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**Supreme Court  
State of Washington**

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**In re the Marriage of:**

**KRISTINE NELSON,  
Petitioner/Appellee,**

**and**

**JAMES J. NELSON.  
Respondent/Appellant.**

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**APPELLANT'S OPENING BRIEF**

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**ORIGINAL**

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### Assignments of Error

1. The Superior Court erred in refusing to consider Mr. Nelson's request for a child support deviation based on his residential care time.
2. The Superior Court failed to provide adequate written findings for denying Mr. Nelson's request for deviation as required by RCW 26.19.035(2).

### Issues Pertaining to Assignments of Error

1. Did the trial court err in directing a transfer payment equal to Mr. Nelson's entire "Standard Calculation"?
2. Did the trial court err in refusing to consider a deviation under RCW 26.19.075(1)(d) in light of Mr. Nelson's care time?
2. Did the Superior Court provide adequate written findings to support its denial of Mr. Nelson's request for deviation as required by RCW 26.19.035(2)?

## Statement of the Case

This case seeks to clarify the process by which child support is calculated.

The case involves one young child, age 8. Following a trial, the court adopted a parenting plan which provides that mother parents the child somewhat more than father, but father's care time is significant – alternate weeks from Thursday after school until return to school the next week Tuesday morning; other extended school breaks and holidays are shared about evenly. CP 34-44. In fact, the court's oral commentary was as follows:

I think dad needs to have substantial [time] with Sierrarose . . .  
So he's got five overnights out of the 14. So it's a pretty  
substantial amount of time with dad. So that there – there's a lot  
of time with both parents here.

See transcript of closing arguments and court's ruling at page 23, lines 14-20.

There is no dispute that Mr. Nelson earns \$3,904.34 net. Ms. Nelson earns \$1,908.63 net. Based on Washington's support schedule, Mr. Nelson's "basic support obligation" is \$562.46 a month; Ms. Nelson's

“basic support obligation” is \$274.54 a month. That can be seen from line 15 of the support worksheets (CP 26).

Mr. Nelson sought, on the basis of his substantial parenting time, a deviation or an adjustment to the “transfer payment” as authorized by RCW 26.19.075(1)(d). That request was denied.

The reasons for denial are unclear. The Support Order itself says:

3.8 REASONS WHY REQUEST FOR DEVIATION WAS DENIED.

The deviation sought by the obligor was denied because other:

Court declines to deviate based on father's parenting time with child as requested by father.

CP 21.

The transcript of the court's ruling has been provided. There, the Superior Court judge explained:

“I – I – with regard to the, I – child support, I think we should take the worksheets you've done there, Mr. Mills, and I – I understand your concerns about the – the – what you view as the inequity of the transfer payment, but I'm going to stick with the orthodoxy here and – and have Mr. Nelson pay the amount of the transfer payment as indicated by the worksheet there, which is 500 and some odd dollars – I don't have the figure right in front of me at the moment, to Ms. Nelson for the care of Sierrarose.”

Following that ruling, the court signed a Support Order directing that Mr. Nelson pay the entirety of his “basic support obligation” (\$562.46) to Ms. Nelson each month.

This timely appeal followed.

## APPLICABLE LAW AND ARGUMENT

### *Standard of Review*

The issues here pertain to setting of child support. Those are reviewed for abuse of discretion. See e.g. In re Marriage of Choate, No. 35940-5-II, February 26, 2008.<sup>1</sup>

A court abuses its discretion if its decision is “based on an incorrect standard or the facts do not meet the requirements of the correct standard.” The Court of Appeals does not substitute its own judgment for that of the trial court where the record shows that the trial court

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<sup>1</sup> “We will not reverse the trial court's decision to modify child support absent a manifest abuse of discretion. *In re Marriage of McCausland*, 159 Wn.2d 607, 616, 152 P.3d 1013 (2007). And we “cannot substitute [our] judgment for that of the trial court unless the trial court's decision rests on unreasonable or untenable grounds.” *In re Marriage of Leslie*, 90 Wn.App. 796, 802-03, 954 P.2d 330 (1998). “A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.” *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). We must look to the child support schedule statute, chapter 26.19 RCW, and determine if the trial court abused its discretion in modifying the order of child support and granting a downward deviation. We grant deference to the trial court's domestic relations decisions because (1) they involve emotional and financial interests that are best served by finality and de novo review may encourage appeals and (2) abuse of discretion is the proper standard of review when the trial court relies solely on documentary evidence in reaching its decision. See *In re Parentage of Jannot*, 149 Wn.2d 123, 126-28, 65 P.3d 664 (2003).”

considered all relevant factors and the award is not unreasonable under the circumstances.

***On the facts of this case, there is no adequate reason to set a transfer payment to the children's mother equal to father's "basic support obligation."***

The core question in every child support calculation is how to calculate the "Support Transfer Payment." All financial information, and the statutory rules, are designed to assist the court in calculating a proper "Transfer Payment."

"Transfer Payment" is defined by RCW 26.19.011(9); it says:

"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. [Emphasis added.]

However, while the legislature has defined "Transfer Payment," the statutes don't describe how to calculate, with mathematical precision, the proper transfer payment.

Instead, the statute gives the court discretion in setting the transfer payment. The court's obligation is to consider 1) "standard calculation" and 2) "deviations."

The “standard calculation” is defined by RCW 26.19.011(8) as follows:

"Standard calculation" means the presumptive amount of child support owed as determined from the child support schedule before the court considers any reasons for deviation.

Trial courts may be confused by this language indicating that “Standard Calculation” is the presumptive amount owed . . .” That raises the obvious question: “Owed to whom?”

Support is ***always*** owed to the child, and merely held in trust by a recipient parent. See Marriage of Hammack, 114 Wn. App. 805, 60 P.3d 663 (2003) citing In re Marriage of Pippins, 46 Wn. App. 805, 808, 732 P.2d 1005 (1987) (“Child support belongs to the children, not the custodial parent; the custodial parent only receives the support as a trustee for the children . . . . Ditmar v. Ditmar, 48 Wn.2d 373, 293 P.2d 759 (1956).”)

Thus, the so-called “Standard Calculation” is the amount of support each parent owes to ***the child***. It is not the amount one parent presumptively owes to the other ***parent***.

In this case, because there is no genuine dispute about the parties’ respective incomes, the trial court properly had in mind each parent’s “Standard Calculation”; that is, the amount each parent – based on income – should be contributing to the child. Mr. Nelson should be contributing

\$562.46 a month and Ms. Nelson should be contributing \$274.54 a month toward child-rearing expenses. That comes from line 15 of the worksheet, CP 26.

It is this pool of money that **both** parents use to defray child-rearing expenses.

Before deciding on a “Transfer Payment,” the court must consider, in addition to this “Standard Calculation” owed to the child, any applicable deviations. These “deviation” standards are set out at RCW 26.19.075.

Before deciding on a “Transfer Payment,” the court must consider, in addition to this “Standard Calculation” owed to the child, any applicable deviations. These “deviation” standards are set out at RCW 26.19.075.

What’s applicable here is RCW 26.19.075(1)(d); it provides for deviation “if the child spends a significant amount of time with the parent who is obligated to make a support transfer payment.”

While “significant amount of time” is not capable of more precise definition, it’s not crucial to create a bright-line distinction because the key provision of RCW 26.19.075(1)(d) is this:

When determining the 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.

Generally speaking, a parent who has “insignificant” time, such as a parent with, say, two hours supervised time each week, will not have any “increased expenses” attendant to such care time. Similarly, such “insignificant” time will not result in any “decreased expenses” to the parent otherwise entitled to a transfer payment.

But, where, as here, both parents have a significant amount of parenting time, and where, as here, both parents both have significant out-of-pocket expenses attendant to their time parenting the children, it is plain error not to consider a deviation at all. And, by directing that Mr. Nelson make a transfer payment equal to his “Standard Calculation,” it’s clear the trial court did not deviate at all.

At the very least, there ought to be some compelling and unusual reason why a deviation would be totally denied on these facts.

If Ms. Nelson takes the children out to McDonalds, the expense is paid out of the support pool. When she pays an electric bill, the children’s portion of that expense is paid out of the support pool.

But, what happens when Mr. Nelson puts fuel in the car to transport the children? What about money when Mr. Nelson takes the children to dinner and a movie? Clearly that doesn’t come out of the pool of support money because 100% of the entire amount is held by Ms.

Nelson. And if it doesn't come out of the support pool, then necessarily the court is ordering Mr. Nelson to pay **more** than his "Basic Child Support Obligation" for support.

And, yet, the "Basic Child Support Obligation" is what the legislature has determined Mr. Nelson should be spending to support his children. See P.O.P.S. v. Gardner, 998 F.2d 764 (9<sup>th</sup> Cir. 1993). If that's paid entirely to Ms. Nelson, then all the expenses of child-rearing incurred during father's parenting time essentially comprise additional support father is forced to pay beyond the amount set by the legislature.

The residential care credit is merely a way of pointing out that when father's time is not "insignificant," then he – no less than mother – is entitled to a **portion** of the Basic Support Obligation; that is, he's entitled to some of the pool of money both parents are contributing into to meet their individual support obligation.

Neither line 15 nor any other place on the worksheets tells us which parent owes which other parent a "transfer payment." The court can't tell from examining Line 15 whether Mr. Nelson is to pay Ms. Nelson \$562.46 or whether Ms. Nelson is supposed to pay Mr. Nelson \$274.54.

In this case, the court apparently simply directed the entire "Basic Support Obligation" of both parents be given to Ms. Nelson because she parents the children most of the time.

However, there is no statute anywhere that tells the court to examine a ***parenting plan*** in calculating a transfer payment.

Again, the applicable statute is RCW 26.19.011(9); it says:

"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. [Emphasis added.]

Thus, the factors to consider are ***entirely*** financial. The parenting plan is not a listed factor to consider in deciding the proper "support transfer payment."

Generally, while the legislature has defined "Transfer Payment," the statutes don't describe how to calculate, with mathematical precision, the proper transfer payment.

Instead, the statute gives the court discretion in setting the transfer payment. The court's obligation is to consider 1) "standard calculation" and 2) "deviations."

The de-facto rule, or what the Superior Court in this case calls "sticking with orthodoxy" for calculating transfer payments is often as follows: First, determine which parent is the so-called "primary caregiver."<sup>2</sup> Then award to that person 100% of the "Basic Child Support Obligation" owed to the child by the "non-custodial"<sup>3</sup> parent.

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<sup>2</sup> This phrase is used cautiously. It is a term used often in family law cases to refer to that parent who, under the parenting plan, has more than 50% of the care time. But, while used often, it is really little more than a sloppy way to think in terms of "custody" when "custody" is no longer

While this method of calculating support has a certain mathematical simplicity and therefore might be attractive to some in the judiciary, it is simply not the method for calculating support set out in the statutes nor does it result in fair or equitable transfer payments in cases such as this, where both parents share the costs of child-rearing and share the parenting time. Support transfer problems are too complicated to be solved with a quick mathematical computation.

***The trial court failed to provide written reasons for rejecting Mr. Nelson’s requested deviation, and written findings are required.***

On this record, there is no proper basis for ordering that Ms. Nelson should hold the entire pool of both parents’ “Basic Support Obligation” each month.

But if the court has reasons for rejecting Mr. Nelson’s request, at the least the court is required to make written findings supporting its decision. RCW 26.19.035(2). Cf. Harmon v. D.S.H.S., 134 Wn.2d 523, 533, 951 P.2d 770 (1998) (at n.9).

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an aspect of post-dissolution child-rearing. In fact, the entirety of chapter 26.09 RCW contains no use of “primary parent,” “primary residential caregiver” or similar terms used by careless practitioners.

<sup>3</sup> This term is often used by DSHS Division of Child Support Enforcement, but “custody,” is no longer a relevant concept to post-dissolution child-rearing.

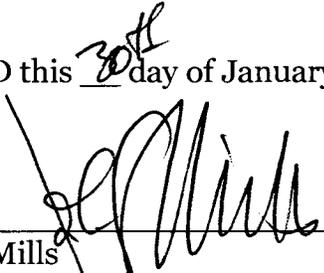
The written findings really contain no reasoning. Still, if an appropriate rationale was articulated orally, that ought to suffice. However, it's not sufficient for the trial judge to simply announce: "I'm going to stick with the orthodoxy here" because that's really an abdication of the discretion vested in the trial court.

**CONCLUSION.**

The trial court erred in setting the "transfer payment" refusing to consider any deviation in this case. Because Mr. Nelson parents the children a "significant" amount of time, the court should have considered deviating under RCW 26.19.075(1)(d). The court erred in simply directing Mr. Nelson to make a "transfer payment" equal to the "standard calculation." It is requested that the case be remanded with instructions to consider the totality of finances, and to exercise discretion in deciding whether a transfer payment is appropriate, and to whom, after considering all of the factors identified by the applicable statutes.

The trial court also needs to provide written reasons for its decision as required by RCW 26.19.035(2).

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of January, 2009.



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