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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.

APPELLANT'S BRIEF ON APPEAL

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I.
INTRODUCTION

After a 13-year marriage Anne and Dr. Weiss divorced. As part of the global settlement of the case, the parties agreed Anne would receive just three and a half years of maintenance but Dr. Weiss would pay an upward deviation support transfer payment of \$2,330 per month and also pay 100% of their two children's very high expenses related to their private school and extracurricular activities, including the summer camps which Anne relied upon for daycare. Dr. Weiss and Anne agreed upon this so that their children would not suffer a reduction in their lifestyle as a result of their parents' divorce.

Dr. Weiss works part-time, just eight months a year, and during the months he does work, it is a four-day workweek of eight-hour shifts; essentially half the number of hours of a fulltime worker. He earns approximately \$400,000 a year working part-time.

Twenty-five months after the entry of the order of child support, ("OCS") Dr. Weiss filed a petition for *modification* of child support (not adjustment) and served discovery with the petition. His petition asserted a substantial change in circumstances (a change in the income of the parties)

and that the order worked a severe economic hardship (he no longer could afford to pay 100% of the children's expenses.)

The trial court granted modification and removed the upward deviation paid by Dr. Weiss. The trial court found:

There has been the following substantial change of circumstances since the order was entered:

It has been over two (2) years since the prior Order of Child Support was entered and the incomes of both parties have changed. The mother is now employed full time earning \$7,995 per month gross in salary.

The Final Order of Child Support entered on November 4, 2010 contemplates an adjustment of child support within three (3) months of January 2013.

The trial court awarded Anne just \$3,000 dollars in legal fees "based on her need and his ability to pay" despite the fact she incurred \$21,167 in fees and costs. Dr. Weiss incurred \$13,000 in fees himself in the extensive modification proceeding.

On October 10, 2013 the modified order was entered and the Commissioner made it retroactive to August 1, 2013. Anne's child support was reduced \$828, from \$2,330 per month to \$1,502 per month.¹ The

¹The modified OCS had two worksheets. Worksheet "A" reflected Anne's \$3,000 maintenance payment and worksheet "B" reflected the parties' incomes when maintenance terminated with the March 31, 2014 payment. The support payment under "A" was \$1,502 and the payment under "B" is \$1,728.

August 1, 2013 retroactive application, however, resulted in an “overpayment” to Anne of \$2,484. Dr. Weiss offset the \$3,000 “fee” award, resulting in Anne receiving just \$516. The impact of the modification removing the upward deviation in the same time frame as the end of Anne’s maintenance was an overall reduction of funds in Anne’s household, the children’s primary parent, of \$3,602 per month.

Anne sought revision to the Superior Court by timely filing a motion for revision on October 21, 2013. CP 684-778. While the motion for revision had been filed within RCW 2.24.050’s ten-day mandatory period, it was not served upon opposing counsel until two days later, on October 23, 2013. CP 801. The motion was set for November 22, 2013; thirty days after Dr. Weiss received the motion. Dr. Weiss filed a six-day motion to strike the revision hearing on November 13, 2013, based upon failure to serve the motion for revision within the same ten days as it had been filed. CP 781-787. Dr. Weiss based his motion on King County Local Civil Rule 7(b)(8)(A) which requires the motion for revision to be both filed and served within ten days. *Id.* While the superior court’s subject matter jurisdiction conferred by RCW 2.24.050 had vested with Anne’s timely filing, the superior court exercised its discretion and struck the revision hearing,

entering an order without oral argument on November 20, 2013. CP 808.

Anne then filed this appeal, seeking the Appellate Court's *de novo* review of the trial by affidavit.

II. **ASSIGNMENTS OF ERROR**

1. The trial court erred by finding a substantial change in circumstances merely because it had been more than 24 months since the entry of the original OCS.

2. The trial court erred by finding there had been a substantial change in circumstances not contemplated by the parties; the parties' incomes did not change in a significant manner and Anne's had actually decreased from the time the original OCS with the upward deviation had been entered.

3. The trial court erred in holding the OCS may be modified upon request of the obligor without any change in circumstances simply because the original OCS was entered by agreement.

4. The trial court erred by modifying the OCS and removing the upward deviation in the transfer payment.

5. The trial court erred by refusing the request to maintain the upward deviation in the transfer payment.

6. The trial court erred by allowing a retroactive modification that resulted in an overpayment of nearly the same amount of the minimal fee award.

7. The trial court erred by making a minimal fee award of just \$3,000 after finding the criteria of RCW 26.09.140 was met.

III.
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does RCW 26.09.170(7) allow for the more extensive proceeding of modification of an OCS rather than merely an adjustment simply because it has been more than twenty-four months since the entry of the last OCS? (Assignment of Error 1.)

2. Where the overall incomes of the parties do not change in a significant manner may the court nonetheless modify an order of child support and eliminate the upward deviation in the transfer payment, even though the obligee's income is 15% lower than when the upward deviation was first ordered? (Assignments of Error 1, 2, 3, 4, 5, 6.)

3. Where Dr. Weiss's income is four times Anne's income, his assets are substantially greater, he petitions for modification and propounds discovery, thereby causing Anne to incur substantially more in legal fees

than a simple adjustment motion procedure, Anne should be awarded all fees incurred rather than a mere fraction of her fees. (Assignment of Error 7.)

IV.
STATEMENT OF THE CASE

The parties married in 1997, separated in August 2010 and negotiated a global settlement on November 3, 2010; the Decree was entered January 2011. CP 548, 559, 560. Their two children were six and four at the time. CP 548.

Dr. Weiss is Board Certified in two specialties: Diagnostic Radiology and Interventional Radiology & Vascular Radiology. CP 508. He earns between \$350,000 and \$450,000 a year working essentially part-time. CP 614. His corporation makes a \$16,500 retirement contribution on his behalf and he also contributes \$16,500 in retirement; his retirement assets increase by \$35,000 per year. CP 617, 579. He works just eight months a year, and during the months he does work, his schedule is just four days per week of eight-hour shifts. CP 614.

Anne had been a stay-at-home mother out of the work force throughout the marriage; she returned to work when the parties divorced. CP 508, 580.

During the marriage, the children were enrolled in private school. Both children participated in many activities: sports, after school and summertime enrichment activities/camps, dance, and skiing. CP 580-581. Their expenses were typically \$6,000 to \$7,000 per month. *Id.*

On August 19, 2010, the parties' marriage came to an abrupt end. Dr. Weiss plunged into an emotional meltdown and refused to move out of the house, despite clearly having the financial means to do so. CP 577-578. Within 77 days of separation, on November 3, the parties, through their lawyers, had reached a global settlement. CP 548-563.

To generate the cash for Anne's property settlement, the parties liquidated stock. CP 559. They agreed to delay entry of the final decree until January 2011 to enable the large capital gains tax to appear on the 2010 joint income tax return. *Id.*

As part of the global settlement, Anne accepted just three and a half years of maintenance and at a very low amount despite Dr. Weiss's substantial income. She received \$4,000 per month for twelve months (October 2010 through September 2011) and then \$3,000 per month for two and a half years, ending March 2014. CP 558.

The low maintenance was an integral part of the total maintenance/child support settlement. Dr. Weiss committed that the children's lifestyle would not suffer due to the divorce and to maintain this lifestyle there had to be an upward deviation in both the support transfer payment and the pro rata division of expenses. CP 579. The upward deviation reflected in the OCS was a higher base transfer payment of \$2,330 and also elimination of the pro rata division of expenses as Dr. Weiss was paying 100% of the children's very high expenses. CP 517, 520. This included payment of all of their activities, equipment (skiing, sports, etc.) private school tuition through high school and all summer camps. CP 520.

The OCS did not mention daycare expenses, which Anne would need as she was returning to work². The OCS's upward deviation shifted to Dr. Weiss payment of summertime day camp and the after school enrichment activities that the children had historically participated in. CP 520. Anne understood this provision to address her need for work-related daycare; the children would continue to attend after school activities and summer camp while Anne was working³. CP 581.

² The worksheet entered with the original OCS reflected Anne's initial anticipated employment income of \$3,000 per month. CP 525.

³ Within months of entering the OCS, Dr. Weiss, through mediation/arbitration, obtained a ruling that Anne was required to pay 25% of his and her work-related daycare.

At settlement, Anne felt confident she would eventually secure a good job, but knew she would never earn the kind of income Dr. Weiss commanded by working just part-time. CP 616. However, with the children's expenses paid entirely by Dr. Weiss and a \$2,330 base support transfer payment, she accepted the global settlement.

This upward deviation and payment of all of the children's expenses were based upon the net incomes stated in the OCS; Dr. Weiss's net was \$20,515.06 and Anne's net monthly income was \$6,761. CP 516, 517.

Two years after the divorce, Dr. Weiss filed a petition for *modification* claiming both a substantial change in circumstances and that the order worked a severe economic hardship. The petition stated:

REASONS FOR MODIFYING CHILD SUPPORT.

A party commenced this action.

AND the order of child support should be modified for the following reasons:

There has been the following substantial change of circumstances since the order was entered:

Dr. Weiss would at times refuse to use summer camps in lieu of daycare and instead insisted upon having more expensive nannies during his residential time. Anne attempted to cap her share of Dr. Weiss's nanny expense at 10 to 15 hours per month, but the arbitrator ruled against her. In addition to the substantial reduction in the support payment, she also must pay 22% of the work-related daycare per month, which has the effect of further eroding away the upward deviation in the original OCS. CP 620-621; 628.

The incomes of the parties have changed. The father can no longer pay 100% of all of the expenses for the children.

Whether or not there is a substantial change of circumstances, the previous order was entered more than a year ago and:

The order works a severe economic hardship due the [sic] fact that the father has been responsible to pay 100% of all the children's expenses (except for uninsured health care expenses and day care expenses), including their private school expenses.

CP 532.

Dr. Weiss's petition sought a downward deviation in the transfer payment and pro rata payment of all expenses (except private school tuition).

CP 532. Dr. Weiss served discovery on Anne along with the petition for modification.

During the proceeding, Anne responded to Dr. Weiss's onerous discovery and also served discovery upon him in an attempt to ascertain the basis for Dr. Weiss's claim that there had been a substantial change in circumstances. Anne asked Dr. Weiss to articulate the facts supporting his assertion that payment for the children's expenses suddenly was a "severe economic hardship," particularly when her maintenance would be ending roughly a year after he filed the petition, thereby increasing his own income by \$36,000 a year! CP 565-566. Anne specifically asked Dr. Weiss what

had changed between the time of settlement and seeking modification that justified modification, rather than a more appropriate adjustment motion. *Id.*

For example, one such interrogatory read:

Please list below all of the facts and/or circumstances that exist now that did not exist prior to November 3, 2010, which have had the effect of increasing your income, decreasing your income, or in any way affecting your ability to pay all categories of support under the order of child support and attenuated documents. This includes, but is not limited to, any expense or category of expense, debts, health condition, work condition, or life condition. For each every fact or circumstance listed, please indicate:

- a. Whether it caused an increase or decrease in your income;
- b. The amount of the increase or decrease; and
- c. Identify any and all documents evidencing the change in facts and/or circumstances.

Dr. Weiss's first responded "overall my income has decreased and my expenses have increased. The hospital where I work has been bought out by another owner and it is possible that the new owner will terminate the services currently provided by IRAD." In response to subpart b. and c., he responded, "see attached" referring to several inches of bank and credit card statements that provided no specific response. CP 566.

Anne found this response inadequate and sent a discovery deficiency letter. CP 568. Dr. Weiss's "supplemental" response was no more

illuminating than his first, stating “overall my income has decreased and my expenses have increased. The hospital where I work has been bought out by another owner (The Franciscan Group) and it is possible that the new owner will terminate the services currently provided by IRAD. The first quarter of 2013, IRAD radiologists did not receive a bonus as the revenue was lower than in previous months.” CP 572. In response to subpart b. and c., he again responded, “see attached” referring to the same stack of paper. *Id.*

In an attempt to uncover the facts another way, such as by having Dr. Weiss identify large (in excess of \$1,000) unanticipated expenditures he first objected, claiming the interrogatory was “too burdensome.” CP 572-573. He supplemented the responses with “see credit cards and bank statements produced”, thus merely identifying the type of uninformative financial documents. *Id.*⁴

At trial, the commissioner found a substantial change in circumstances, i.e. that the income of the parties had changed. CP 659. In fact, the evidence was it had not changed in any significant way.

⁴The credit card and bank statements reflected Dr. Weiss was not suffering a “severe economic hardship” but rather that he had a lovely, and perhaps even lavish, lifestyle. In 2012 he spent \$122,345 on his credit card without accumulating a large, unpaid balance. In addition, his Morgan Stanley Account reflected \$25,000 to PayPal, \$16,000 to interior designers and \$15,000 towards home improvements. In all, this discretionary spending was \$261,000 (after-tax dollars.) CP 657, 617.

Dr. Weiss's net monthly income was \$18,344 [CP 661] until his maintenance obligation ended a few months after modification, and his net monthly income then became almost exactly the same as when the upward deviation had been granted in the original OCS. CP 661; 516. In contrast however, Anne's net monthly income was going to be significantly *lower* than when the upward deviation was granted.

A year before the \$3,000 per month maintenance ended, in April 2012, Anne became employed at Starbucks earning \$95,000 annually. CP 616. Thus, during the ten months between securing the job with Starbucks and the end of the maintenance she had a monthly net income of \$8,025; \$1,264 higher than when the upward deviation was granted. CP 517; 662. When her maintenance ended, however, her monthly net income was a \$1,000 *less* than when the original OCS with the upward deviation was granted! CP 517. The result is that the income to Anne's household, the children's primary household, was reduced by \$3,600 per month, or nearly 40%, yet the commissioner determined it was appropriate to remove the upward deviation in the support payment.

The meager fee award was a further financial blow. By seeking the modification to remove his upward deviation, Dr. Weiss's litigation efforts

caused Anne to incur approximately \$21,000 in legal fees. CP 640-645. Dr. Weiss, himself incurred in excess of \$13,000. CP 452. Yet the trial court awarded just \$3,000 despite finding Dr. Weiss clearly had the ability and Anne clearly had the need. CP 659; 683.

V. **ARGUMENT**

A. Standard of Review

The standard of review of a trial by affidavit ruling is de novo. *Marriage of Langham and Kolde*, 153 Wn.2d 553, 560, n.4, 106 P.3d 212 (2005).

B. Introduction

The child support modification statute is not a tool for the financially advantaged obligor to achieve financial manipulation. The OCS entered in January 2011 provided for an upward deviation in support payments based upon many factors. None of those factors changed in any significant manner between the time of the entry of the order and Dr. Weiss's petition filed 25 months after the original OCS had been entered. The trial court's removal of the deviation was error and should be reversed; the base support transfer payment should not have been changed at all. The trial court's award of just

\$3,000 of legal fees to Anne was error and should be reversed. Anne should receive the fee award she requested of \$20,167.

C. **Modification requires a showing of substantial change in circumstances.**

There is a difference between modification and adjustment of an order of child support. Modification is a proceeding requiring the filing of a petition and “anticipates making substantial changes and/or additions to the order.”

A full modification action is commenced by service of a summons and petition and it is resolved by trial. It may only be sustained under certain prescribed circumstances. In this case, the relevant prerequisite is a substantial change of circumstances, which Washington courts have consistently held is one that was not contemplated at the time the original order of support was entered. A full modification action is significant in nature and anticipates making substantial changes and/or additions to the original order of support.

Marriage of Scanlon, 109 Wn. App. 167, 173, 34 P.3d 877 (2001)

(footnote citations to RCW 26.09.170 and 175 omitted). An adjustment merely conforms the existing order to the parties’ current circumstances.

Id. 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 age of the child. RCW 26.09.170(7)(a)(i), (ii). The court’s authority under this

section of the statute is limited to simply conforming existing calculations in a child support order to the parties' current circumstances and the current statutory standards. For example, adjustment is used to create a new worksheet based upon the parties' incomes and determine the new transfer payment and pro rata division of expenses.

D. Elimination of an upward deviation is a modification that requires a finding of a substantial change in circumstances.

Dr. Weiss sought to eliminate the upward deviation in the OCS. His petition claimed the request was based upon a substantial change in circumstances. Based upon the evidence before the trial court, it was error to find such a change in circumstances.

Where the support order contains an upward deviation, the trial court must first correctly find the prerequisites justifying modification before the deviation may be removed. *Marriage of Trichak*, 72 Wn. App. 21, 25, 863 P.2d 585 (1993) (prior deviation may be modified after a proper finding of substantial change in circumstances.)

The evidence presented establishes the overall income of the parties did not change in any meaningful way or for a significant period of time.

Dr. Weiss's income at the time the original OCS was entered was \$20,515. The modified OCS reflects his net monthly income as \$18,344 and

then \$20,354 beginning April 2014 when there is no longer a maintenance obligation. A reduction of \$161 dollars per month (less than 1%) in the obligator's net income cannot be the definition of a "substantial change in circumstances." Moreover, under the facts of this case, Dr. Weiss had been able to shift to Anne a pro rata payment of the daycare expenses through arbitration proceedings prior to his modification action.

Anne's income, in contrast to Dr. Weiss's, fell significantly from the time of the original OCS. While it was contemplated that the maintenance would end, it was not contemplated that the upward deviation would be whisked away and compound the loss of funds into her household. Anne's monthly net income is 15% lower than when first awarded the deviation, further compelling the conclusion it was error to find a substantial change in circumstances and eliminate the deviation.

Dr. Weiss's assertion that he was suffering a severe economic hardship due to his payment of 100% of the children's expenses is not supported by the record. Furthermore, his payment of these expenses was contemplated at the time the original OCS was entered. The children's expenses were well-known prior to the divorce and his income has not changed in a significant amount.

Moreover, the evidence presented shows Dr. Weiss works 4 days a week for eight months out of the year. He is an equal owner in the professional services corporation in which all of the owner-doctors are paid based upon how much they work. The corporate records reflect every doctor owns 14.29% yet their compensation differs. The reason some are paid more is because some work more than Dr. Weiss. Last year Dr. Weiss earned \$42,000 less than the highest paid doctor, who also does not work full-time. The fact that Dr. Weiss already earns a high income while working part-time is not relevant to a determination of whether or not Dr. Weiss is voluntarily under-employed. *Marriage of Wright*, 78 Wn. App. 230, 896 P.2d 735(1995).

Wright cannot be read to create a “safe harbor” for a part-time worker that relieved them of having income imputed simply because they earned a high income. Dr. Weiss claims the payment of the children’s expenses and the upward deviation in the transfer payment were an economic hardship for him, yet he continued to work just eight months a year and take multiple and expensive vacations. When a party has full-time work available to them, it is reversible legal error not to impute income to them at full-time. *Marriage of Wright*, 78 Wn. App. 230, 896 P.2d

735(1995).

In *Wright*, the Court rejected the argument that a single mother of five is not expected to work fulltime if such work is available to them, “regardless of the merit of the reason for the under employment.” *Wright*, 896 P.2d at 737.

Income was imputed to Ms. Wright despite the Court’s acknowledgement that as a single mother of five who was also in the National Guard, she was very busy indeed. The reason Dr. Weiss doesn’t work more is not because he is too busy—it is because he does not want to and he believes he should not have to. There is no legal theory or equitable grounds which would impute income to a single mother of five who works three-quarters ($\frac{3}{4}$) time year round, but would not impute income to Dr. Weiss who works an eighty percent schedule but only eight months a year.

Anne works full-time. While Dr. Weiss may choose to work less, he should at least be considered to have the income as though he did work fulltime such that the upward deviation did not work a substantial hardship. To fail to do so in these circumstances would be ever more egregious as it would relieve Dr. Weiss of his bargained for obligation which he now

decides he does not want, when he is even more capable than the mother in *Wright* of meeting that agreed to obligation.

E. **Dr. Weiss's reliance on *Schumacher v. Watson*, 100 Wn. App. 208 (2000) and *Pippins v. Jankelson*, 110 Wn.2d. 475 (1988) to support his claim he did not need to show a substantial change of circumstances to eliminate the upward deviation is incorrect.**

Dr. Weiss also asserted at trial the prerequisite of showing a substantial change in circumstances for modification was automatically eliminated because the OCS had been entered by agreement of the parties as part of the global settlement. Dr. Weiss cited *Schumacher v. Watson*, 100 Wn. App. 208, 997 P.2d 399 (2000) and *Pippins v. Jankelson*, 110 Wn.2d. 475, 754 P.2d 105 (1988) in support of this proposition.

These two cases are inapposite to this case. The rule is a court must find a substantial change of circumstances before modifying an order of support. The *Schumacher* court explains the rule is based upon the presumption "that the court independently examined the evidence after a fully contested hearing." *Schumacher*, 100 Wn. App. 213, citing *Pippins v. Jankelson*, 110 Wn.2d 475, 478, 754 P.2d 105 (1988). Where there has not been a fully contested hearing, but rather orders entered by agreement, this presumption may not be true and a trial court "need not" find substantial

change. 110 Wn. App. 213. *Schumacher* does not stand for the proposition the trial court is directed to automatically modify without regard for the circumstances under which the agreed order was entered.

Dr. Weiss attempts to use these cases to create a new rule that all agreed orders are subject to modification with any showing whatsoever of a change in the parties' finances. Yet in both *Schumacher* and *Jankelson*, the modification action differed significantly in many respects from the instant case. In *Schumacher* and *Jankelson* the petitions to modify were filed eight years after entry of the original orders compared to the mere 25 months Dr. Weiss waited to seek modification. In both cases it was the person receiving the support who sought modification so as to increase the funds into the child's primary residence; here it is Dr. Weiss who seeks to reduce the funds into his children's primary residence. Finally, in both cases there were facts reflected in the record which were actually substantial changes in the circumstances!

While the *Schumacher* court, citing *Jankelson*, stated it was not error to modify the original order that had been entered by agreement without first finding a substantial change in circumstances, the opinion recites facts that were a substantial change from the time of the original order. The trial court

in *Schumacher* had found the order was working a severe economic hardship on the needs of the child. 100 Wn. App. 211. This is a substantial change from when the order had first been entered.

In *Jankelson*, in the near decade between the original order and the modified order, the child's expenses had risen considerably and thus the support was not sufficient. 110 Wn.2d 478. Expenses that rise considerably are considered a substantial change in circumstances, thus, in *Jankelson* there was a substantial change in circumstances.

Dr. Weiss should not be permitted to use *Schumacher* and *Jankelson* as a path to erasing the upward deviation in his and Anne's original OCS. The upward deviation was based upon the recognition of the children's expenses and lifestyles they had before the divorce. It was based upon the comparable income of the parties which for Dr. Weiss has not changed but for which Anne has dramatically decreased.

The upward deviation in the original OCS was erroneously removed through the modification proceeding by the trial court. This upward deviation should have remained in the OCS and its basis is supported by the holding of *Krieger v. Walker*, 147 Wn. App. 952 (2009). The Krieger court explained the economic table in the child support schedule lists the

presumptive amount of base support owed when the combined incomes of parties do not exceed the table's net income level maximum. *Krieger*, 147 Wn. App. at 960. Where the combined net income exceeds the maximum, the table is not presumptive, but rather, is advisory. *Id.*

The *Krieger* court held that while support may not be set by extrapolation, and should consider, at a minimum, the parents' comparative standards of living, as well as the children's special medical, educational, or financial needs. Importantly, there is no requirement of an "extraordinary" need to deviate upwards where the combined incomes exceed the statutory maximum as the income of the parties do here. *Krieger*, 147 Wn. App. at 963.

F. The modification should not have been made retroactive causing a significant "overpayment" to Anne and thereby having the effect of eliminating her meager fee award.

Not only did the trial court err in modifying the child support, it compounded this error by making the modification retroactive to August 1, 2013. The order was entered October 10, 2013, so by then Dr. Weiss was deemed to have overpaid his support by nearly the same amount as the fee award. This resulted in further financial hardship to Anne.

G. The fee award of \$3,000 was inequitable based upon Dr. Weiss's tactic to seek modification, allege substantial change in circumstances and engage in extensive discovery efforts by both propounding discovery and refusing to specifically identify the alleged substantial change in circumstances.

The trial court awarded fees to Anne pursuant to RCW 26.09.140.

Despite finding she had the financial need and Dr. Weiss had the ability to pay, it awarded just \$3,000 out of the \$21,000 that she incurred. The reason her fees were as high as the \$21,000 was because Dr. Weiss chose to seek modification and engage in extensive litigation with Anne. His fees were \$13,000 due to his choice of litigation tactics.

H. Fees and Costs on Appeal.

Anne requests fees on appeal based upon RCW 26.09.140. This statute allows for an award to Anne even if she does not prevail upon this appeal. She was awarded fees by the trial court pursuant to this statute though in an insufficient amount.

Dr. Weiss is not entitled to an award of fees. He cannot meet the standard of an award under RCW 26.09.140. Absent a finding that Anne's appeal is in bad faith, Dr. Weiss would not be entitled to fees. *Marriage of Berg*, 47, Wn. App. 754, 760, 737 P.2d 680 (1987) (where wife had been awarded fees in the trial court and there was no showing of appealing in bad

faith, fees would not be awarded to husband on appeal, even as the prevailing party.)

VI.
CONCLUSION.

It was error for the trial court to modify the OCS and to remove the upward deviation where there was no showing of substantial change in circumstances. This is particularly true when the substantial change is one which justifies the continuance of the upward deviation; the obligor's income has not changed and the obligee's income is substantially less. The Court of Appeals, ruling de novo, should reinstate the upward deviation base support transfer payment of \$2,330.

It was error for the trial court to find Anne had the need and that Dr. Weiss had the ability to pay, yet only award \$3,000 of the \$21,000 of fees and costs incurred in the modification action. The Court of Appeals should award to Anne \$21,000 in fees and costs incurred in the trial court as well as all fees and costs incurred in this appeal.

Dated this 28th day of May, 2014.

Respectfully submitted,

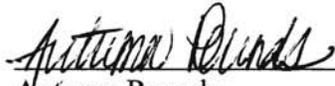
THE PERRY LAW GROUP, PLLC

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

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CERTIFICATE OF SERVICE

I certify that on April 28, 2014, I served a copy of the Appellant's 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.


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