No. 89472-8
COA No. 43125-4-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of

MATTHEW ANDERSON
Respondent

and

TAMRA ANDERSON
Appellant

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Tamra Anderson, respondent below, asks this Court to accept review of the Court of Appeals' decision terminating review. See Part B.

B. COURT OF APPEALS DECISION

Petitioner Tamra Anderson, seeks review of the Court of Appeals' decision entered on September 4, 2013, and the decision denying reconsideration, entered on October 2, 2013, by which the court reversed the trial court's order denying a downward deviation of child support. A copy of these decisions is attached.

C. ISSUES PRESENTED FOR REVIEW

1. If an order of child support includes a downward deviation, must that downward deviation be perpetuated in all future orders absent a modification based on a substantial change of circumstances, or should a trial court conduct the deviation analysis every time the standard calculation is altered, including by motion to adjust?

2. Even if a downward deviation has a preclusive effect, should this rule apply where the original order of child support was not independently reviewed by the trial court and was not susceptible to appellate review on the merits, being entered either pursuant to arbitration, as here, or by agreement, as in *Pippins v. Jankelson,* 110 Wn.2d 475, 754 P.2d 105 (1988)?

D. STATEMENT OF THE CASE[1]

Matthew and Tamra are parents to two children, currently ages eight and six. The children reside two-thirds of the time with Tamra.

The parents began dissolution proceedings in August 2008, which did not conclude until two years later. As temporary child support, for about six months, Matthew was ordered to pay Tamra $927 monthly.

The parties negotiated a CR 2A agreement, which included a requirement they arbitrate child support. CP 19. The arbitration resulted in an order of child support dated May 17, 2009. CP 15, 19. Pursuant to this order, starting June 1, 2009, Matthew reduced his child support payments to $700. CP 40. This amount reflected a deviation granted by the arbitrator from the standard calculation of $873 based on the following reasons:

> The children spend a significant amount of time with the parent who is obligated to make a support transfer payment. The deviation does not result in insufficient funds in the receiving parent's household to meet the basic needs of the child. The child does not receive public assistance.

CP 15. The children spend 64.4% of their residential time with Tamra and 35.6% with Matthew. CP 162. When final orders were entered dissolving the marriage, on September 10, 2010, over a year after arbitration, the trial court simply incorporated the arbitrated order of child support. CP 12-25.

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[1]Additional facts and citations to the record may be found in the mother's brief.

At the time the parties arbitrated child support, the state's child support table was capped at $7000 in joint monthly net income. *State ex rel. M.M.G. v. Graham,* 159 Wn.2d 623, 627, 152 P.3d 1005 (2007) ("the table ends at a combined monthly income level of $7,000"). Both Matthew and Tamra work outside the home and are well compensated; together their income in 2009 totaled nearly $12000. CP 22. However, both the temporary order and the arbitrated order calculated basic child support according to the $7000 cap in the statutory table.

In 2009, for the first time in decades, the legislature revised the child support table extending it to $12000 monthly net income. RCW 26.19.020. Under this new table, effective October 1, 2009, the basic child support obligation for the parties' two children is $2330, compared to $1534 under the previous table. CP 22, 195. Although this new level of support was in effect at the time final orders were entered, i.e., in September 2010, the arbitrated order of child support, incorporated into those final orders, was based on the lower level.

A year after final orders were entered, on September 28, 2011, Tamra moved to adjust child support, as permitted under the arbitrated order and the statute, to reflect the new level of support in the child support table. CP 17, 113-115; RCW 26.09.170. Matthew opposed the

motion on various grounds (CP 157-167), but conceded the new statutory level of basic child support. CP 162.

The family court commissioner granted the adjustment on December 8, 2011. CP 180-198. The commissioner denied Matthew's request to continue the arbitrator's deviation, finding "no good reason exists to justify deviation." CP 187. Matthew sought revision. CP 203-256. The court denied revision. CP 268.

Matthew appealed and Court of Appeals reversed the trial court's decision to deny the father's requested deviation downward. The Court reasoned that "[a]bsent a substantial change of circumstances, a court does not also have authority in an adjustment proceeding to modify a prior court's deviation decision." Slip Op., at 7.

Tamra seeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Family law requires some exceptions to the principles of finality that apply to most civil proceedings. In particular, statute provides mechanisms for altering child support orders to keep them current with the family's changing circumstances. One such mechanism, the motion to adjust, applies where the parties' incomes have changed and where the legislature has implemented a new support table. The adjustment procedure results in a new standard calculation. Under the statute, a

request for deviation must be addressed after the standard calculation is derived. Specifically, RCW 26.19.075(3) states that: "The court shall not consider reasons for deviation until the court determines the standard calculation for each parent." (Emphasis added.)

The Court of Appeals' decision perpetuating the arbitrator's deviation conflicts with this plain language of the statute and, consequently, with numerous state cases declaring the rules of statutory construction, including the paramount requirement that statutes be construed to fulfill the legislature's intent. RAP 13.4(b)(1) and (2). Given the primacy of the state's duty to children, any decision that undermines the legislative intent to assure through child support that children's basic needs are met necessarily presents an issue of substantial public interest. RAP 13.4(b)(4).

Furthermore, this case raises a more specific question regarding whether a deviation, once ordered, must be perpetuated in subsequent orders even where the original order was entered without benefit of independent judicial review and where the original order was never reviewable on the merits by a higher court.

For example, this Court has previously held that a child support order may be altered without proof of a substantial change of circumstances if there was no independent judicial review. *Pippins v.*

Jankelson, 110 Wn.2d 475, 754 P.2d 105 (1988), *superseded by statute in respect of unrelated issue, as recognized by State v. Cooperrider,* 76 Wn. App. 699, 887 P.2d 408 (1994). Application of this principle here makes the same kind of sense, i.e., as a way of not permitting the perpetuation of an error. Yet Division Two did not even address this more specific question, despite that its decision conflicts with this Court's holding in *Pippins*. RAP 13.4(b)(1).

For these reasons, and because this same issue arises with respect to parenting plans entered by arbitration or agreement, this case merits review under RAP 13.4(b)(1), (2), and (4).

1. WHENEVER A NEW STANDARD CALCULATION IS DERIVED, THE COURT SHOULD ANALYSE ANEW WHETHER A DEVIATION IS JUSTIFIED.

The standard calculation represents the legislature's judgment as to the level of support children need. Any deviation "is an exception and should only be used where it would be *inequitable* not to do so." *In re Marriage of Goodell,* 130 Wn. App. 381, 391, 122 P.3d 929 (2005). Most importantly, a deviation is permitted only where it will not "result in insufficient funds" in the receiving household and only after the court considers evidence "concerning the increased expenses to a parent making support transfer payments resulting from the significant amount of time spent with that parent and ... the decreased expenses, if any, to the party

receiving support ..." RCW 26.19.075(1)(d).[2] This is why the statute permits, but does not require, a credit for residential time spent in an obligor parent's home. RCW 26.19.075(1)(d). As this Court observed, even where residential time is split equally, this credit remains discretionary with the court. *M.M.G.*, 159 Wn. 2d at 638. Here the residential split is roughly two-thirds/one-third.

The legislature prescribes a specific order to the derivation of the standard calculation, as this Court described in *M.M.G.*, 159 Wn.2d at 626-628. First, a court must determine the basic child support obligation, then determine the standard calculation, "which is the presumptive amount of child support owed by the obligor parent to the obligee parent." *Id.*, at 627. "The court next determines whether it is appropriate to deviate from the standard calculation." *Id.; see, also* RCW 26.19.075(3) ("The court

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[2]The relevant statutory provision follows:

> (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.

shall not consider reasons for deviation until the court determines the standard calculation of each parent.").

If the court deviates, it "must enter written findings of fact supporting the reasons for the deviation." *Id.,* at 627-628.

The question presented here is whether the court must follow these same steps when adjusting child support to comport with changes in income and/or the support table. The plain language of the statute suggests the deviation analysis must be undertaken any time a new standard calculation is derived. This also makes sense. A previously granted deviation may no longer be justified under the new standard calculation, given changes in the parties' incomes or the support table. The reverse might also occur: changes in income or the support table might justify a deviation upward or downard. These changes may or may not support a modification based on a substantial change of circumstnces, since the change of circumstances must "be of a kind not within the contemplation of the parties or the court at the time the original order of support was entered." *Pippins,* 110 Wn.2d at 480.

Importantly, whatever the type of proceeding, the child support analysis occurs as a piece, from start to finish. Tacking a previously ordered deviation onto a new standard calculation simply does not make sense.

This is further apparent from the facts in this case. The arbitrator granted a deviation, on merely cursory factual findings and with zero explanation for the amount of the deviation. CP 158. Carried forward, does a trial court order a deviation in the same amount (i.e., $873-$700=$173) or in the same ratio (i.e., $173 = 20% of $873, therefore the new standard calculation of $1342 would be reduced by 20% to $1074), or does the court calculate an entirely new amount? This haphazard approach does not comport with the legislature's careful calculus.

This Court should take review to enforce the legislative scheme for derivation of the transfer payment, including by requiring that any deviation be justified every time a new standard calculation is derived. Not only does this rule fulfill the legislative intent, it is simple, straightforward, and easy to apply in a uniform manner. These are highly desirable benefits.

2. EVEN IF A DEVIATION MAY GENERALLY BE ALTERED ONLY BY PROOF OF A SUBSTANTIAL CHANGE OF CIRCUMSTANCES IN A MODIFICATION PROCEEDING, THAT RULE SHOULD NOT APPLY WHERE THE ORIGINAL ORDER WAS NOT SUBJECT TO JUDICIAL REVIEW.

In this case, an additional reason compels upholding the trial court's order denying the downward deviation. The original order of child support resulted from binding arbitration. As a consequence, it was not

reviewed independently by the trial court and was not subject to appellate review on the merits, since judicial review of arbitration awards is extremely limited. In fact, "judicial review of an arbitration award is limited to the face of the award." *Davidson v. Hensen,* 135 Wn.2d 112, 119, 954 P.2d 1327 (1998). *See, also,* RCW 7.04A.230(1) (listing the very narrow grounds for vacating an arbitration award).[3]

The exact same would be true of orders entered by agreement, since review of such "judgments by consent" is extremely limited. *See, e.g., In re Dependency of J.M.R.,* 160 Wn. App. 929, 942, 249 P.3d 193

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[3] The text of the statute follows:

> (a) The award was procured by corruption, fraud, or other undue means;
> (b) There was:
> (i) Evident partiality by an arbitrator appointed as a neutral;
> (ii) Corruption by an arbitrator; or
> (iii) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
> (c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to RCW 7.04A.150, so as to prejudice substantially the rights of a party to the arbitration proceeding;
> (d) An arbitrator exceeded the arbitrator's powers;
> (e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under RCW 7.04A.150(3) not later than the commencement of the arbitration hearing; or
> (f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in RCW 7.04A.090 so as to prejudice substantially the rights of a party to the arbitration proceeding.

RCW 7.04A.230(1).

(2011) (stipulation to termination of parental rights), *review granted and dismissed as improvidently granted,* 172 Wn.2d 1017. Yet, it is well settled that parents cannot agree to waive child support obligations. *In re Marriage of Hammack,* 114 Wn. App. 805, 808, 60 P.3d 663 (2003); *see, also,* RCW 26.19.075(5) ("Agreement of the parties is not by itself adequate reason for any deviations from the standard calculation.").

Either by arbitration or by agreement, an error can be made in child support orders or parenting plans. That is what appears to have happened here. The arbitrator apparently erred when he awarded the father a downward deviation based on the residential credit. The children spend merely an approximate third of their time in their father's residence, which is wholly unremarkable. There is no reason to think this schedule reduces the mother's costs of providing for the children when in her care, or to think this schedule increases the father's costs. The arbitrator's cursory findings in no way illuminate what the arbitrator was thinking. He could have been thinking of an entirely different case or could have inadvertently inserted boilerplate language. Yet there was no way to challenge the ruling at the trial court or on appeal. Under Division Two's holding, this apparent error could be perpetuated for the entire minority of these two children, depriving them of the support they need while in the mother's household.

This result is at odds with Washington law, in particular, this Court's holding that the substantial change of circumstances standard does not apply to orders never subject to independent judicial review, such as arise from uncontested proceedings. *Pippins, supra. See, also,* 1 Wash. State Bar Ass'n, *Washington Family Law Deskbook* § 28.7(4)(d)(ii), at 28-74 (2d ed. 2000 & Supp. 2006) ("If the original court fails to independently review the adequacy of an agreed support order, a subsequent court may evaluate the order's reasonableness and modify it without a change of circumstances."). This same principle should apply to orders entered pursuant to binding arbitration, where judicial review is expressly limited by statute.

This is completely sensible. The court acts as a guarantor that children receive the support to which they are entitled. When inadequate support is ordered pursuant to arbitration or agreement and, consequently, evades judicial review, then a successor court should be empowered to correct the error by requiring proof a deviation is justified. Here, the trial court did that analysis, saw there was no justification, and denied the deviation. This was correct. The Court of Appeals' decision to the contrary should be reversed.

Moreover, clarifying this rule offers substantial additional benefits to courts, parties, and practitioners. This case represents a conflict

between two competing goods – meeting the needs of children and encouraging parties to settle their family law disputes. If arbitration or settlement include the risk that an erroneous decision – on child support or parenting plans -- will be perpetuated, parties and their lawyers should understand that risk. The better rule is to remove the risk by allowing subsequent judicial review of orders entered without independent judicial review. Either way, the rule should be made clear.

F. CONCLUSION

Division Two's decision jeopardizes the important legislative goal of ensuring children receive the minimum support they need after their parents have separated. Certainly, that is result in this case. From June 2009 until the trial court ordered an adjustment, the father has paid less than what the legislature declares to be his fair share and necessary for the children, while the mother has disproportionately carried the burden of supporting the children. Accordingly, Tamra respectfully requests this Court take review, reverse the Court of Appeals, and uphold the child support order entered by the Pierce County Superior Court.

Dated this 29th day of October 2013.

RESPECTFULLY SUBMITTED,
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MATTHEW ANDERSON, Appellant, v. TAMRA ANDERSON, Respondent.	No. 43125-4-II UNPUBLISHED OPINION

PENOYAR, J. — Matthew Anderson appeals the superior court's denial of his motion to revise the commissioner's ruling adjusting his child support obligation to his former wife, Tamra Anderson. Matthew[1] argues that (1) the commissioner did not have the authority to grant the adjustment because the statutorily required 24-month waiting period had not passed since the superior court entered the child support order, and (2) the commissioner erred by failing to continue his previously allowed deviation from the statutory child support schedule. We hold that Matthew lost his right to object to the timeliness of the adjustment by affirmatively agreeing that it was timely and by asking the commissioner to grant certain specific relief to him in ruling on the motion. But we agree that the deviation that the arbitrator and the court previously ordered was improperly revoked because Tamra did not plead or prove a substantial change in circumstances. Accordingly, we reverse the superior court's denial of Matthew's motion to revise the commissioner's ruling adjusting the child support order.

FACTS

In May 2009, Matthew and Tamra entered marital dissolution and child support agreements through arbitration. But instead of immediately filing the child support and

[1] We use the parties' first names for clarity; we mean no disrespect.

dissolution agreements, Matthew and Tamra waited until September 10, 2010, (roughly 16 months) before filing these documents with Pierce County Superior Court. Approximately 12 months later, Tamra filed a motion to adjust the child support order with a superior court commissioner, stating:

> It [has been] more than 24 months since the [child support] order was entered by arbitration dated May 17, 2009 or since the last incremental change went into effect, whichever is later, and there have been changes in the economic table or standards in RCW 26.19 as follows: . . . Since the amount of child support was arbitrated a new standard for the calculation of child support was adopted by the State. . . . There is no longer any factual basis to allow Father a deviation in his child support obligation.

Clerk's Papers (CP) at 113-14.

Matthew filed a responsive declaration agreeing that "it [had] been more than two years since support was last ordered," but requesting the court to enter an order that would continue to permit his previously allowed deviation from the statutory child support schedule. CP at 157. The commissioner granted Tamra's motion and adjusted Matthew's child support obligation upward; the commissioner denied Matthew's request to continue his deviation, finding that "no good reasons exist[ed] to justify the deviation." CP at 187.

Following a substitution of counsel, Matthew moved the superior court to revise the commissioner's ruling, arguing that Tamra's motion to adjust should have been denied because it was premature under RCW 26.09.170(7)(a); he also argued that the commissioner erred by terminating his previously allowed deviation. The superior court denied the motion. Matthew appeals the superior court's denial.

ANALYSIS

I. TIMELINESS OF THE CHILD SUPPORT ADJUSTMENT

Matthew argues that the superior court erred by denying his motion to revise because the 24-month waiting period in RCW 26.09.170(7)(a) is clear and begins to run when the initial child support order is filed with the superior court. We conclude that Matthew waived this issue by agreeing before the commissioner that Tamra's adjustment action was timely.[2]

A. Statutory Interpretation and Plain Meaning

The interpretation and applicability of a statute presents questions of law that we review de novo. *Grey v. Leach*, 158 Wn. App. 837, 844, 244 P.3d 970 (2010). When interpreting a statute, we seek to ascertain the legislature's intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). Where a statute's meaning is plain on its face, we must give effect to that meaning as expressing the legislature's intent. *Jacobs*, 154 Wn.2d at 600.

Among other things, RCW 26.09.170 governs a parent's ability to modify a child support order; modifications generally are limited to situations where there has been a "substantial change of circumstances."[3] RCW 26.09.170(1). As an exception to this general limitation, RCW 26.09.170(7)(a) provides,

> If twenty-four months have passed from the date of the entry of the order or the last adjustment or modification, whichever is later, the order may be adjusted without a showing of substantially changed circumstances based upon: (i)

[2] Though Tamra does not argue waiver in any detail, she does rely on the fact that Matthew agreed the 24-month period had run. *See Casper v. Esteb Enters., Inc.*, 119 Wn. App. 759, 771, 82 P.3d 1223 (2004) (under invited error doctrine, party may not set up error at trial and then complain of it on appeal). Moreover, we may affirm on any basis the record supports. *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002).

[3] Neither party in this case alleges substantially changed circumstances, so no claim exists under RCW 26.09.170(1).

> [c]hanges in the income of the parents; or (ii) [c]hanges in the economic table or standards in chapter 26.19 RCW.

Neither party explains the lengthy delay in entering the child support agreement following arbitration. Br. of Appellant at 6; Br. of Resp't at 10. But there is no question that the adjustment was sought less than 24 months after the arbitrator's decision was filed with the court. RCW 26.09.170(7)(a) permits adjustments only "*[i]f twenty-four months have passed from the date of the entry of the order.*" (Italics added). Thus, under the plain meaning of the statute, Tamra's motion was untimely.[4]

B. Waiver

We conclude, however, that Matthew waived the ability to raise the timeliness issue in his motion for revision and on appeal when he responded to Tamra's motion for adjustment by asserting before the commissioner that the 24-month period had run and by requesting substantive relief.

Waiver can occur if the defendant's assertion of a defense is inconsistent with his previous behavior. *Haywood v. Aranda*, 143 Wn.2d 231, 239, 19 P.3d 406 (2001). Although jurisdictional time limits cannot be waived, nonjurisdictional time periods are subject to waiver. *See State v. Walker*, 153 Wn. App. 701, 705 n.2, 224 P.3d 814 (2009) (because criminal statute of limitations is jurisdictional, unlike civil statute of limitations, it cannot be waived). *See also Hazel v. Van Beek*, 135 Wn.2d 45, 61, 954 P.2d 1301 (1998) (if judgment life-span was "normal"

[4] Tamra argues that the arbitrator's decision should be treated as filed with the court when it was made, asserting that (1) the arbitration statutes should be read together with title 26 RCW so that arbitrators' decisions are treated like court orders and (2) the trial court here made the child support order effective to the date the arbitrator entered it and thus it should be treated as though filed with the court on that date. Though both lines of reasoning have arguable merit, we resolve the issue on the legal consequences that flow from Matthew's affirmatively informing the commissioner that the 24-month period had in fact elapsed and requesting that the commissioner grant him affirmative relief.

statute of limitations, petitioner could argue equitable tolling); *State v. Duvall*, 86 Wn. App. 871, 874, 940 P.2d 671 (1997) ("ordinary" statutory time limitation, as opposed to jurisdictional limit, may be waived).

A court has jurisdiction after a party commences or institutes an action. *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 113 Wn. App. 142, 153-54, 53 P.3d 44 (2002). At issue here is a child support adjustment action brought well after the commencement of the initial dissolution action and the court's assumption of continuing jurisdiction over that action. As stated, RCW 26.09.170 outlines some of the procedures for modifying child support orders, and subsection (7) allows the parties to adjust a child support order every 24 months without showing a substantial change in circumstances. *Kauzlarich v. Dep't of Soc. & Health Servs.*, 132 Wn. App. 868, 874, 134 P.3d 1183 (2006); *In re Marriage of Scanlon*, 109 Wn. App. 167, 173, 34 P.3d 877 (2001). A 24-month adjustment action under RCW 26.09.170(7) is a routine action that may be effected by moving for a hearing; no summons or trial is necessary. "An adjustment action therefore simply conforms existing provisions of a child support order to the parties' current circumstances." *Scanlon*, 109 Wn. App. at 173.

It is clear that the 24-month time period set forth in RCW 26.09.170(7) is nonjurisdictional in nature and may be waived. The civil rules support this conclusion, as CR 8(c) provides that a party "shall set forth" in an answer to a preceding pleading "any . . . matter constituting an avoidance or affirmative defense." Generally, affirmative defenses are waived unless they are affirmatively pleaded under CR 8, asserted in a motion under CR 12(b), or tried by the express or implied consent of the parties. *Henderson v. Tyrrell*, 80 Wn. App. 592, 624, 910 P.2d 522 (1996).

The doctrine of judicial estoppel also supports waiver in this case. "'Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.'" *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (quoting *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)). In determining whether the doctrine applies, we consider (1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled, and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Kellar v. Estate of Kellar*, 172 Wn. App. 562, 580, 291 P.3d 906 (2012).

Matthew's assertion in the superior court that Tamra's adjustment motion was untimely was clearly inconsistent with his agreement on its timeliness before the commissioner. The commissioner was misled on that issue by the parties' agreement, and Tamra relied on that agreement in her appearances before both the commissioner and the superior court. Having lost on the merits in the adjustment proceeding, Matthew cannot have a second bite of the apple; he has lost the right to subsequently assert a procedural defense that he had formerly repudiated.

C. Deviation Revocation

Despite our holding regarding Matthew's waiver of the timeliness issue, we conclude that he is entitled to relief based on his additional challenge to the commissioner's deviation ruling. By its nature, an adjustment action does not require the moving party to show a substantial change in circumstances to obtain relief. 1 WASH. STATE BAR ASS'N, WASH. FAMILY LAW DESKBOOK, § 28.7(3), at 28-73 (2nd ed. 2000 and Supp. 2012). RCW 26.09.170(7) allows an

adjustment of child support based on changes in the parties' incomes or changes in the economic table or standards in chapter 26.19 RCW. RCW 26.09.170(7)(a)(i), (ii). The court's authority under this statute is limited to simply conforming existing calculations in a child support order to the parties' current circumstances and the current statutory standards. 1 FAMILY LAW DESKBOOK, at 28-72. Absent a substantial change of circumstances, a court does not also have authority in an adjustment proceeding to modify a prior court's deviation decision. *See In re Marriage of Trichak*, 72 Wn. App. 21, 23-24, 863 P.2d 585 (1993) (prior court's deviation may be modified where substantial change in circumstances is shown).

II. ATTORNEY FEES

Matthew has requested attorney fees on appeal; Tamra has not. The prevailing party is entitled to an award of reasonable attorney fees on appeal if such recovery is allowed by statute, rule, or contract, and if the party requests fees under RAP 18.1(a). *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 535, 79 P.3d 1154 (2003). Where both parties prevail on major issues, however, neither is the prevailing party for the purpose of RAP 18.1. *Seashore Villa Ass'n v. Hugglund Family Ltd. P'ship*, 163 Wn. App. 531, 547, 260 P.3d 906 (2011), *review denied*, 173 Wn.2d 1036 (2012). We decline to award Matthew attorney fees on appeal because he prevailed only in part, noting in addition that he failed to cite to authority supporting his request. *Coballes v. Spokane County*, 167 Wn. App. 857, 869, 274 P.3d 1102 (2012).

We reverse the superior court's denial of Matthew's motion to revise the commissioner's ruling adjusting the child support order.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Hunt, P.J.

Bjorgen, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Marriage of:

TAMRA ANDERSON,

Respondent,

v.

MATTHEW ANDERSON,

Appellant.

No. 43125-4-II

ORDER DENYING MOTIONS FOR RECONSIDERATION

Appellant and Respondent moved for reconsideration of the Court's September 4, 2013 opinion. After further consideration, the Court denies both motions.

PANEL: Jj. Hunt, Penoyar, Bjorgen

DATED this 2nd day of October, 2013.

FOR THE COURT:

Hunt, P.J.

PRESIDING JUDGE

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