parenting plan. WWCSCLR 18 used to be the reference for this schedule. Under the updated rules, it is found at WWCSCLR 94.04. The parenting plan provides the non-residential parent essentially every other weekend visitation, from Friday through Sunday, and shared holidays and summer breaks. It was this 'standard' parenting plan that formed the basis for the 35% calculation, to which both counsel referenced.

Mr. Marroquin filed a motion for reconsideration on 12/13/17. (CP 234.) It was denied. (CP 242-244.) An appeal followed. (CP 246-68.)

IV. LEGAL ARGUMENT

A. Standard of Review

A trial court's order of child support is reviewed for abuse of discretion. *State v. Graham*, 159 Wn.2d 623, 632, 162 P.3d 1005 (2007); *In re Marriage of Booth*, 114 Wn.2d 772, 776, 791 P.2d 519 (1990). A trial court abuses its discretion if its decision rests on unreasonable or untenable grounds. *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007); *In re Marriage of Leslie*, 90 Wn. App. 796, 802-03, 954 P.2d 330 (1998). A trial court's decision will not be reversed absent a manifest abuse of discretion. *Leslie*, 90 Wn. App. at 802-03. Moreover, the reviewing court cannot substitute its judgment for that of the trial court unless the trial court's decision rests on unreasonable or untenable grounds. *Id.* at 802. A trial court necessarily abuses its discretion if its ruling is based on an erroneous view of the law or involves incorrect legal analysis. *Dix*, 160 Wn.2d at 833.

The case *In re A.L.*, 185 Wn. App. 225, 340 P.3d 260 (2014), provides insight into the broad discretion available to the trial court considering questions of deviation of child support. There, this Tribunal

looked to the legislative history involving the residential deviation, explaining as follows:

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, 39-41, 216 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.

A.L., 185 Wn. App. at 237.

Here, the lower court acted within its discretionary authority in construing and applying the Mediated Agreement and in ruling on the question of the downward deviation. As such, the ruling denying Mr. Marroquin’s request for the residential child support deviation should be affirmed.

B. **Mr. Marroquin's Procedural and Substantive Due Process Rights Were Protected Throughout the Lower Court Process in Construing and Applying the Mediated Agreement.**

1) *Meeting Between Counsel and Judge To Discuss Procedure Moving Forward Did Not Violate Due Process.*

Mr. Marroquin alleges that the meeting between Mr. Mitchell, Ms. Monahan-Hood, and Judge Wolfram at the ex parte table⁸ in October regarding the steps to apply to the Mediated Agreement violated Article 1 § 10 of the Washington Constitution because it was off the record. Further, he argues that the request for live testimony should have been heard in the courtroom through a written motion. (Brief of App. at 13.) These arguments are not tenable.

After all, it was Mr. Marroquin's choice, through counsel, not to file a motion under CR 7 regarding his request for testimony. Had that motion been filed, the hearing would have been noted in due course on the record. He failed to do that. Instead, it appears that his counsel raised these requests informally, directly to opposing counsel and perhaps via email to the judge's assistant. He now asserts that the judge acted in an informal manner in response to these requests. His position is untenable. He cannot have it both ways.

⁸ In Walla Walla, *ex parte* matters are presented between 1 and 1:30 PM to the assigned judge, who is at a table in the clerk's office.

Even upon learning of the judge's request to meet on October 17, 2017, at the *ex parte* hearing area, Mr. Marroquin could have filed a motion opposing the meeting. He could have moved for a formal hearing on the record pertaining to the question. He did not do so. Because Mr. Marroquin was represented by experienced, competent counsel, it appears that this was a tactical decision. *See State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989) (discussing tactical decisions by competent counsel). Ultimately, by failing to utilize the options available to him to cure this issue, Mr. Marroquin has waived these arguments on appeal. *See* RAP 2.5.

As to the meeting itself, Mr. Marroquin's briefing on this issue provides citations that are simply not helpful to his cause. For example, he relies upon *State v. Jamie*, 168 Wn.2d 857, 862, 233 P.3d 554 (2010), for the proposition that this meeting was improper. The *Jamie* case involved an entire criminal trial being held in a jailhouse courtroom, from which the public was excluded. *Id.* at 168 Wn.2d at 859. That is not the case here, as the substantive hearing occurred in open court and the applicable constitutional provision is entirely different.

Mr. Marroquin also cites to *State v. Jones*, 185 Wn.2d 412, 421, 372 P.3d 755 (2016), as authority against this meeting. That case involved a criminal defendant's waiver of his due process argument involving a random drawing to designate alternate jurors outside a defendant's

presence. Again, that case is not helpful due to the factual distinction as well as the differing constitutional provisions. He also cites to *Bennett v. Smith Bunday Berman Britton, PS*, 156 Wn. App. 293, 234 P.3d 236 (2010). Again, that case is not relevant here, as it involves arguments involving a sealed court record and application of the *Ishikawa* factors.

As a general rule, it is not uncommon or improper for lawyers and judges to meet to discuss the general processes that will be applicable for a proceeding pre-trial. See *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012); (holding “[N]ot every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public.”); see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 598 n. 23, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (Brennan, J., concurring) (public trial presumption not incompatible with private exchanges at the bench and conferences in chambers).

If a specific ruling is needed on an issue, of course a motion would be filed and the matter would be heard publicly. Moreover, even during an informal meeting among the participants, at any point, any lawyer or party – or even the court- can request the matter be held in a courtroom on the record. In this case, the meeting was not improper in any fashion, nor is there a showing that any of the parties requested that some matter raised in the meeting – or the entire meeting - be heard on the record.

Notably, even after the meeting and entry of the pre-trial order, Mr. Marroquin apparently still believed it possible that he could testify, which was his stated basis for delaying filing his declaration. (CP 171-81.) Accordingly, he apparently did not believe that any result of this meeting resulted in a final, binding order. Again, relying on his sworn statement, it appears that he could have proceeded to file a formal motion for testimony, but chose not to do so. This meeting does not form the basis for reversible error.

Ultimately, it is not the process utilized at the meeting that offended Mr. Marroquin. Instead he is upset he was not permitted to testify. As that issue was repeatedly revisited even after the October meeting, there was not error resulting from the meeting. Mr. Marroquin's arguments to the contrary should be rejected.

2) Under this Mediated Agreement, the Lower Court Had Discretion To Decline To Hear Live Testimony on the Discrete Contested Issue.

Mr. Marroquin asserts that where only the discrete issue of a downward deviation remained to be 'litigated' under the Mediated Agreement, he had the right to demand live testimony and cross-examination. (Brief of App. at 7-12.⁹) Therefore, the question before this Tribunal is whether under this particular Mediated Agreement, the lower

⁹ In support of this argument, Mr. Marroquin cites to nine out-of-state cases, and no cases directly on point.

court correctly construed and applied the term ‘litigate’ as it pertained to the narrow question of a downward residential deviation in the child support calculation.

In construing this settlement agreement, basic canons of construction apply. Settlement agreements are construed the same as other contracts. *Condon v. Condon*, 177 Wn.2d 150, 162-63, 298 P.3d 86 (2013). In a dispute as to the terms of a settlement agreement, the party moving to enforce a settlement agreement carries the burden of demonstrating no genuine dispute over the existence and material terms of the agreement. *Id.* Thus, it is paramount that this Court determines the intent of the parties from the actual words used in the agreement. *Id.* When doing so, this Court will give the words their ordinary, usual, and popular meaning unless a contrary intent is shown from the entirety of the agreement. *Id.* (emphasis supplied)

Here, the term in the settlement agreement at issue is the word ‘litigate.’ Mr. Marroquin had every opportunity to declare the term ambiguous and insist on the arbitrator’s construction of the term as per the process set forth in Mediated Agreement. He did not do so. His failure to do so constitutes an admission that the term ‘litigate’ was plain and unambiguous. Therefore, the lower court had no alternative but to give the term its plain and standard meaning.

The Merriam-Webster Dictionary defines the term ‘litigate’ as “to carry on a legal contest by a judicial process.”¹⁰ The Cambridge Dictionary defines the term as “to ask for a disagreement to be discussed in a court of law so that a judgment can be made that must be accepted by both sides in the argument.”¹¹ The Oxford Dictionary defines the term as to “resort to legal action to settle a matter; be involved in a lawsuit.”¹² Nowhere in the plain definition of this term is there a requirement that the parties submit live testimony. Rather, a meaningful judicial process needs to occur, and it did.

Mr. Mitchell made this clear to the lower court, explaining,

Litigate can mean many things, but clearly it means that the issue will go to a court to be decided. That is precisely what the court has ordered. The court has simply decided that live testimony is unnecessary at this point. There should also be a finding that the court has previously instructed the parties that testimony is unnecessary at this point and the matter could be noted for hearing. I noted it on the court’s docket but if the court prefers a special setting, I have no objection to that.

(CP 232.)

Notably, Mr. Marroquin was given time to complete discovery before this matter was heard in December. (RP 15:17-19.) As such, he

¹⁰ www.merriam-webster.com/dictionary/litigate (Aug. 17, 2018).

¹¹ www.dictionary.cambridge.org/dictionary/english/litigate. (Aug. 19, 2018).

¹² <https://en.oxforddictionaries.com/definition/litigate>. (Aug. 19, 2018).

could have opted to note a deposition of Ms. Marroquin so he could have conducted the cross-examination of her he felt would be so crucial. He did not do so. He could have issued written interrogatories. He did not do so. The deposition and responses could have been filed, thereby showing Ms. Marroquin's answers to his questions under oath. He did not do so. Perhaps those answers could have given him a basis to request the arbitrator or lower court review as to whether live testimony was needed. He did not do so, even though the pre-trial order that was entered plainly gave him authority to seek discovery. Instead, he chose to submit documents, argument, and his own declarations for consideration on the issue of the residential deviation. While he did not have the opportunity for live testimony, he did have the opportunity for meaningful judicial process. In other words, the issue was litigated.

The lower court acted within its discretion in declining to hear testimony on the issues presented. After all, the trial court is generally in the best position to perceive and structure its own proceedings. *State v. Dye*, 178 Wn.2d 541, 309 P.3d 1192 (2013). Accordingly, a trial court has broad discretion to make a variety of trial management decisions, ranging from “the mode and order of interrogating witnesses and presenting evidence,” to the admissibility of evidence, to provisions for the order and security of the courtroom. *Id.* at 547-58 (internal citations omitted). In

order to effectuate the trial court's discretion, on review, the trial court is granted broad discretion: even if the appellate court disagrees with the trial court, it will not reverse the lower court's decision unless that decision is "manifestly unreasonable or based on untenable grounds or untenable reasons." *In re Marriage of Littlefield*, 133 Wn.2d 39, 46–47, 940 P.2d 1362 (1997). Here, the lower court's decision declining to hear live testimony in carrying out this Mediated Agreement was not manifestly unreasonable or untenable.

In general, due process requires a meaningful opportunity to be heard on an issue. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Aiken v. Aiken*, 187 Wn.2d 491, 500, 387 P.3d 680 (2017). Due process is a flexible concept; the level of procedural protection varies based on circumstance. *Mathews*, 424 U.S. at 334. In evaluating the process due in a particular situation, courts consider (1) the private interest impacted by the government action, (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) the government interest, including the additional burden that added procedural safeguards would entail. *Id* at 335. Here, the process utilized gave Mr. Marroquin the full opportunity to present his

facts and legal argument on the remaining discrete issue involving the downward deviation.

Even in the absence of a mediated agreement, in the context of other family law actions, trial courts' decisions to deny live testimony or cross-examination under certain circumstances have been affirmed. For example, in *Aiken v. Aiken*, 187 Wn.2d 491, 387 P.3d 680 (2017), our State Supreme Court upheld the lower court's decision to prevent a father from cross-examining his own child in a domestic violence protection order case, finding that such a determination was well within the discretion of the trial court. Moreover, the analysis supplied therein makes clear that a full hearing on a case can occur in a manner comporting with due process without live testimony or cross-examination. *Id.* at 500 (explaining the DVPO statute contemplates that both sides will be able to offer appropriate argument and evidence within the proper discretion of the trial court and that there were other procedural and substantive safeguards available).

In applying the *Mathews v. Eldridge* factors, the *Aiken* court recognized that there were times that due process may require cross-examination even in a civil proceeding. The court also recognized there existed ample legal authority for a trial court to limit such testimony and require the parties to rely upon affidavits or declarations rather than live

testimony in some circumstances. *Id.* at 503. The *Aiken* analysis referenced *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.5, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), for the notion that, even when as fundamental a liberty interest as physical liberty is at stake, substitutes for live testimony such as affidavits, depositions, and documentary evidence may be constitutionally sufficient. *Id.* at 503. Finally, the *Aiken* court recognized that there were times that cross-examination in the family law context could be misused. *Id.*

It is apparent that the *Aiken* parties had a chance to “litigate” their case, even though certain live testimony was restricted. The same is true in the case at Bar.

Here, there was no relevant or significant information that Mr. Marroquin sought that was not adequately provided. In his appeal, he has offered nothing more than mere conjecture as to how he has in fact been prejudiced by not being able to pursue cross-examination of his ex-wife regarding her spending. Ultimately, the lower court acted within its authority to manage the submission of information and evidence, and its ruling was appropriate. The parties were permitted to fully litigate the remaining question on the child support calculation, and the resulting ruling should be upheld.

C. **Mr. Marroquin's Failure To Seek Arbitration Waives His Claims Here.**

Mr. Marroquin asserts that the term 'litigate' in the Mediated Agreement contemplated live testimony in a trial-like proceeding rather than via briefing, documentary evidence, and declarations. However, by failing to seek the arbitrator's ruling on the intended definition of the term 'litigate', Mr. Marroquin has admitted the term was plain and unambiguous. Had he disputed this, he would have been mandated to pursue the arbitration provision within the mediated agreement. He could have asked the arbitrator to decide how the term should be construed. Because he did not follow the arbitration process, he cannot seek a finding that the term 'litigate' demanded live testimony.

After all, Washington has a strong public policy favoring arbitration. *Heights at Issaquah Ridge Owners Ass'n v. Burton Landscape Grp., Inc.*, 148 Wn. App. 400, 405, 200 P.3d 254 (2009); *Verbeek Props., LLC v. GreenCo Env'tl, Inc.*, 159 Wn. App. 82, 87, 246 P.3d 205 (2010). Arbitration clauses that are expressly negotiated at arms-length between parties are routinely and regularly enforced. *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 16 P.3d 617 (2001). However, a party can waive his or her contractual rights to arbitration by engaging in conduct directly inconsistent with the intent to arbitrate. *Otis House Ass'n, Inc. v. Ha*, 165

Wn.2d 582, 586, 201 P.3d 309 (2009). One of the ways a contractual right to arbitration may be waived is if it is not timely invoked. *Otis Hous.*, 165 Wn.2d at 587. In order to avoid a finding of waiver by conduct, a party seeking to enforce its right to arbitration must take some action to enforce that right within a reasonable time. “A party waives a right to arbitrate if it elects to litigate instead of arbitrate.” *Id.*

Here, Mr. Marroquin, on the advice of experienced and competent counsel, expressly opted not to seek an arbitrator’s ruling on the meaning of the term ‘litigate’. Had he believed the term to be ambiguous, he could have requested mandatory arbitration for Mr. Lowry to construe the term. Clearly, Mr. Lowry had intimate knowledge of what the parties’ intended in this Mediated Agreement. However, Mr. Marroquin opted never to request that Mr. Lowry construe the term. In so doing, he has now waived his right to assert that the word ‘litigate’ was ambiguous. Instead, he must rely on the plain meaning, as discussed more fully above.

Unquestionably, Mr. Marroquin was given his day in court and was able to make his arguments relative to his requested downward deviation. The lower court’s ruling should be affirmed.

D. Child Support Calculation Was Correctly Applied By the Lower Court.

In Washington, both biological parents have an obligation to support their children regardless of marital status. *Linda D. v. Fritz C.*, 38 Wn. App. 288, 300, 687 P.2d 223 (1984). A parent's obligation for the care and support of his or her child is a basic tenet recognized in this state without reference to any particular statute. *State v. Wood*, 89 Wn.2d 97, 100, 569 P.2d 1148 (1977).

Objective rules apply in Washington for calculation of child support obligations.¹³ A parent's child support obligation is calculated by applying the combined monthly net income of both parents to the uniform child support schedule in RCW 26.19.020 to determine the presumptive support level, which is then apportioned according to each parent's percentage of the combined monthly net income. RCW 26.19.035(1) (enumerating the standards for application of the child support schedule). A determination of each parent's net income is essential to this calculation. *See* RCW 26.19.071(1)-(5).

Each parent is required to verify net income with sufficient documentary evidence. RCW 26.19.071(2). RCW 26.19.071 enumerates income sources that a trial court must consider when computing a parent's

¹³ Any party filing a pleading with the clerk of the court under Chapter 26.09 RCW must use the court forms. RCW 26.09.006; RCW 26.18.220.

gross income. RCW 26.19.071(3). The statute also enumerates expenses the trial court must deduct from gross monthly income to calculate the net monthly income used to establish the presumptive support level. RCW 26.19.071(5). Upon application of these mandatory, objective rules, the presumptive child support payment is established. From the presumptive standard child support payment, the parent may argue for a deviation under RCW 26.19.075.

One of the downward deviations available is a deviation resulting from the parent's residential schedule with the child. Here, the lower court correctly denied the residential deviation because Mr. Marroquin failed to meet his legal burden. Mr. Marroquin was requesting a deviation based on the residential time he had with the child under RCW 26.19.075, which governs the standards for deviation from the standard calculation from the Washington State child support worksheet. RCW 26.19.075(d) indicates,

(d) Residential schedule. 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.

(emphasis supplied.) As a preliminary matter, it is important to note that the use of the word ‘may’ in the statutes makes clear that this issue is plainly within the sound discretion of the trial court. Here, the trial court did not abuse that discretionary authority in denying Mr. Marroquin’s request for a downward deviation.

The case *In re Marriage of Schnurman*, 178 Wn. App. 634, 316 P.3d 514 (2013), provides guidance on application of RCW 26.19.075(d). There, the father requested a downward deviation of his child support obligation because he shared substantially equal residential time with the parties’ children. *Schnurman*, 178 Wn. App. at 637. The trial court rejected his request because the father had failed to demonstrate an increase to his expenses, a decrease to the mother’s expenses, and because the downward deviation would result in insufficient funds for the mother’s household. *Id.* On appeal, the father alleged that the standard calculation should be rejected where the parents held shared custody, and that the parents’ expenses must be equitably apportioned in an alternative manner. *Id.* at 638. The appellate court answered simply: “Seth is wrong.” *Id.*

The Court’s ruling relied upon the legislative intent behind the child support statute, “to insure that child support orders are adequate to

meet a child's basic needs and to provide additional child support commensurate with the parents' income, resources, and standard of living.” *Id.* (quoting RCW 26.19.001.) Thus, Division One determined that the legislature has already equitably apportioned costs between parents by application of the child support table to each parent’s proportionate share of income. As a result, Mr. Schnurman’s arguments were rejected and the trial court’s denial of the residential deviation was affirmed. *Id.* at 643.

Ms. Marroquin also relied upon *Langford v. Langford*, 184 Wn. App. 1006 (2014), an unpublished case, for this same proposition. (CP 50.)¹⁴ In *Langford*, the court considered a father’s request for a residential deviation, and found it inappropriate based on the facts and law, and not in the children’s best interests. The decision was affirmed, and a subsequent petition for review to the Supreme Court was denied. The same result is applicable here.

Under the terms of RCW 26.19.075(d), the inquiry about a residential deviation begins with consideration of whether the child is, in fact, spending a significantly greater time with the parent who is obligated

¹⁴ Under GR 14.1(a), unpublished opinions may be cited, provided it is made clear that the decision is unpublished, has no precedential value, is not binding on any court, and that it is cited only for such persuasive value as the court deemed appropriate.

to pay child support than was contemplated by the legislature in drafting the child support schedule. The legislature calculated child support on a presumption that the non-residential (paying) parent would be spending approximately 35% of time with the child. (RP 17:6-7, RP 34:24-25.) Here, the record reflects that Mr. Marroquin is spending, at best, 5% more time than that with his child. (Id.) Thus, it does not appear this is the ‘significant’ amount of time contemplated by the deviation standard. The trial court did not err in denying this downward deviation where Mr. Marroquin did not demonstrate that he was, in fact, spending any greater residential time with the child than contemplated by the standard calculation.

Second, the lower court did not err in denying the requested downward deviation where the decrease in child support would prevent the mother’s household from having adequate funding. RCW 26.19.075(d) indicates that the court may not grant this downward deviation if it would result in insufficient funds in the household receiving the support to meet the basic needs of the child.

Here, Ms. Marroquin presented evidence of her costs of living and the fact that her household would lack basic necessities to provide for the child if the deviation were permitted. (RP 35.) She provided financial

information demonstrating the financial hardship that would arise upon application of the residential deviation. (CP 56-50, 204-20.)

Third, the lower court did not err in denying the residential deviation where Mr. Marroquin failed to demonstrate an increase in expenses from the increased amount of time he was spending with the child. RCW 26.19.075(d) indicates that in considering the amount of deviation to apply, the trial court must consider whether the moving parent has demonstrated an increase in expenses from the increased amount of time he or she is spending with the child.

At hearing, Mr. Marroquin failed to demonstrate increased expenses that were related to significantly increased time. (RP 22.) He did show some additional voluntary expenses with the parties' child that he wanted to engage in such as activities, amusement parks, aquarium visits, museum visits, and fishing and camping costs. (RP 22, 31.) These were voluntary costs going far beyond the necessities contemplated by statute. Alternatively, he did list some expenses, such as bedding or medical co-payments, that he would have had no matter the length of time he had the child. (RP 22, 23.) These were not the type of additional costs contemplated by the deviation. As a result, the lower court did not err by finding that the deviation was inappropriate on these contentions.

Fourth, the lower court did not err in denying the residential deviation where Mr. Marroquin failed to demonstrate a decrease in the mother's expenses resulting from the significant residential time he was spending with the child. RCW 26.19.075(d) indicates that, in considering the amount of deviation to apply, the trial court must consider whether the requesting parent has demonstrated the other parent has a decrease in expenses from the increased amount of time being spent with the child by the paying parent.

Here, Mr. Marroquin could not provide one example of payments that he was making on behalf of the child during his residential time that was going to save the mother money. He generally claimed that if he were spending money on the child for fishing or camping costs, or museum tickets, for example, that was saving the mother money. (RP 30-35.) However, he could not provide evidence of this claimed corollary.

Ultimately, Mr. Marroquin failed to meet any of these mandatory statutory requirements. He failed to demonstrate any statistically significant additional time that he was spending with the child to warrant the deviation. He failed to demonstrate evidence of increased expense to him, or a decreased expense for Ms. Marroquin due to the amount of time the child is with him. Finally, he failed to address the fact that the

deviation would result in insufficient funds of the mother. Thus, there is no factual basis to grant a deviation based on the father's residential time, and a ruling otherwise would be contrary to law. The denial was well within the lower court's discretion, and its decision should therefore be affirmed.

E. Mr. Marroquin Should Reimburse Ms. Marroquin for Legal Fees on Appeal.

An appellate court may award attorney fees where allowed by statute, rule, or contract. *Malted Mousse, Inc., v. Steinmetz*, 150 Wn.2d 518, 535, 79 P.3d 1154 (2003). If attorney fees are allowable at trial, the prevailing party may recover fees on appeal. RAP 18.1.

Here, assessment of attorney's fees is appropriate in the mother's attempt to have reasonable child support calculated and applied. After all, it is a fundamental legal principle that when a custodial parent must go to court to obtain child support, he or she has a right to reimbursement for attorney's fees under RCW 26.18.160. That provision states,

In any action to enforce a support or maintenance order under this chapter, the prevailing party is entitled to a recovery of costs, including an award for reasonable attorney fees. An obligor may not be considered a prevailing party unless the obligee has acted in bad faith in connection with the proceeding in question.

RCW 26.18.160.

This provision in the law carried forward the state's policy of ensuring that each child has the benefit of child support. *See Goodell v.*

Goddell, 130 Wn. App. 381, 122 P.3d 929 (2005) (holding that every parent has the obligation to pay to support his or her child.); *State ex rel. Lucas v. Superior Ct.*, 193 Wn. 74, 77-78, 74 P.2d 888 (1937) (holding that obligation for support for minor child continued no matter what divorce decree said); *Ditmar v. Ditmar*, 48 Wn.2d 373, 293 P.2d 859 (1956); *Gaidos v. Gaidos*, 48 Wn.2d 276, 293 P.2d 388 (1956) (holding that the father had to pay child support even if he did not wish to engage in visitation); *Fuqua v. Fuqua*, 88 Wn.2d 100, 105, 558 P.2d 801 (1977) (holding a child's custodian receives support money as a trustee, and not in his or her own right); *Powers v. Dep't of Soc. H. Servs.*, 32 Wn. App. 310, 316, 648 P.2d 439 (1982) (holding that the father's duty of support continued even after disputed custody change); *Hartman v. Smith*, 100 Wn.2d 766, 769, 674 P.2d 176 (1984) (holding agreements as to prospective payments of child support invalid); *In re the Marriage of Pippens*, 46 Wn. App. 805, 808, 732 P.2d 1005 (1987); *In re Marriage of Fox*, 58 Wn. App. 935, 937 n. 3, 795 P.2d 1170 (1990); *In re Marriage of Stern*, 68 Wn. App. 922, 932, 846 P.2d 1387 (1993) (explaining that right of support belongs to child and is premised on public policy considerations). As a result of the foregoing, Mr. Marroquin should reimburse Ms. Marroquin for her costs on appeal.

Alternatively, this Court could choose to allow the mother's legal fees to be reimbursed as a result of disparity of income. A party may be required to pay legal fees in a family law action for a number of reasons.

RCW 26.09.140 provides in part:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter (The Uniform Marriage and Divorce Act) and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

RCW 26.09.140. Under the terms of this statute, the award of attorney's fees rests within the sound discretion of the trial court, which must balance the financial needs of the spouse requesting them with the ability of the other spouse to pay. The case *In re Marriage of Low*, 44 Wn. App. 6, 720 P.2d 850 (1986), speaks of the statute as being intended "to protect a financially weaker party from the expense of costly litigation or vexatious custody disputes." See also *Kruger v. Kruger*, 37 Wn. App. 329, 333, 679 P.2d 961 (1984); *In re Marriage of Melville*, 11 Wn. App. 879, 882, 526 P.2d 1228 (1974).

If this Court is inclined to consider an award of attorney's fees and costs based on the financial resources of the parties pursuant to RCW

26.10.080, then Respondent requests that she be awarded her fees and costs. Ms. Marroquin will timely submit an affidavit of financial need pursuant to RAP 18.1 prior to oral argument or consideration of this matter.

V. CONCLUSION

The Mediated Agreement preserved for ‘litigation’ the narrow issue of the residential deviation. Mr. Marroquin’s failure to seek an arbiter’s ruling – as was mandatory – regarding the intended meaning of the term ‘litigate’ prevents him from claiming the term was ambiguous. Here, the lower court correctly applied the plain meaning of the term to provide for the parties to present facts and legal argument pertaining to the question of the residential deviation.

Ultimately, Mr. Marroquin failed to establish that he spent significantly greater time with the child than contemplated by the child support table or that the deviation would not make the mother’s household financially unstable or that his costs were increased from his residential time or that the mother’s costs were thereby decreased. Accordingly, the lower court was correctly within its authority and discretion in denying the requested deviation.

For the reasons set forth herein, the lower court's decision should be affirmed and Ms. Marroquin should be reimbursed her legal fees.

Respectfully submitted this 20th day of August, 2018 by:

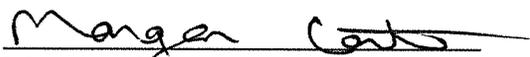
A handwritten signature in black ink, appearing to read 'J. Carman', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I provided service of the Respondent's Brief as follows: to Co-Counsel for Appellant, Bridie Monahan Hood to *bridie@monahanhood.com*; to Co-Counsel for Appellant Chris Constantine, *ofcounsl1@mindspring.com*; and to Michael Mitchell, *mike@msmlaw.biz*. Prior to delivering this document by email, I secured permission for service by email from the identified counsel.

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