

NO. 289184-III

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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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MARIA RICCIARDELLI (FKA BRO),

Respondent,

vs.

THOMAS ILMAR BRO,

Appellant.

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BRIEF OF APPELLANT

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## I. INTRODUCTION

Appellant and Respondent divorced in 2007. From the entry of their Decree of Divorce to the present, the couple has equally shared residential care of their two young boys. Both children spend the same number of nights with each parent throughout the calendar year.

Despite this shared custody arrangement, the Decree of Divorce required the father, Thomas I. Bro, to pay child support to Respondent Maria Ricciardelli. Mr. Bro was fully employed at the time. But on June 30, 2009 Mr. Bro, unemployed and searching for work, petitioned the court to modify his child support payment.

Mr. Bro sought to modify the child support payment on two grounds. First, in the case of equally shared custody, there is no “obligor” who must pay child support. Child support historically aims to require a non-custodial parent, or one who spends less time caring for the child, to contribute equally to the child’s upbringing. Where the parents share custody equally, and especially where the parents have substantially equal incomes, child support is not appropriate.

Second, even if Mr. Bro was an obligor, the child support award reduces Mr. Bro’s current net income below one hundred twenty-five percent of the federal poverty level. Washington statute prohibits requiring such a burdensome support payment.

Despite these facts, the Superior Court Commissioner denied Mr. Bro's request to eliminate his child support payment. When Mr. Bro moved to revise the Commissioner's ruling, the Superior Court Judge denied his motion. Mr. Bro now appeals the trial court's erroneous orders and seeks reversal.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The trial court erred by designating Mr. Bro the "obligor" and imposing a child support payment on him despite the parties' equally shared custody of their children. The court should have deviated from the standard child support calculation based on the parties' shared custody and eliminated Mr. Bro's support payment.

2. The trial court violated Washington statute by imposing a child support payment on Mr. Bro that reduces his net income below one hundred twenty-five percent of the federal poverty level.

### **B. Issues Pertaining to Assignments of Error**

1. Where divorced parents equally share residential care of their children, does Washington law require a court to refrain from imposing a child support transfer payment on that parent?

2. May a trial court impose a child support transfer payment on an obligor where the required payment reduces the obligor's net income below the minimum designated federal poverty level?

### III. STATEMENT OF THE CASE

Appellant Thomas Bro ("Appellant" or "Mr. Bro") and Respondent Maria Ricciardelli ("Respondent" or "Ms. Ricciardelli") are divorced and have two children. (CP 1-4, 108)<sup>1</sup> On December 17, 2007, a Decree of Divorce and an Order of Child Support were entered in Spokane County Superior Court, dissolving the marriage between Mr. Bro and Ms. Ricciardelli. (CP 1-4)

The child support order established a monthly transfer payment of \$266.50 for each child for a total amount of \$533 to be paid by Mr. Bro. (CP 1-4, 169-174) Mr. Bro was fully employed at the time the order was entered. (CP 1-4, 158-174)

From the time the court entered the divorce decree and child support order through the present, Mr. Bro and Ms. Ricciardelli shared custody of both children equally. (CP 1-4, 19-21, 149-157) Each child spends an equal number of nights with each parent throughout each calendar year. (CP 1-4, 19-21, 149-157)

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<sup>1</sup> "CP" and the numbers following designate page numbers of the Clerk's Papers.

On June 30, 2009, Mr. Bro filed a Petition for Modification of Child Support. (CP 5-16) At the time he filed his motion, Mr. Bro was unemployed and looking for work. (CP 5-16, 19-50) Because of his unemployment, Mr. Bro could no longer pay child support in the amount required by the original order. (CP 5-16, 19-50) Among other hardships, Mr. Bro detailed his difficulty finding employment and explained that he had relied on his parents to make support payments he could not afford. (CP 19-21)

Mr. Bro asked the court to modify the original child support order to take his unemployment and resulting lower income into account. (CP 5-16, 19-50) In particular, Mr. Bro asked the court to deviate from the standard child support calculation by taking into account his shared custody arrangement with Ms. Ricciardelli. (CP 5-16, 19-50) Mr. Bro contended that because the parents spend equal time housing both, the court should not consider him an “obligor” and impose a transfer payment on him. (CP 5-16, 19-50)

Trial before the Superior Court Commissioner was held on December 14, 2010. (CP 55-61) In ruling on Mr. Bro’s motion, the court found the parties’ incomes were substantially the same. Its Order identified Mr. Bro’s income as \$1450.00 per month and Ms. Ricciardelli’s as \$1367.00 per month. (CP 55-61, 108-110) Despite this

fact, the court declined Mr. Bro's request to deviate from the standard calculation and eliminate his child support payment. (CP 55-61, 104-114) Instead, the court reduced Mr. Bro's child support obligation only slightly, from \$533 per month to \$439, or \$219.50 per child. (CP 55-61, 104-106, 108-110)

In addition to the court's refusal to deviate from the standard calculation, the new child support payment unlawfully reduced Mr. Bro's net income below one hundred twenty-five percent of the federal poverty level. As of January 2009, the poverty level for a family of one was \$10,830, of which 125% is \$13,537.50. *See Federal Register*, Vol. 74, No. 14, January 23, 2009, pp. 4199-4201. After making his child support payments, Mr. Bro's net income was \$1,011 per month, or \$12,132.00 per year—below 125% of the federal poverty level. (CP 108-110)

Despite the order's impact on Mr. Bro's modest income, the Superior Court Commissioner stated in her Order that deviation "would take the support below the child basic needs standard." (CP 110)

Mr. Bro promptly moved for reconsideration of the Commissioner's oral ruling of December 14, 2009. (CP 62-98) The Commissioner denied Mr. Bro's motion for reconsideration, and on March 1, 2010, the Commissioner entered final orders setting petitioner's support obligation at \$439.00 per month. (CP 106-114). Included with

these orders, the Commissioner filed a document entitled  
“Findings/Conclusions on Petition for Modification of Child Support.”  
(CP 104-105)

Concerned that the Commissioner’s March 1, 2010 Findings and  
Conclusions provided an insufficient basis for appellate review, Mr. Bro  
moved to revise the Commissioner’s Order. (CP 115-116) The Superior  
Court Judge denied Mr. Bro’s motion. (CP 134) Mr. Bro then filed this  
appeal. (CP 135-148)

Despite the parents’ shared custody arrangement, the hardship it  
posed to Mr. Bro, and the parties’ substantially equal incomes, the trial  
court has refused deviate from the standard child support calculation.  
(CP 110) This constitutes an abuse of the court’s discretion and  
reversible error.

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

The trial court abused its discretion in two ways. First, it  
improperly named Mr. Bro as the “obligor,” required to pay child  
support, and refused to eliminate his support payment even though the  
parties share equal custody of their children. Second, it violated  
Washington statute by imposing a support obligation that reduces Mr.

Bro's net income below the federal poverty level. Both constitute abuse of discretion and warrant reversal.

## V. ARGUMENT

### A. Standard of Review

An appellate court reviews an order modifying child support for abuse of discretion. *In re Marriage of Holmes*, 128 Wn. App. 727, 736, 117 P.3d 370, 374 (2005). Here, the trial court abused its discretion by imposing an unlawful child support payment on Mr. Bro.

### B. The Court Abused Its Discretion by Designating Mr. Bro an “Obligor”, Imposing a Child Support Payment on Him, and Refusing to Deviate from the Standard Calculation Where Both Parents Equally Share Custody of Their Children.

A court must consider all relevant factors in determining parents' child support obligations.

(1) In a proceeding for...child support, *after considering all relevant factors* but without regard to misconduct, the court shall order either or both parents owing a duty of support to any child of the marriage...dependent upon either or both spouses...to pay an amount determined under chapter 26.19 RCW.

RCW 26.09.100(1) (emphasis added).

To determine child support, a court follows a process established by statute. It calculates the parents' total income, establishes the “standard calculation” according to the statutory economic table, decides whether to deviate from the standard calculation, and allocates each

parent's obligation. *In re Marriage of Crosetto*, 82 Wn. App. 545, 560, 918 P.2d 954 (1996).<sup>2</sup>

A court may deviate from the standard calculation. *See* RCW 26.19.075. Whether it does or not, its findings and conclusions must support the court's decision to deviate, or not to deviate, from the standard calculation. RCW 26.19.035(2).<sup>3</sup>

A court may deviate from the standard calculation if the children spend substantial time with the parent who would normally be required to pay child support. If it deviates from the standard calculation, the court must take into account the time the children spend with that parent and the effect of that time on the parent's child support obligation.

(d) Residential schedule. The court may deviate from the standard calculation if the child spends a significant amount of time with the parent who is obligated to make a support transfer payment. The court may not deviate on that basis if the deviation will result in insufficient funds in the household receiving the support to meet the basic needs of the child or if the child is receiving temporary assistance for needy families. When determining the

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<sup>2</sup> "When setting child support, the trial court must first compute the total income of the parents (RCW 26.19.071); determine the standard child support level from the economic table (RCW 26.19.020); decide whether to deviate from the standard calculation, based upon consideration of statutory factors (RCW 26.19.075); and allocate each parent's support obligation (RCW 26.19.080)." *Crosetto*, 82 Wn. App. at 560, 918 P.2d 954.

<sup>3</sup> "(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." RCW 26.19.035(2).

amount of the deviation, the court shall consider evidence concerning the increased expenses to a parent making support transfer payments resulting from the significant amount of time spent with that parent and shall consider the decreased expenses, if any, to the party receiving the support resulting from the significant amount of time the child spends with the parent making the support transfer payment.

RCW 26.19.075(1)(d).

If a court does not deviate from the standard calculation, or if it fails to make specific findings and conclusions supporting a deviation, the court must order each parent to pay the amount determined under the standard calculation. RCW 26.19.075(2).<sup>4</sup> This does not require the one parent to pay child support to the other, although the court can require a so-called “support transfer payment”<sup>5</sup> if necessary.

Nothing in RCW 26.19.075 requires that each parent make a payment to the other or assumes that the parent with the greater presumptive support obligation will be responsible for a net transfer payment. Instead, RCW 26.19.075(2) merely affirms that absent a basis for deviation, each parent will pay the amount of the standard calculation to the other, *if that parent is obligated to make a transfer payment.*

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<sup>4</sup> The relevant portion of that subsection provides:

The presumptive amount of support shall be determined according to the child support schedule. Unless specific reasons for deviation are set forth in the written findings of fact and are supported by the evidence, the court shall order each parent to pay the amount of support determined by using the standard calculation.

RCW 26.19.075(2).

<sup>5</sup> “(9) “Support transfer payment” means the amount of money the court orders one parent to pay to another parent or custodian for child support after determination of the standard calculation and deviations.” RCW 26.19.011(9).

*Holmes*, 128 Wn. App. at 738, 117 P.3d at 375 (emphasis in original). In such cases, the parent required to pay is the non-custodial parent and is known as the “obligor.”

This process for determining child support obligations is readily applicable to divorced family situations where the children reside a majority of the time with one residential parent. In those situations, 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.

*State ex rel. M.M.G. v. Graham*, 123 Wn. App. 931, 939, 99 P.3d 1248, 1252 (2004), *aff'd in part, rev'd in part on other grounds*, *State v. Graham*, 159 Wn. 2d 623, 152 P.3d 1005 (2007).

Historically, the parent without custody of the child was the “obligor” required to make a support transfer payment. *Holmes*, 128 Wn. App. at 738, 117 P.3d at 375 (“Child support payments have historically been the obligation of the noncustodial parent”). The law presumed the custodial parent fulfilled his obligation by caring for the children in his home. *Holmes*, 128 Wn. App. at 739, 117 P.3d at 375 (“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”). The Uniform Child Support Guidelines, approved in 1982 by the Washington State

Association of Superior Court Judges, embodied this presumption.

*Holmes*, 128 Wn. App. at 738, 117 P.3d at 375.<sup>6</sup>

The legislature later replaced the Uniform Child Support Guidelines with RCW Chapter 26.19. *Holmes*, 128 Wn. App. at 739, 117 P.3d at 375. The legislature did not, however, change the historical presumption that the custodial parent is not obligated to pay child support.

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.

*Holmes*, 128 Wn. App. at 739, 117 P.3d at 375-76.

In *Holmes*, the Court found it appropriate to terminate the father's support transfer payment where the couple's son lived with him most of the time. *Holmes*, 128 Wn. App. at 739-41, 117 P.3d at 375-76. Even though the father was far wealthier than the mother, the Court found the mother had substantial assets and could support the son without help from the father. *Id.* Because the son needed no greater support while in

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<sup>6</sup> "Under the ASCJ Guidelines, 'the support to be paid by the noncustodial parent is that fraction of the scheduled amount in the proportion that the parent's income bears to the total income of both parents.' WASHINGTON STATE CHILD SUPPORT COMMISSION, FINAL REPORT, November 1, 1987, at 6." *Holmes*, 128 Wn. App. at 738, 117 P.3d at 375.

his mother's home, the court found it proper to terminate the father's support payment. *Id.*

The principle from *Holmes* applies here. It is improper to designate Mr. Bro as the "obligor" and impose a support transfer payment on him where the children reside with him half of the time. First, the trial court made no finding, and Respondent no showing, that the children require any greater support while living with their mother. Second, the parties' incomes are substantially the same. The trial court found Mr. Bro's monthly income to be \$1450.00 and Ms. Ricciardelli's to be \$1367.00. The trial court's reason for refusing to deviate, that deviation would take child support "below the child basic needs standard," makes no sense when the parties' income is nearly identical. Both father and mother support the children half of the time on substantially the same income. Child support effectively, and unfairly, requires one parent to pay more than the other despite these circumstances.

The trial court abused its discretion by refusing to terminate Mr. Bro's support payment. The court ignored the fact that the children reside with Mr. Bro cares half of the time and that the parents have substantially the same income. This fact warrants deviation from the standard calculation and warrants reversal of the trial court's order.

**C. Even If Mr. Bro Was an “Obligor” and Required to Pay Child Support, the Court Abused Its Discretion by Imposing a Transfer Payment That Reduces Mr. Bro’s Net Income Below the Federal Poverty Line.**

A court generally may not impose a child support obligation of more than fifty dollars per child per month if it reduces a parent’s net income below one hundred twenty-five percent of the federal poverty level.

(b) The basic support obligation of the parent making the transfer payment, excluding health care, day care, and special child-rearing expenses, shall not reduce his or her net income below the self-support reserve of one hundred twenty-five percent of the federal poverty level, except for the presumptive minimum payment of fifty dollars per child per month or when it would be unjust to apply the self-support reserve limitation after considering the best interests of the child and the circumstances of each parent. Such circumstances include, but are not limited to, leaving insufficient funds in the custodial parent's household to meet the basic needs of the child, comparative hardship to the affected households, assets or liabilities, and earning capacity....

RCW 26.19.065(2)(b).

As of January 2009, the federal poverty level for a family of one in the 48 contiguous states was \$10,830 per year. *Federal Register*, Vol. 74, No. 14, January 23, 2009, pp. 4199-4201. One hundred twenty-five percent of that amount is \$13,537.50 per year. By comparison, the poverty levels for families of two, three, and four are \$14,570, \$18,310, and \$22,050 per year, respectively.

The trial court calculated Mr. Bro's monthly net income as \$1,450.00 per month and imposed a support transfer payment of \$439.00 per month. (CP 109-110) This child support transfer payment reduces Mr. Bro's net income to \$1011.00 per month, or \$12,132.00 per year—below 125% of the federal poverty level for a family of one. Mr. Bro's family likely qualifies as a family of at least three, since Mr. Bro is married and cares for two children for half of every year. An order that reduces his income below the allowable level for a much smaller family constitutes an egregious violation of Washington's statutory standard. The Superior Court's child support award is unlawful, an abuse of discretion, and reversible error.

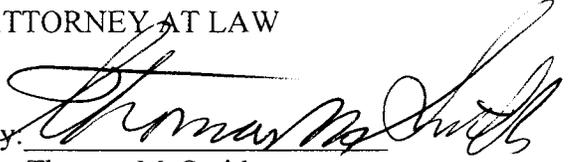
## VI. CONCLUSION

Child support aims to require non-custodial parents to contribute to their children's care. Mr. Bro, however, is a custodial parent. His children live with him half of every year. He spends an equal amount of time caring for them as their mother. He is not, as the trial court ruled, an "obligor" required to pay child support in these circumstances. Even if Mr. Bro was an obligor, however, the court imposed an unlawful child support transfer payment on him—one that illegally reduces his net

income below the federal poverty level. Both rulings constitute abuse of discretion and require reversal.

Dated: July 7, 2010

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