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No. 68507-4-1

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

In re the Marriage of

SARA STEPHENSON
Appellant

and

SHATA STEPHENSON
Respondent

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

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS
DIVISION ONE

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I. STATEMENT OF ISSUES IN REPLY

1. Child support is determined by statute and compliance with the statute is mandatory.
2. There is no challenge by either party to the court ordering the father to be the “obligor” parent.
3. Washington law requires the court to order child support in the amount of the “standard calculation,” which is presumed necessary to meet the basic needs of the children and is presumed to be equitable as between the parents. These presumptions apply here.
4. The father has the ability to pay fees, contrary to his claims of poverty, and the mother, consistent with the trial court’s findings, has a financial need for the father to pay the fees and costs of this appeal.

II. ARGUMENT IN REPLY

A. INTRODUCTION AND THE STANDARD OF REVIEW.

Specific responses to the father’s arguments follow. However, at the outset, it helps to acknowledge the father’s argument is, essentially, with the Washington child support statutes. He complains the statutory scheme does not address 50/50 shared residential arrangements *in the way he prefers*. He is

right about this. The legislature chose to deal with such arrangements by means of the downward deviation and the “residential credit.” RCW 26.19.075(1)(d). There are good reasons for this, as discussed below. The father must take his complaint about this policy decision to the legislature.

Nevertheless, the father argues the trial court has discretion to enter the order it did. Br. Respondent, at 7. In fact, the trial court’s discretion does not extend that far, that is, the court does not have discretion to ignore the statute. Rather, the child support statute applies to all determinations of child support in the state. RCW 26.19.035 specifically declares “[t]he child support schedule shall be applied: ... [i]n all proceedings in which child support is determined or modified” There is no exception for families where the children spend 50% of their residential time in each household.

Washington law is crystal clear on this point. “Under the statewide child support schedule, a court must set the child support obligation of each parent according to a standard calculation.” *In re Marriage of Trichak*, 72 Wn. App. 21, 23, 863 P.2d 585 (1993). The trial court was not free to bypass the statute. Indeed, one virtue of the child support schedule is that it strictly limits the court’s

discretion, bringing uniformity to a subject previously plagued by inconsistency and unpredictability. Not only is this a good idea, it is mandatory under state and federal law. See Br. Appellant, at 11.

B. THERE IS NO CHALLENGE TO THE FATHER BEING THE OBLIGOR PARENT.

The father also complains about being made the “obligor” parent. Br. Respondent, at 8. He argues there is no presumptive obligee or obligor parent in 50/50 residential arrangements. Br. Respondent, at 8-10. Whatever the merits of this particular point, they are not at issue in this case. That is, here, the trial court declared the father to be the obligor parent and the father has not challenged that determination, nor, obviously, has the mother. See, e.g., CP 75. Accordingly, the cases the father cites are not relevant to the issues actually raised in this case. See, e.g., *In re Marriage of Holmes*, 128 Wn. App. 727, 737, 117 P.3d 370 (2005), cited by father at Br. Respondent, at 9, for the proposition that there is no statutorily presumed obligor parent.

Moreover, the father appears to be simply wrong in his assertion. The proposition that there is “no obligee/no obligor” applies only to split-residential arrangements (splitting the children) and the formula approved in *In re Marriage of Arvey*, 77 Wn. App. 817, 823, 894 P.2d 1346 (1995). This case involves a shared-

residential arrangement (splitting the time), to which the *Arvey* formula does not apply. *State ex rel. M.M.G. v. Graham*, 159 Wn.2d 623, 633, 152 P.3d 1005 (2007). For this additional reason, the father's argument on this score, and the "*Arvey*" cases he cites, are irrelevant.

In any case, the father appears to agree the trial court had the discretion to determine he should make the transfer parent (i.e., that he has an obligation and is, therefore, an "obligor") and that determination is not contested by the mother and the father did not appeal. Accordingly, there simply is no issue raised here regarding the father being made the "obligor" parent.

C. STATUTE REQUIRES THE TRIAL COURT TO ORDER THE STANDARD CALCULATION OR TO USE THE DEVIATION ANALYSIS.

Though resurfacing throughout his brief, the father's essential argument is, as noted above, that he dislikes how Washington law deals with his situation. He argues the standard calculation can be unfair in 50/50 arrangements and that the trial court has the discretion to fashion a solution in such cases. Br. Respondent, at 11 and 14. The problem for the father is that the court's discretion is strictly limited to determining whether the facts justify a deviation. Here, the father did not request a deviation and,

for obvious reasons. As discussed below, a downward deviation leaves insufficient funds in the mother's household. Instead of confronting this problem directly, the father urged the trial court to ignore the deviation analysis. But the problem remains.

- 1) The standard calculation is necessary here to ensure adequate support for the children while in the mother's home.

The father spends considerable time arguing he cannot afford to pay his basic child support obligation. The evidence indicates otherwise, i.e., that he has considerable resources, as elaborated upon below. As importantly, and completely contrary to the father's characterizations, the mother cannot provide for the children's needs in her household without receiving the amount of child support required by the statute.

First, the father tries to make it sound like the mother is sitting on a lot of wealth, as a consequence of the court's distribution, and that this should ameliorate the need for basic child support. Br. Respondent, 2-4 (and appendices). Without conceding the father's arithmetic, the main problem with his argument is that neither party received much in the way of liquid assets because there were hardly any liquid assets to distribute. Rather, the parties' assets consisted of real estate and some

retirement. CP 71-72. Basically, each party got a house (and a mortgage), a vehicle, and the prospect of some funds once Shata retires. Id. His claim that Sara has nearly \$90,000 in liquid assets ignores that \$77,000 of those assets is in his deferred compensation plan with the fire department. RP 264. Testimony at trial left unclear whether the plan could be liquidated and what penalties and or taxes would be incurred with liquidation. RP 277-278. Certainly, the parties agreed the value would be less if liquidated, so it is completely misleading for Shata to suggest that money, in that or any amount, is readily available to Sara.¹

Not only does the father boldly misstate what the mother received in assets, he ignores the pink elephant in the room: the court's factual finding that the mother needed maintenance. CP 85. During the marriage, she soft-pedaled her own career so she could perform most of the domestic labor for the family. The court recognized, over the father's vigorous objections, that the mother would not be able to instantly build a business or achieve earnings anywhere comparable to his. Accordingly, the court awarded maintenance. This award addresses the mother's needs, not the children's, contrary to the father's claim that the maintenance award

¹ It was not even available to Shata. He could only borrow from it. RP 172, 241-242, 269-273.

can do that double duty. And, of course, the maintenance is factored into the calculation of the parties' respective child support obligations. RCW 26.19.071(3)(q).

By contrast to the mother's difficult circumstances, the father is making a very good salary, over \$120,000 annually. RP 94-97, 216; Exhibit 7. He admits he nets at least \$6,359 monthly, and he appears to have some control over how much overtime he works. RP 120-123, 216. And although he claims poverty, the father spends like someone with a very comfortable budget, which includes travel to Palm Springs and Arizona for golfing and other recreation expenses, as well as monthly discretionary spending of \$500-850 (including meals eaten out and golfing locally). RP 283-285, 307-309, 313; Exhibit 60. None of these high expenses reported by the father are basic child support expenses, or costs of having the children in his residence.

In short, the evidence at trial shows the father understates his finances and overstates the mother's, which again suggests why he chose not to seek a deviation analysis, but to evade it.

- 2) The standard calculation captures the cost of meeting the children's needs, in the judgment of the legislature.

The legislature aims to identify a level of support adequate to meeting the children's basic needs, not that which would pay for jet

ski rental, charter fishing boats, or golf trips. Rather, the standard calculation takes into account the number of children, their ages, and the income of the parents. RCW 26.19.020. It establishes a non-discretionary standard for all families. Presumptively, this amount is necessary to provide for the children's basic needs. RCW 26.19.011(8).

Yet the father argues the statute should not apply to this family, not because he can overcome the presumption, but because the statute was devised for a historical or conventional practice not applicable here (i.e., of splitting the children's residential time disproportionately between the parents). Br. Respondent, at 9-12. As indicated above, this is an argument he must make to the legislature, since, as mentioned, the statute is mandatory.

In any case, at issue here is not whether the child support statute could be altered to address 50/50 residential arrangements differently. It could, but it would not be altered in the way the father likes. His proposed formula is grossly inadequate, since it is concerned with only one goal: making child support equal as between both parents. He forgets the other goal of child support: meeting the children's needs. RCW 26.19.001. In 50/50 residential

M.M.G. v. Graham, 159 Wn.2d at 636. Our Supreme Court saw no need for a formula when the legislature has already authorized a deviation in appropriate circumstances. That is, contrary to the father's argument, the legislature is certainly aware that some families do share residential time equally. See, e.g., RCW 26.09.187(3)(b) (specifically requiring court to consider whether equally shared residential arrangements are in best interests). The legislature did not simply forget about this circumstance. Rather, it devised the residential credit to address it. RCW 26.19.075(1)(d). In *M.M.G.*, our Supreme Court expressly confirmed this path is the one available to parents equally sharing residential time with their children. 159 Wn.2d at 636. Where, as here, no deviation can be justified, the standard calculation of \$1,399.50 applies.

3) The deviation analysis mandates consideration of the children's needs.

One virtue of the deviation analysis is that it requires the court to consider the adequacy of funding in both parents' households. RCW 26.19.075(1)(d). This is the important goal of child support ignored by the father. Here, a deviation from the standard calculation results in insufficient funds in the mother's household. Indeed, the mother cannot even support herself yet; she needs maintenance until she can get her business going. Our

statute provides the “court may not deviate [for the residential credit] if the deviation will result in insufficient funds in the household receiving the support to meet the basic needs of the child ...” RCW 26.19.075(1)(d). This is the problem evaded by the father and the trial court when embracing the “equal” or “equitable” apportionment formula.

Perhaps this is the reason the father fails to see the relevance of *Bast v. Rossoff*, 91 N.Y.2d 723, 697 N.E.2d 1009 (1988). Br. Respondent, at 19-20. In *Bast*, the father also tried to evade the child support statute because of the amount of time the children resided with him. He argued the state’s child support statute did not apply to him because it “is silent on the issue of shared custody and speaks in terms of a ‘custodial’ and ‘noncustodial’ parent in the application of its methodology...” 697 N.E.2d at 1011. The New York court saw “no reason to abandon the statute and its Federally mandated policy considerations, in shared custody cases.” *Id.* The same considerations require the same result here.

For example, the “proportional offset” formula offered by the father in *Bast* resembles the father’s proposal here. In *Bast*, the father urged the court to adopt a formula whereby

... each parent's pro rata share of the basic child support obligation is multiplied by the percentage of time the child spends with the other parent. The two resulting amounts are then offset against each other, and the "net" is paid to the parent with the lower amount .

Bast, 697 N.E.2d at 1012. Here, similarly, the father urged the court to offset the father's transfer payment by 50% of the standard calculation because he has the children 50% of the time. RP 370-373; Br. Respondent, at 6-7. The pleasing symmetry and simplicity of this calculation is undermined by the lack of any consideration for whether the reduction in the funds transferred to the mother results in the child's basic needs going unmet. This was one of the reasons the New York court rejected the father's invitation to amend the child support statute by adding a "proportional offset" provision for shared residential arrangements. 697 N.E.2d at 1013. Specifically, the court refused to "reduce the parental resources available to children by applying this problematic formula." 697 N.E.2d at 1014. The court affirmed that "[s]hared custody arrangements do not alter the scope and methodology of the [statutory child support scheme]." *Id.* Rather, the court held, "[t]he difficult policy choices inherent in creating an offset formula for shared custody arrangements are better left to the Legislature."

697 N.E.2d at 1013. Here, likewise, the father must take his arguments to the legislature.

By evading an analysis of the children's needs when in their mother's home, the father here effectively argues he is entitled to an automatic deviation. The Louisiana high court rejected this same argument for the same reasons it should be rejected here. *Guillot v. Munn*, 756 So. 2d 290 (La. Mar. 24, 2000). As the court noted, "shared custody or extraordinary visitation arrangements are more expensive, perhaps significantly so, than traditional visitation arrangements." 756 So. 2d at 300. Accordingly, trial courts considering whether to exercise their discretion to reduce a presumptive amount must "ensure that any deviation from the guidelines will not result in the domiciliary parent's inability to adequately provide for the child." 756 So. 2d at 300. This is also the law in our state. The father does not get to legislate his own child support arrangement.

4) Conclusion

The father argues "there was no logical or legal basis for awarding child support to either party based on the Standard Calculation because neither party was a primary residential parent." Br. Respondent, at 18-19. Actually, the legal reason is that the

statute requires it. The logical reason is that the children need the support while in the mother's home, a need left unmet by the father's proposed solution. The trial court erred when it agreed with the father.

D. ATTORNEY FEES

The father should pay fees here. He has urged on the trial court a plain error, which has meant the mother has been without the funds she needs to provide for the children since trial. Moreover, she has had to pursue this appeal so that the error can be corrected and will not be perpetuated in future child support orders. This is an unnecessary expense imposed on her at the same time she is trying to get her financial footing, effectively undermining that effort. The father has the ability to pay fees, though he may have to sacrifice some recreational activities to do so.

III. CONCLUSION

For the reasons stated above and in Appellant's Opening Brief, Sara Stephenson asks this Court to vacate the child support order and the remand matter for entry of an order in compliance with the mandatory support tables. She also asks this Court to order the father's income be corrected to match the amount in the

worksheets, that the worksheets be attached as required by statute, and that the father be ordered to pay the amount of child support derived by the standard calculation of \$1,399.50. She also asks this Court to award her fees on appeal.

Dated this 19th day of December 2012.

RESPECTFULLY SUBMITTED,



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APPENDIX: RELEVANT STATUTES

RCW 26.09.035. Standards for application of the child support schedule

(1) Application of the child support schedule. The child support schedule shall be applied:

- (a) In each county of the state;
- (b) In judicial and administrative proceedings under this title or Title 13 or 74 RCW;
- (c) In all proceedings in which child support is determined or modified;
- (d) In setting temporary and permanent support;
- (e) In automatic modification provisions or decrees entered pursuant to RCW 26.09.100; and
- (f) In addition to proceedings in which child support is determined for minors, to adult children who are dependent on their parents and for whom support is ordered pursuant to RCW 26.09.100.

The provisions of this chapter for determining child support and reasons for deviation from the standard calculation shall be applied in the same manner by the court, presiding officers, and reviewing officers.

(2) Written findings of fact supported by the evidence. An order for child support shall be supported by written findings of fact upon which the support determination is based and shall include reasons for any deviation from the standard calculation and reasons for denial of a party's request for deviation from the standard calculation. The court shall enter written findings of fact in all cases whether or not the court:

- (a) Sets the support at the presumptive amount, for combined monthly net incomes below five thousand dollars;
- (b) sets the support at an advisory amount, for combined monthly net incomes between five thousand and seven thousand dollars; or
- (c) deviates from the presumptive or advisory amounts.

(3) Completion of worksheets. Worksheets in the form developed by the administrative office of the courts shall be completed under penalty of perjury and filed in every proceeding in which child support is determined. The court shall not accept incomplete worksheets or worksheets that vary from the worksheets developed by the administrative office of the courts.

(4) Court review of the worksheets and order. The court shall review the worksheets and the order setting support for the adequacy of the reasons set forth for any deviation or denial of any request for deviation and for the adequacy of the amount of support ordered. Each order shall state the amount of child support calculated using the standard calculation and the amount of child support actually ordered. Worksheets shall be attached to the decree or order or if filed separately shall be initialed or signed by the judge and filed with the order.

Handwritten initials and a stamp: "JAH" and "JAN 19 2013".

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

<p>In re the Marriage of:</p> <p>SARA STEPHENSON</p> <p>Appellant/Cross-Respondent</p> <p>and</p> <p>SHATA STEPHENSON</p> <p>Respondent/Cross-Appellant</p>	<p>No. 68507-4-1</p> <p>DECLARATION OF SERVICE</p>
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Jayne Hibbing certifies as follows:

On December 19, 2012, I served upon the following true and correct copies of the Reply Brief of Appellant, 2nd Designation of Clerk's Papers, and this Declaration, by:

depositing same with the United States Postal Service, postage paid
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