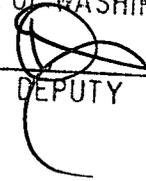


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY  \_\_\_\_\_  
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No. 47181-7-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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JENNIFER J. ZACAPU, Appellant

v.

ANDRES ZACAPU-OLICER, Respondent

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BRIEF OF APPELLANT – JENNIFER J. ZACAPU

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N/A

### Other

N/A

## **I. INTRODUCTION**

This case arises out of an action (motion) to adjust child support filed by the State of Washington Department of Social Health Services' Division of Child Support pursuant to RCW 26.09.170(8) and (9). The State alleged and neither party disputed the fact that more than 24 months had elapsed since the prior order of child support was entered by the Court and that the income of the parties had changed.

The original order of child support was entered after a dissolution of marriage trial held in Pierce County Superior Court on May 4, 2012. At that time, the parties' older dependent child (Andrea) was living with her father and the parties' youngest child (Dylen) was living with the mother. Based upon this split custody arrangement, the trial court deviated from the standard calculation by applying the Arvey (77 Wn. App. 817) child support calculation method. At that time (May 4, 2012), the trial court found the father's net income to be \$3,609.54 per month and the mother's net income to be \$2,457.63 per month. The father's child support obligation to the mother was set at \$127.41.

On December 1, 2014, the State's motion to adjust child support was heard by a Commissioner in Pierce County Superior Court. Both parties were represented by legal counsel and neither party disputed the net income figures calculated by the State. The State calculated the

father's net income as \$3,745 per month and the mother's net income of \$2,047 per month. Thus an increase in father's income (\$3,609 to \$3,745) and a reduction in mother's income (\$2,457 to \$2,047). Likewise, neither party disputed the fact that the child who had been residing with the father (Andrea) had become emancipated and moved out of the father's home. Thus support was being calculated only for Dylen.

At the time of the hearing, the father requested a downward deviation of child support based upon his recent marriage to a woman with 6 children. The father alleged that he had a duty of support under RCW 26.16.205 to these 6 step-children and therefore he was entitled to a downward deviation pursuant to RCW 26.19.075(e). The Commissioner rejected the father's argument and denied his request for downward deviation of his child support obligation. Child support was set at \$524 per month in accordance with the standard calculation from the child support table.

The father then filed a motion for revision and the trial judge reversed the commissioner's decision and ordered a downward deviation of support to \$350 per month. This appeal followed that decision.

## **II. ASSIGNMENT OF ERRORS**

### **Assignment of Errors**

1. The trial court erred when it held that the duty of support referred to in RCW 26.09.075(1)(e) included the support obligations of a step-parent to step-children as referenced in RCW 26.16.205.
2. The trial court erred when it considered the financial declarations of the parties and held not deviating from the standard calculation would result in the obligor (father) parent having insufficient income in his household, yet sufficient funds in the obligee (mother's) household.

### **Issues Pertaining to Assignment of Errors**

1. Did the trial court err when it ruled as matter of law that "RCW 26.19.075(1)(e) Children from other relationships" includes the support obligation of a step-parent to the step-children as referenced in RCW 26.16.205?
2. Did the trial court err when it found that a downward deviation was necessary to avoid insufficient income in the obligor parent's (father) household, yet not provide adequate resources in the obligee / child's household?

### III. STATEMENT OF THE CASE

The parties were married for sixteen years before separating in 2010. The parties' divorce was finalized in May of 2012 after a bench trial in the Pierce County Superior Court (RP 2). At that time, the father was awarded the family home and the parties' daughter (Andrea) remained with her father. Their son (Dylen) remained with the mother (CP 114)

The trial court found that the father's net income was \$3,609.54 per month and the mother's net income was \$2,457.63 per month (CP 59-60). Based upon these incomes, the standard calculation was \$887 per month (father to mother) (CP 61). However, since Andrea was living with her father, the Court deviated downward to \$127.41 per month (CP 60-61).

Over the next two years, the father's net income increased to \$3,745 per month and he began contributing more than \$416 per month into his 401(k) retirement account (CP 132 & 140). Over this same two year period, the mother's net income decreased to \$2,047 per month (CP 132). She has not been contributing to a retirement account (CP 140). In essence, the father's net monthly income and retirement contributions went from \$3,609.54 at the time of the divorce to \$4,025.54 (\$3,745 + \$416) while the mother's monthly net income fell from \$2,457.63 to \$2,047 (CP 132 & 140).

Andrea has subsequently been emancipated and has moved out of her father's home (CP 115). The parties' son, Dylen is still residing with his mother (CP 115). On August 6, 2014, the mother requested the State revisit the issue of child support (CP 115). That is the date she filed a "Child Support Order Review Request" (CP 115).

The State requested information from both parties and determined that more than 24 months had elapsed since the prior order of child support had been entered and that there had been a change in incomes of the parties (CP 87). The state then filed a motion to adjust child support pursuant to RCW 26.09.170(8) and (9) (CP 87).

Both parties obtained counsel and the State's motion was heard on December 1, 2014 (CP129). At the time of the hearing, both parties accepted the State's income figures for both parties. The point of disagreement was whether or not the father should receive a downward deviation based upon the fact that he had recently married a woman with 6 children from other relationships (CP 96 & 115). In essence, the father argued his support obligation to his biological child should be reduced because he recently was married and now had 6 step-children living in his home (CP 121).

At the time of the hearing, it was undisputed that the father had a net income for child support purposes of \$3,745 per month (CP 96). He

also was receiving a credit of \$416 for 401(k) contributions, which is income available to him (CP 140). His wife was also receiving \$900 per month in food stamps and \$250 per month in child support for her children (CP 126 & 121). Therefore, the total net funds available to the father's household was \$5,311 per month. After payment of the father's mortgage payment of \$1,325 (CP 109), the father had available to the household the sum of \$3,986 to meet his households' basic needs, and he was relieved from having to provide support to his daughter Andrea who was emancipated and no longer living with him (CP 115). These income figures are not only undisputed, but come from the father's own evidence (CP 96, 115, 126, 121 & 109).

Likewise, there was no dispute on the mother's net income. Her income had decreased over the past two years to \$2,047, per month (CP 132). The mother's rent was \$1,150 per month leaving her with just \$897 to cover her household's basic needs (utilities, gas, insurance, food, school lunches, clothes and supplies, etc...) (CP 116).

Arguments from both parties' and the State were heard and the Commissioner denied the father's request for downward deviation and set child support at \$524 per month based upon the standard calculation (CP 133-134). The father then filed a motion for revision and the matter was heard by the trial court de novo (CP 145 & 158).

After oral arguments of counsel, the trial court stated on the record that “the duty of support that’s referred to in 26.19.075(e) includes support obligations of a step-parent to the step-children as referenced in 26.16.205” (RP 32).

The trial court then continued by stating “ So I do find it compelling that while Dad has a much greater income and there is greater total household assets in Dad’s household than Mother’s, I find two things compelling. One is the number of people in the household that have to be supported with that income (referring to the father’s household) ... and the other thing is that I haven’t heard anything about her financial circumstances changing such that her expenses have increased... So based upon those two things, I am going to deviate...” (RP 33-34).

The Court then proceeded to deviate downward from the standard calculation of \$524 per month to \$350 per month in child support (RP 34 & CP 156, 167). This appeal followed.

#### **IV. SUMMARY OF ARGUMENT**

The court erred when it provided for a downward deviation of the father’s child support obligation when it held that the duty of support referred to in RCW 26.19.075(1)(e) includes the support obligation of a step-parent to step-children found in RCW 26.26.205. The court also

erred when it compared the financial resources of the parties and found a downward deviation of child support was necessary to prevent the obligor parent from having insufficient funds in his household over the support needs of the one child (Dylen) that was before the court.

## V. ARGUMENT

Parents have both a common law & statutory duty to pay support for his or her biological children. See *State v Wood*, 89 Wn 2d 97, 100 (1977); and *RCW 26.18.010-020*. This is based upon the Child's Fundamental Right for Support from his or her natural parents. *Wood @* 102. The beneficiary of the child support is not the obligee (custodial parent), but rather the child himself. The residential or custodial parent receives the support as the child's trustee and has no personal interest in the child support collected. *Hartman v Smith*, 100 Wn. 2d 766, 768 (1984). The legislature established a child support schedule, to insure that child support **orders are adequate to meet a child's basic needs and to provide additional child support** commensurate with the parent's income, resources and standards of living. *RCW 26.19.001*, Emphasis added. The "standard calculation" of child support means the presumptive amount of child support owed as determined from the child support

schedule before the court considers any reasons for deviation. *RCW 26.19.011(8)*.

Two of the primary reasons the legislature adopted the statewide child support schedule was to 1) Increase the adequacy of child support orders through the use of economic data as the basis for establishing the child support schedule and to 2) reduce the adversarial nature of the proceedings by increasing voluntary settlements as a result of greater predictability achieved by a uniform statewide child support schedule. *RCW 26.19.001 (1) & (3)*.

In this case, the trial court did not adopt the standard calculation, which would have provided adequate support for Dylen. In deviating downward from the standard calculation, the court was essentially requiring the father's 10 year old biological son, Dylan, to do without his full child support in favor of step-children whose child support had already been established between their biological mother and father. According to the record, the step-children were not only receiving support from their natural mother and father and the State, they were now receiving through their step-father what would have otherwise gone to Dylen. In essence, Dylen is now also supporting the father's step-children through a loss of resources he would otherwise have received.

The court's decision to deviate downward from the standard calculation based upon the father's new marriage and new step-children does not advance the legislature's intent and findings in adopting a statewide child support schedule. As stated above, one of the primary purposes of adopting the statewide child support schedule was to "Increase the adequacy of child support orders through the use of economic data as the basis for establishing the child support schedule."

In this case, the mother's net income fell from \$2,457.63 per month in 2012 to just \$2,047 per month in 2014; a loss in the child's household of more than \$410 per month. Furthermore, according to the mother's financial declaration incorporated into her declaration, this falling income resulted in insufficient funds in her household to provide for Dylen's basic needs. In short, the downward deviation certainly did not further the legislature's intent to "increase the adequacy of child support orders." *RCW 26.19.001 (1)*.

Secondly, the downward deviation from the court does not further the legislature's stated purpose of "reducing the adversarial nature of the proceedings by increasing voluntary settlements as a result of greater predictability achieved by a uniform statewide child support schedule." *RCW 26.19.001 (3)*.

Here, by interpreting RCW 26.19.075(1)(e) to include support obligations of a step-parent to step-children, the court has decreased the predictability that results from following the uniform statewide child support schedule. In fact, using the courts rationale as long as one of the parties had a step-child (triggering RCW 26.09.075(1)(e)), either party could ask for an upward or downward deviation based upon comparative household finances. In fact, based upon the court's ruling, if the father in this case had a single step-child and his spouse had a net income of \$200,000 per year, the court could grant an upward deviation using the spouse's income in comparing relative household resources. In short, there would be no predictability in cases involving step-children and each case would have to be decided on a case by case basis.

**A. RCW 26.19.075(1)(e) does not provide for deviations based upon step-children.**

Standards for deviation from the standard calculation are stated in RCW 26.19.075. In this case, the trial court based its decision to deviate downward from the standard calculation on RCW 26.19.175(1)(e). That statute states the following: **“(e) Children from other relationships.** The court may deviate from the standard calculation when either or both

parents before the court have children from other relationships to whom the parent owes a duty of support.”

The statute does not state “Step-children” nor does it state “Children or Step-children.” The statute specifically provides that the court may deviate downward from the standard calculation if one or both of the parents have “Children” from other relationships (i.e., one party having a child with a new spouse and that child being the half sibling of the child before the Court). At the time of the court’s decision there were no cited cases by either party that stood for the proposition that RCW 26.19.075(1)(e) included step-children within its purview. Nor was there any cases that held RCW 26.16.205 situations applied to deviations under RCW 26.19.075(1)(e).

In the *Harmon* case, the State attempted to impose a child support obligation onto a step-parent based upon RCW 26.16.205. In that case, the children at issue moved into their father’s home and the Department of Social Health Services (Department) filed a notice and finding of financial responsibility on the mother. The mother was disabled and support was only set at \$25 per month for her. The Department then served a notice and finding of financial responsibility on the mother’s current husband alleging that he (a step-parent) had a duty to support the step-children

pursuant to RCW 26.16.205. See, *Harmon v Dep't of Soc. & Health Serv's.*, 134 Wn 2d 523.

The Supreme Court rejected the state's argument and denied their request. In the *Harmon* case, the Court stated "with the enactment of this state's child support schedule and standards in 1988, the legislature made a policy decision to impose the primary child support obligation on the child's natural parents and therefore provided that the basic child support obligation is to be calculated without reference to a step-parents income." *Id* at 526-527, Emphasis added.

In interpreting RCW 26.16.205, The Court held that this statute was "not a self contained and autonomous child support statute." *Harmon* at 526. In analyzing this statute the Court not only gave the historical basis for the statute from its enactment in 1881, but it also explained that the basis of the duty of support stems from cases in which the step-parent is a de facto parent acting in loco parentis (which is voluntary and temporary). In these cases, the legislature provided a statutory mechanism for the termination of the duty of support arising from this obligation.

In any event, the father/respondent in this case is not acting as a de facto parent in loco parentis. For at least 4 of the 6 stepchildren there is a natural father who has already been ordered to pay child support and is paying child support for the step-children. Furthermore, the standards for

deviation standard (RCW 26.19.075(1)(e) does not provide for step-parent deviations. Therefore the court's ruling should be reversed and the commissioner's original order of child support reinstated.

**B. The court should not have deviated downward as such deviation was not in Dylon's best interest and would leave the mother's home with insufficient resources.**

The court erred when it compared the financial resources of the parties and found a downward deviation of child support was necessary to prevent the obligor parent from having insufficient funds in his household over the support needs of the one child (Dylon) that was before the court.

RCW 26.19.075(1)(e)(iv) states "when the court has determined that either or both parents have children from other relationships deviations under this section shall be based on considerations of the total circumstances of both households.

In this case, the undisputed facts demonstrated that the father's total resources available to his household was \$5,311 per month net income as follows: \$3,745 per month net income; \$416 for 401(k) contributions, which is income available to him; \$900 per month in food stamps that his wife was receiving; and, \$250 per month in child support that his wife was receiving for her children. After payment of his

mortgage (\$1,325) he had nearly \$4,000 (\$3,986) in available resources for his basic needs.

The mother/receiving parent was not in as favorable a position. Her net income had went down by more than \$400 since the last order of child support was entered and after paying her rent of \$1,150, she had just \$899 to provide for her and Dylen's basic needs. In fact, if the Court subtracts both the rent (\$1,150) and utility expenses (\$442,48) from her \$2,047 net income, the court will see that she had just \$454.52 remaining for all the rest of her and Dylen's basic needs. Clearly the downward deviation the Court ordered left the mother and Dylen with insufficient funds to live on and was err.

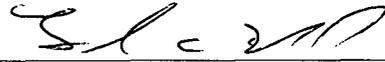
## **VI. CONCLUSION**

For the foregoing reasons, the Appellant asserts that the court erred when it provided for a downward deviation of the father's child support obligation when it held that the duty of support referred to in RCW 26.19.075(1)(e) includes the support obligation of a step-parent to step-children found in RCW 26.26.205. The court also erred when it compared the financial resources of the parties and found a downward deviation of child support was necessary to prevent the obligor parent from having insufficient funds in his household over the support needs of the one child

(Dylen) that was before the court. The appellant therefore request the court to reverse the trial court decision.

DATED this 19 day of June, 2013.

RESPECTFULLY SUBMITTED



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Thomas A. Baldwin, Jr., WSBA #28167  
Attorney for Appellant

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**DECLARATION OF SERVICE**

I, Thomas A. Baldwin, Jr., declare under penalty of perjury of the laws of the State of Washington that the foregoing statements are true and correct and based upon my own personal knowledge.

I certify that I caused one copy of the foregoing Brief of Appellant to be served on the following parties of record and/or interested parties by email delivery, to the below named parties as follows:

Counsel for Respondent  
Barbara Henderson  
Smith Alling, PS  
1501 Dock Street  
Tacoma, WA 98402

Dated this 19<sup>th</sup> day June, 2015, at Puyallup, Washington.



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