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No. 712696

**COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON**

ANNE M. WEISS,

Appellant,

v.

JEREMY S. WEISS,

Respondent.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Modification and adjustment of an order of child support are distinct actions; a modification action is significant in nature and anticipates making substantial changes and/or additions to the original order. *Marriage of Scanlon*, 109 Wn. App. 167, 173, 34 P.3d 877 (2001). An adjustment of child support pursuant to RCW 26.09.170(7) does not require the filing of a petition, but rather may be accomplished by a motion; the court merely conforms the order to the parties' current incomes. *Scanlon*, 109 Wn.App. at 174. In an adjustment proceeding, no substantial changes and/or additions to the order are made. It is reversible error for the trial court to rely upon RCW 26.09.170(7)(a) as a basis for modification of an order of support.

An order of child support entered by agreement of the parties as part of their global settlement is not subject to modification 24 months later solely by virtue of it being an agreed order. If this was the law, virtually every agreed order of support entered during the settlement of a divorce would be subject to modification two years after settlement. Instead of encouraging settlement, an agreed order of support would become a mere placeholder; a two year delay in a bi-furcated divorce proceeding.

II. REPLY ARGUMENT

A. Standard of Review

Dr. Weiss asserts the standard of review is abuse of discretion, citing *Marriage of Choate*, 143 Wn.App. 235, 238, 177 P.3d 176 (2008). *Marriage of Langham and Kolde*, 153 Wn.2d 553, 106 P.3d 212 (2005) holds where the trial court's decision is based upon the documentary evidence and there are no issues of credibility the standard is de novo. *Id.*, 153 Wn.2d 553, 560, n.4. *Langham* distinguished domestic relation cases applying an abuse of discretion or substantial evidence standard in a contempt proceeding or parenting plan modification because those cases turn on the credibility of the parties.

Here, the case does not turn on the credibility of the parties, but rather, application of law making the proper review de novo. However, if this Court determines the proper standard of review is abuse of discretion, the trial court's decision is error. Misapplication or erroneous view of the law is an abuse of discretion. *Choate*, 143 Wn.App. 235, 240. It is also an abuse of discretion where a decision turns on a factual finding not supported by substantial evidence. "Substantial evidence exists if the record contains

evidence of sufficient quantity to persuade a fair-minded, rational person.”

In re Marriage of Griswold, 112 Wn.App. 333, 340, 48 P.3d 1018 (2002).

B. Authority for Modification Is Not Found In RCW 26.09.170(7)(a)

Dr. Weiss argues at page nine of his brief RCW 26.09.170(7)(a) provides the legal basis for modification without a substantial change in circumstances. Dr. Weiss miscomprehends RCW 26.09.170(7)(a). That provision of the statute speaks specifically to adjustment of support. It states an order may be adjusted after 24 months if there is a change in the income of the parties or there is a change in the economic tables/standards set forth in RCW 26.19.

The trial court erred in adopting Dr. Weiss’s misapplication of RCW 26.09.170(7)(a) and holding the provision allowed modification simply because the trial court concluded there was a change in the parties’ incomes.

The trial court’s error is clear from the court’s comments:

THE COURT: Ms. Perry, I know much has been spent on that, but 3.16, the periodic adjustment in the agreed-upon order of child support stated: Child support may be reviewed and adjusted every two years per the statute then in effect.

MS. PERRY: Well, that's an adjustment.

THE COURT: The first --

MS. PERRY: I beg your pardon.

THE COURT: And so you're saying, well, adjustment versus modification, there's a...

MS. PERRY: Well, he brought a modification, not an adjustment.

THE COURT: But the modification statute says that after two years you don't have to show a change of circumstances if there's changes in income.

RP Page 11, Lines 6 to 20.

The trial court's erroneous application of the law is clear. The trial court applied RCW 26.09.170(7)(a) as a basis for modification of an order if the parties' incomes change.

C. Elimination of the Upward Deviation in the Support Transfer Payment is a Modification Which Requires a Substantial Change.

Dr. Weiss's support for the trial court's removal of the slight upward deviation in the support transfer payment is premised upon his, and the trial court's erroneous application of RCW 26.09.170(7)(a) allowing for modification. He argues the "statutory basis for modification in this case is RCW 26.09.170(7)(a)" and so the court could remove the upward deviation as the grounds for modification were met.

Dr. Weiss is correct that removing an upward deviation is a modification of the order. *Marriage of Trichak*, 72 Wn. App. 21, 25, 863

P.2d 585 (1993)(Trial court must first correctly find the prerequisites justifying modification before the deviation may be removed.) Dr. Weiss errs in urging RCW 26.09.170(7)(a) is that basis for modification.

The trial court erred in relying upon RCW 26.09.170(7)(a) for modification; it compounded its error by modifying the order and removing the upward deviation in the support transfer payment. The support transfer payment should not have been changed. The slight upward deviation in the original order provided for Dr. Weiss's transfer payment to be \$2,330 rather than the \$1,752 standard calculation, a \$578 upward deviation.

It was error for the trial court to modify this transfer payment. The order should have only been adjusted, and the adjustment should have been to those expenses for which the parties pay a pro rata share based upon the adjusted worksheets.

D. The Finding Of A Change In the Parties' Income Being A "Substantial Change in Circumstances" Is Not Supported By Substantial Evidence.

The trial court's finding of a change in the parties income is also error as it is not supported by substantial evidence. Dr. Weiss's net income in the original order was \$20,515; it is \$20,354 under the modified order. CP 661; 516 The Mother's income, in contract, does reflect a significant

change. In the original order the Mother's net income was \$6,761; it is now \$5,775. CP 661; 516

Dr. Weiss's allegation that the order "works a substantial hardship" was not supported with any evidence. Not only had Dr. Weiss's income not changed, the children's expenses had not changed. Dr. Weiss offered no evidence to support his claim of substantial hardship.

E. The Award of Attorney's Fees To The Mother Is Inequitable.

The trial court's found the Mother had the need for fees and Dr. Weiss had the ability to pay. Dr. Weiss chose to file a petition and to serve discovery upon the Mother. The Mother's attempts to uncover the facts to support the allegations raised in his petition and to respond to his discovery caused her to incur thousands of dollars in legal fees; slightly more than \$21,000! Dr. Weiss also incurred more than \$10,000 in legal fees; \$13,000 by the time of the trial, and certainly he incurred more in preparation of the final orders and attending the presentation hearing.

It was an abuse of the trial court's discretion to award only \$3,000 of fees to the Mother. The retroactive application of the reduction of support to the Mother, coupled with the meager fee award exacerbated the inequity of the meager fee award.

F. Fees and Costs on Appeal.

In response to the Mother's request for an award of fees and costs on appeal, Dr. Weiss asserts she has no need because of her employment income. RCW 26.09.140 requires the court to consider the financial resources of both parties. The Mother's monthly net income is ¼ of Dr. Weiss's net income. Her overall financial assets are substantially less. The Mother should be awarded fees incurred in this appeal.

Dr. Weiss also argues the Mother should pay his fees because the appeal was "filed in bad faith." He provides no support for this assertion; and there is no support. Under *Marriage of Berg*, 47, Wn. App. 754, 760. 737 P.2d 680 (1987) Dr. Weiss is not entitled to fees. Furthermore, the Court of Appeals does not consider unsupported assertions. *Port Susan Chapel of the Woods v. Port Susan Camping Club*, 50 Wn.App. 176, 189, 746 P.2d 816 (1987)(Court will not consider claim or argument when no argument is made beyond assertion of conclusion itself.)

III. CONCLUSION.

The trial court's erroneous application of law is undeniable. The trial court held an order of child support can be modified without a substantial

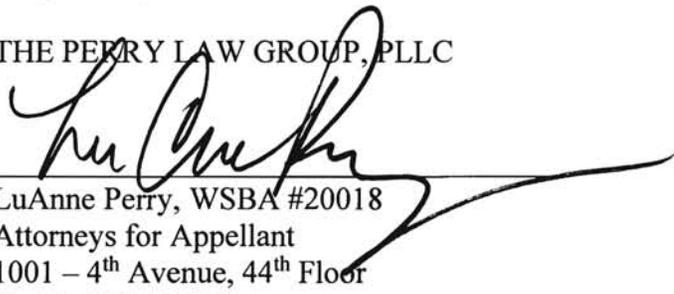
change of circumstances pursuant to RCW 26.09.170(7)(a) if there has been a change in the parties income. While an order of child support may be adjusted pursuant to this provision, the statute cannot be expanded to include the more significant modification procedure. It was error for the trial court to rely upon this provision of the statute to then remove the upward deviation based upon its erroneous application of the law.

The Mother asks the Court of Appeals to direct the trial court to reinstate the upward deviation of the base support transfer payment, direct the trial court to award to the Mother all fees and costs incurred in the trial court and to award to the Mother all fees and costs she has incurred in this appeal.

Dated this 28th day of July, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 28, 2014, I served a copy of the Appellant's Reply Brief on Appeal to Sharon Friedrich, Carol Bailey & Associates, PLLC, 901 5th Ave, Ste 2800, Seattle, WA 98164-2069, using the agreed method of service via email as well as personally delivering a copy to the above address.


Kasey Johansen

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