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No.70048-~~4~~-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

LALIDA SCHNURMAN, Respondent

v.

SETH SCHNURMAN, Appellant

BRIEF OF APPELLANT

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Introduction:

This appeal involves questions of law not addressed by either the legislature or by appellate court published decisions. None have dealt the question, the proper methodology to determine the amount of a transfer payment, where neither parent is the primary residential parent, to wit, the children reside equally with both parents.

I. Assignments Of Error

A. Assignment Of Error #1

The Trial Court Erred In Utilizing The Standard Calculation Of Child Support To Determine The Amount Of The Transfer Payment Required Of The Father Since The Mother Is Not The Majority Residential Parent.

Issues Related To Assignment Of Error #1:

Whether finding of fact #2.20 should be treated as a conclusion of law: that an amount of the transfer payment, which is less than the standard calculation, constitutes a deviation under RCW 26.19.075?

Whether the criteria set forth in the deviation statute are too limiting when considering the kinds of expenses a transfer payment is designed to cover, such as, shelter, transportation, clothes etc.?

B. Assignment Of Error #2:

The Court Erred In Failing To Consider And Apportion The Expenses Each Parent Pays For Expenses Such As Shelter,

Transportation And Clothing, Where They Share Equal Residential Time With The Children.

Issue Related To Assignment of Error #2:

Whether the appropriate method would be to apportion the incomes of the parties to the costs expended in each household that a transfer payment is designed to cover, in order to determine the appropriate amount of the transfer payment that the father will pay the mother: housing, food, transportation, clothing, and incidental expenses.

II. Statement Of The Case:

The parties were married on June 22, 2001 and separated on July 22, 2011 (CP 157). They have two children who at the time of dissolution in February 2013 were age 8 and age 6 (CP 159).

The trial judge awarded the mother spousal maintenance of $2,000 per month for three years and also imputed income of $2,000 per month to her (CP 165). The court took these incomes into consideration in determining child support, finding the mother's after tax income to be $3,380.33 per month and the father's to be $6337.69 (CP 108).

The trial was largely over the residential provisions of a final parenting plan order with each party seeking majority residential care. The court imposed a final parenting plan order that resulted in an equal

sharing of residential time during each year. Neither parent is the majority or primary residential parent. (CP 172 - 175).

The trial court utilized the standard calculation to determine the amount of the transfer payment and determined that a deviation should not be ordered (CP 160).

III. Argument:

A. Assignment Of Error #1

Once it is understood what child costs the standard calculation is designed to cover and how those costs are quantified on the economic table, it will be clear why imposition of the standard calculation as to the transfer payment, where parents equally share residential time of their children, is an error of law.

1. **The Costs That A Majority Residential Parent Is Presumed To Pay As The Basic Child Support Obligation Are For Shelter, Transportation, Clothes, and Incidental Expenses.**

RCW 26.19.080 obligates each parent to pay a pro-rata share of child rearing cost of the children based upon net incomes. The statute breaks these costs down into three distinct components other than post-secondary education (not applicable here).

One component pertains to uninsured health care costs. These costs are apportioned with each parent obligated to pay the provider as billed, or by one parent, and then reimbursed by the other based upon a proration of their monthly net incomes (see RCW 26.19.080 (2)). A second component pertains to other direct child care costs: work related day care, education costs, such as tuition, agreed upon extracurricular activities: music lessons, sports, etc. These too are apportioned between the parents based upon their net incomes (RCW 26.19.080 (3)). The final child support order segregates these two distinct categories, under separate sections: 3.19 and 3.23 (CP 114 and 115). What each parent pays for these two types of expenses is the same, irrespective of whom or whether there is a primary residential parent.

The third component of the child support obligation involves child related expenses not including day care, health education, etc. under RCW 26.19.080 (1). Those costs encompass the balance of child related obligations for shelter, transportation, food, vacation, if any, etc. These costs are mainly fungible in that they are shared among the adult and the children for whom child support is to be paid. (See *In re The Marriage of Krieger and Walker*, Wn.App 952 at 962, 199 P.3d 450 (2008).

The economic table contains an amount that is presumptive as to the portion of those costs attributable to the children based upon the combined net incomes of the parents, as if they were an intact family. That amount is called the basic child support obligation (RCW 26.19. 080 and line 5 of the child support work sheet) (CP 51).

2. The Cost Amount Of The Basic Child Support Obligation Covered Under RCW 26.19.080 (1) Is The Same No Matter Which Parent Is The Majority Residential Parent.

Every child support order must contain a form called a child support worksheet signed by the trial judge. This is required so that a reviewing court can understand how the transfer payment was derived (see *In re Marriage of Sacco,* 114 Wa.2d 1 at 6, 784 P.2d 1266 (1990)).

In this case a worksheet was submitted for the judge's signature. For reasons unexplained when the judge signed the child support order, she did not sign the work sheet. Nevertheless, there is no dispute as to the accuracy of the worksheet.

The standard calculation of a transfer payment on the worksheet is on line 9 (CP 52). The worksheet covers items not related to a standard calculation on subsequent lines: Line 10 covers uninsured health care expenses under RCW 26.19.080 (2), and line 11 covers day care,

education, and other expenses each parent should pay pursuant to RCW 26.19.080 (3). In this case those lines are blank (CP 52).

3. Only The Parent Who Has Majority Residential Care Is Entitled To The Standard Calculation Transfer Amount.

The amount of the apportionment of the presumptive fungible costs for shelter, food, transportation, etc. attributed to the children for which a transfer payment is to be paid based upon the combined incomes of the parties at $9,718 per month, is reflected as the basic child support obligation: it is $1994 per month (see line 2, 4, and 5 of the worksheet (CP 51)), and is the same irrespective of who is the majority residential parent.

The standard calculation of a transfer payment is derived by taking each parent's pro rata share of the amount of those presumptive child costs represented by the number $1994 per month as the basic child support obligation (see line 6) (CP 51). Line 7 shows that since Mr. Schnurman earns 65.2% and Ms. Schnurman 34.8% of their combined net incomes (CP 52), if Mr. Schnurman were the majority residential parent, Ms. Schnurman would owe him 34.8% of $1994 per month or $693.91 per month (see line 9, CP 52). If Ms. Schnurman were the majority residential parent, Mr. Schnurman would owe her 65.2% of $1994.00, or $1300.09

per month, (see line 9) (CP 52). However, under the parenting plan entered here, neither parent is the primary residential parent:

> "The children named in this parenting plan are schedule to reside substantially equal time with both parents. Both parents are designated the custodian of the children solely for purposes of all other state and deferral statues which require a designation or determination of custody. This designation shall not affect either parent's rights and responsibilities under this parenting plan" (CP 175).

4. Earning The Lesser Of The Total Combined Incomes Does Not Entitled One To A Transfer Payment Based Upon The Standard Calculation As If He Or She Were A Majority Residential Parent.

The operating principle used by the trial judge here was that Ms. Schnurman was necessarily to be treated as if she were the majority residential parent because she makes less income than Mr. Schnurman. This is reflected by virtue of her ordering a transfer payment based upon the standard calculation (CP 51).

In re the Marriage of Oakes, 71 Wn. App 646, 861 P.2d 1065 (1993) involved a split custody situation in which each parent had a different child a majority of the residential time. Application of the standard calculation was approved. However, *Oakes*, supra was later overruled, by a Division I case which failed to follow the methodology to

determine a transfer payment utilized in *Oakes*, supra by stating, in reference to its holding:

> "The problem with the final amount is that it still assumes that one parent…is the primary residential caretaker of both children. That is to say, the method applied in *Oakes* does not equitably apportion the amount owed based upon each parent's primary caretaking responsibility." *In re Marriage of Arvey*, supra at 825 (1995).

The same conclusion obtains where neither parent is the primary residential parent.

In re The Marriage of Holmes, 128 Wn. App 727, 117 P.3d 370 (2005), involved a mother who did not have majority residential care and earned $4,000 per month. Her ex-husband, who was the majority residential parent, earned $600,000 net income per month. She argued that he should be paying her the standard calculations transfer payment as a fair apportionment under RCW 26.19.001. Based on the principles quoted above, the Court of Appeals Division I upheld the trial court decision, which failed to require the primary parent, the father, to pay child support to the mother. In reading the court's explanation, it should be recalled that the term "custodial" meant what came to be renamed as primary or majority residential parent after the enactment of the parenting act in 1987:

"**Child support payments have historically been the obligation of the noncustodial parent.** (Emphasis supplied). It has been within the province of the superior court to determine which parent will be custodial, which would pay child support and how much would be paid. The historical presumption was reflected in the Uniform Child Support Guidelines, which were approved in 1982 by the Washington State Association of Superior Court Judges. Under the ASCJ Guidelines..." (See Washington State Child Support Commission, Final Report, November 1, 1987 at 6).

The obligation of the custodial parent was satisfied by providing for the child in that parent's home, as evidenced by the fact that the custodial parent received a support payment and did not make one. These guidelines were replaced by the child support guidelines as adopted by the Washington Child Support Commission and as subsequently enacted by the legislature as chapter 26.19 RCW. **This chapter focuses on the method of calculation of support, not on which parent would make payment to the other. The latter determination is made under chapter 26.09 RCW** (emphasis supplied).

> ...RCW 26.09.100(1) as amended, vested the superior court with authority to 'order either or both parents... to pay [child support] in an amount determined under chapter 26.19 RCW.' However, the legislature did not change the historical presumption in practice that the parent with whom the child resided a majority of the time would satisfy the support obligation by providing for the child while in his or her home and that the other parent would make a child support transfer payment. As this court recently noted,
>
> **[i]n those situations [where children reside a majority of the time with one parent], the obligor parent is the one with whom the children do not reside a majority of the time and that parent makes a transfer payment to the parent with whom the children primarily reside** (emphasis supplied) (Citation omitted). *In re Marriage of Holmes,* supra.

In summary, the only parent entitled to a transfer payment based upon the standard calculation, is the parent with whom the children reside a majority of their residential time. In an equal sharing of time arrangement there is no parent with whom the children reside a majority of the time. Therefore, the award of child support, as if Ms. Schnurman were a majority parent, is an abuse of discretion.

State ex rel MMG v. Graham, 159 Wa. 2d 623, 152 P.3d 1005 (2007), does not hold otherwise. *Graham*, supra, involved an equal sharing of residential time, but none of the parties to that appeal raised the question of whether determination of a standard calculation is appropriate. All parties took as a given that it does.

The father argued that the *In re Marriage of Arvey*[1] formula in a divided residential arrangement, (which necessarily would also require first determining a standard calculation, since both parents have majority residential time with a different child), should apply in a shared residential arrangement. Starting from the same premise, the state argued that a standard calculation, based upon an extrapolated amount was appropriate. Both of them lost.

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[1] 77 Wn.App 817, 894 P.2d 1346 (1995)

However, since each party's position began with the assumption, without challenge, that the standard calculation is the necessary beginning point, the court reasoned from within that framework. Thus, whether that framework was the wrong premise was not before the court. It is here. This issue has not been raised in any other published decision.

Since the standard calculation can only be paid to a primary residential parent, whether a deviation is warranted is not to be reached. Deviations are only to be considered as a counter-point to a standard calculation: "Reasons for deviation from the standard calculation include but are not limited to the following..." (See RCW 26.19.075 (3)). The trial judge here looked to whether a downward deviation from what would be the "standard calculation" was appropriate and determined that it was not. This is reflected in finding of fact 2.20 in the child support order but in reality is a conclusion of law and, therefore, to be reviewed de novo. (*In re Parentage of M.F.*, 141 Wn. App 558, 170 P.3d 601 (2007)).The trial court erred see also *In re G.W.-F*, 170 Wn. App 631, 285 P.3d 208, (2012).

The child's portions of the costs of housing are a major component of a transfer payment under RCW 26.19.080(1). And yet, under the

deviation statute only debt that is "extraordinary debt not voluntarily incurred" can be considered (See RCW 26.19.075 (1) (c) (i). The children's portion of Mr. Schnurman's mortgage payments and utilities costs, Ms. Schnurman's rent payments are utility costs, credit card purchases for food, clothing, household supplies, gas, oil, car repairs, and car payments by each party are all voluntary debts, and they are not extraordinary. And yet these very debts are among those apportioned by means of in a transfer payment. Therefore, the deviation statute does not apply to a determination of what apportionment of these child related expenses, should be that results in a transfer payment where neither parent is a majority residential parent.

In fact, Mr. Schnurman did not seek a deviation (CP 35), because his position on this appeal is exactly what he urged upon the trial court (CP 35-49). Instead he urged an amount based upon the methodology suggested under assignment of error #2.

B. Assignment of Error #2

> **What Method Should Then Be Used To Determine The Amount Mr. Schnurman Should Pay Ms. Schnurman for the Two Children?**

Division I has observed: "when the legislature enacted Washington's child support statute, RCW 26.19, it did not establish a method for calculating child support when each parent has primary residential care of one or more of the children. Washington courts have therefore been faced with the task of flushing out an acceptable method that is consistent with the overall purpose of the act." *Arvey,* supra at 823 (1995). The same is true where neither parent has primary residential care of any of the children, to wit: an equal sharing of residential time.

The purpose of the act is outlined in RCW 26.19.001. It states in pertinent part:

> "The legislature also intends that the child support obligation should be equitably apportioned between the parents."

Our State Supreme Court observed that..."in shared residential situations, both parents are responsible for the same children and the same needs." *State ex rel. M.M.G. v Graham*, 159 Wn.2d 623 at 636, 152 P.3d 1005 (2007). A recent Division I case is instructive as to how the court should quantify and apportion those needs: to wit, the fungible costs attributable to the children, for shelter etc. in determining how these

expenses are to be prorated based upon incomes in an equal time or "shared residential" arrangement.

In re The Marriage of Krieger and Walker, 147 Wn. App. 952, 199 P.3d 450 (2008) is a case in which the father was not seeing the children at all. The combined incomes of the parties exceeded the maximum advisory level. What is instructive is its method of approach used by the court of appeals to determine an equitable apportionment of the costs to determine the amount of the transfer payment obligation. The court stated:

> "According to Walker's budget, the children's monthly expenses for basic needs of housing, utilities, food and transportation are at least $1800. Fn 31" *Krieger,* supra at 964 (2008).

Footnote 31 further elaborates: "This is half of $3,725.69 which is the total of these expenses," *Krieger*, supra at 964 (2008). This is the first reported decision that contains a methodology that quantifies the child support expenses that impact the transfer payment under RCW 26.19.080 (1), as distinguished from expenses not included in the transfer payment, such as medical costs or private school tuition, separately required under RCW 26.19.080 (2) and (3). Thus, it requires that the transfer payment expenses, common to the adult and the child in each household, be

segregated so as to determine those costs strictly attributable to the children, such as " housing, utilities, food, and transportation" (see *Krieger*, supra at 964).

IV. Conclusion

Thus the following methodology is suggested. The standards that govern a transfer payment that fulfills the policies of RCW 26.09.020 applicable to combined incomes that exceed the maximum advisory level be applicable to a determination of a transfer payment in an equal sharing of residential time scenario except that the costs in both households are weighed.

First, to quantify the amount each parent pays for housing including utilities, cable, internet etc., food and transportation. An apportionment of those costs as attributable to the children should next be ascertained. Costs of such direct costs such as clothing for the children and other incidental expenses should be added. Since Mr. Schnurman earns 65.2% of their combined net incomes, he necessarily will pay her a transfer payment, that apportions of those actual costs based upon their incomes.

The trial court should be directed to consider the expenses in each household the basic support obligation is designed to cover, as well as the household supplies, transportation, and any other expenses that impact each family not included under RCW 26.19.080(2) or (3) . These should then be apportioned to derive a cost attributable to the children and prorated based upon incomes. Since Mr. Schnurman earns more this will result in a transfer payment from him to her.

DATED this 21 day of May, 2013.

Respectfully submitted,

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