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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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NO. 712969

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

ANNE WEISS,

Appellant

V.

JEREMY WEISS,

Respondent

RESPONDENT'S BRIEF ON APPEAL

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ORIGINAL

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I.

REPLY TO ASSIGNMENTS OF ERROR

1. The trial court properly modified child support because the incomes of both parties had changed since the 2010 Order of Child Support was entered and more than 24 months had passed since the 2010 Order of Child support was entered.

2. The trial court properly acknowledged that Anne's income from employment at the time of \$7,995 gross per month at the time the trial by affidavit was held was substantially different than her income from employment at the time the 2010 Order of Child Support was entered when she had no income from employment.

3. The trial court does have the authority to modify orders that arise from an uncontested proceeding, such as the agreed upon terms of the Final Order of Child Support entered in to by the parties in this case in 2010, without a finding that there was a substantial change of circumstances.

4. The trial court did not err in removing the upward deviation in the transfer payment.

5. The trial court had the authority to allow a retroactive modification of child support back to the date the petition was filed, which was February 2013.

6. The award of attorney's fees by the trial court was appropriate under all of the circumstances of this case.

II. BACKGROUND AND ARGUMENT IN REPLY

A. BACKGROUND

The parties have two (2) children. Their son, Emerson, was nine (9) years old and their daughter, Talia, was age seven (7) years old when the trial by affidavit was heard.

In 2010 Jeremy Weiss and Anne Weiss separated and reached an agreement regarding the terms of their divorce, including child support. Anne was not employed at the time the parties separated and divorced. CP 14-20. Jeremy agreed to assume the vast majority of the expenses for the children and to pay an upward deviation of support in addition to spousal maintenance because Anne was unemployed at the time the parties divorced. CP 14-20. The expenses that Jeremy paid for the children included, and still include, 100% of the costs for their private school tuition. The 2010 Order of Child Support entered in conjunction with the parties' divorce contemplated that the Final Order of Child Support could be modified for the first time in January 2013. CP 61-75.

Since the 2010 Order of Child Support contemplated that the first time it can be modified is within three (3) months of January 2013, Jeremy filed a Petition for Modification of Child Support on February 19, 2013. CP 483-446. In addition to requesting modification of the child support transfer payment, Jeremy requested that the court grant him a deviation downward since he has substantial residential time with his children, which averages out to Jeremy having the children 44.5% of the time. He also requested that the court order

Anne to pay her pro rata share of the children's expenses excluding the cost of the children's private school expenses.

Anne began working full time in 2012. At the time of trial, she earned \$7,995 per month gross from her job. This is substantial change in her income since she was unemployed with no income from an employer when the parties settled their dissolution of marriage action and divorced.

Jeremy is employed as a radiologist with IRAD Medical Imaging. CP 127-133. He works full time. He works the maximum amount of time that his practice offers. CP 127-133. His employment contract prohibits him from "moonlighting" and he cannot pick up additional shifts since no additional shifts exist for him to pick up. CP 127-133. Because of his specialization within his practice area, he does have to pick up extra call duty. CP 127-133. However, the extra call duty and pay is divided equally between Jeremy and the other two (2) practitioners in the group that have the same specialization. CP 127-133.

The trial court granted Jeremy's request for modification in part. The trial court adopted child support worksheets that reflected the parties' current incomes and adjusted the transfer payment based on the parties' current incomes. The trial court denied Jeremy's request for a deviation downward based on the substantial residential time that he enjoys with his children. The trial court also denied Jeremy's request that Anne be ordered to pay her pro rata share of the children's expenses, excluding the private school expenses that Jeremy agreed to pay in full, and ordered that Jeremy continue to pay 100% of the children's expenses as he

had been required to do under the 2010 Order of Child Support. The trial court also ordered Jeremy to pay \$3,000 in attorney's fees to Anne.

Anne filed a motion for revision of the orders entered modifying child support. However, Anne failed to timely serve her motion for revision upon Jeremy's counsel. Jeremy promptly filed a motion seeking to strike the motion for revision for untimely service since Anne did not comply with King County Local Rule 7(b)(8)(A). CP 781-787. The court granted Jeremy's motion to strike the motion for revision. CP 807-808.

B. ARGUMENT

1. Standard of Review.

Anne misstates the standard of review in her brief and relies on unrelated authority. It is true that Washington appellate courts have historically applied *de novo* review to trial court decisions based on affidavits alone. However, current precedent establishes that the appropriate standard of review of a trial by affidavit ruling on the modification of child support is abuse of discretion. *In re the Matter of the Marriage of Choate*, 143 Wash.App. 235, 238, 177 P.3d 176 (2008). As here, the court in *Choate* granted the petitioner's modification of child support. On appeal, the court stated, "...abuse of discretion is the proper standard of review when the trial court relies solely on documentary evidence in reaching its decision." *Choate, supra*, at 241.

2. Modification of Child Support Did not Require a Showing of Substantial Change in Circumstances Because the Authority for Modification of Child Support in this Case is RCW 26.09.170(7)(a).

The 2010 Final Order of Child Support in this case was based upon agreement made by the parties in settling their divorce and it specifically contemplated that child support would be adjusted in the future. It specified that the first request to modify child support had to be filed within three (3) months of January 2013. CP 61-75. Jeremy timely filed his Petition for Modification of Child Support. CP 438-446.

RCW 26.09.170(7)(a) provides for modification of a child support order as follows:

(7)(a) If twenty-four months have passed from the date of the entry of the order or the last adjustment or modification, whichever is later, the order may be adjusted without a showing of substantially changed circumstances based upon:

- (i) Changes in the income of the parents; or
- (ii) Changes in the economic table or standards in chapter 26.19 RCW.

(b) Either party may initiate the adjustment by filing a motion and child support worksheets.

Between the time the 2010 Order of Child Support was entered and 2013, Anne's income changed from having no income from employment to earning a gross income of \$7,995 per month. This is a substantial increase. Jeremy's income decreased during this same period of time. Pursuant to the Child Support Worksheets attached to the 2010 Order of Child Support, his gross monthly income was \$35,148.58. CP 61-75. In 2013, his gross monthly income was

\$29,589. CP 14-20. Because of lack of profits in his practice group, he was not given any bonuses for the first and second quarter of 2013. CP 14-20.

Since it has been more than 24 months since the 2010 Order of Child Support was entered and because the incomes of both parties had changed, modification of child support is authorized by RCW 26.09.170(7)(a). Jeremy is not required to show that there has been a substantial change of circumstances in order to modify the child support order under the facts in this case.

There is additional legal support for the modification of child support requested by Jeremy. When a court order arises from an uncontested proceeding, the court does not need to find a substantial change of circumstances in order to modify the order and all elements of a child support order are subject to modification. *Schumacher v. Watson*, 100 Wash.App. 208, 212, 997 P.2d 399 (2000); *Pippins v. Jankelson*, 110 Wash.2d 475, 480-82, 754 P.2d 105 (1988).

3. Elimination of an Upward Deviation Does Not Require a Substantial Change of Circumstances.

In *Marriage of Trichak*, 72 Wash.App.21, 25, 863 P.2d 585 (1993), the Division 2 Court of Appeals, citing to *In re Marriage of Lee*, 57 Wash.App. 268,277, 788 P.2d 564 (1990), stated: “A trial court has discretion in deciding the extent of such a deviation so long as the statutory grounds for modification are present.” The statutory basis for modification in this case is RCW 26.09.170(7)(a) and as such, the elimination of the upward deviation was appropriately decided by the trial court since the statutory grounds for modification were met.

Further, Jeremy pays an average of \$3,800 per month solely for his children's private school tuition. CP 127-142. Plus, he is still required to pay 100% of the children's other expenses, including summer camps. This additional financial responsibility on Jeremy's part is significant and this fact was brought to the trial court's attention by Jeremy.

It is incorrect to state that Jeremy works part-time. Jeremy works full time as a radiologist. He is required to adhere to the terms of his employment contract and he cannot work a second job. Since Jeremy is gainfully employed full-time, the court may not impute income to him unless the court finds that he is voluntarily underemployed and that he is purposefully underemployed to reduce his child support obligation. *In re Marriage of Dewberry*, 115 Wash. App. 351, 367, 62. P.3d 535 (2003); RCW 26.19.071(6).

There is nothing in the record that supports Anne's allegation that Jeremy is voluntarily underemployed since he is employed as a radiologist, which is the position that he is trained and educated for in, and he is employed with the same employer he was employed with when the parties divorced. It is even clearer that he is not "purposefully underemployed to reduce his child support obligation" since Jeremy pays child support of \$1,728 per month as of April 2014, he pays at least an additional \$3,800 per month for his children's private school tuition and he pays 100% of all of the children's other expenses (except he pays 75% of day care expenses and tutoring). That Jeremy is required to pay 100% of the children's expenses rather than his pro rata share of the children's expenses is a deviation that benefits Anne.

4. The Effective Date of Modification of the Child Support Order was Appropriate.

The trial court could have ordered that the effective date of the new child support order was the month the petition was filed, which was February 2013. The trial court may set the effective date of the modification from the date of filing the petition regardless of whether temporary orders were previously entered. RCW 26.09.170(1); *In re Marriage of Schumacher*, 100 Wash. App. 208, 212, 997 P.2d 339 (2000). That the trial court ordered the effective date of the new child support order to be August 2013, which benefited Anne far more than it benefited Jeremy.

5. Award of Attorney's Fees was Equitable.

Anne provides no authority for her argument that the attorney's fees award she received was inequitable. Anne has the ability to pay her own attorney's fees as she is gainfully employed and earns \$7,995 gross per month. She was also receiving spousal maintenance of \$3,000 per month from Jeremy at the time of the trial by affidavit and through March 2014. Therefore, Anne cannot meet the requirement of need under RCW 26.09.140 since she has the ability to pay her attorney's fees.

Further, in order to ask the court to modify provisions of the 2010 Order of Child Support and request a deviation downward, Jeremy was required to file a petition to modify child support rather than a motion for adjustment since adjustment of child support is more limited in scope than modification of child support. *In re Marriage of Scanlon*, 109 Wash. App. 167, 173, 34 P.3d 877

(2001). An adjustment action simply conforms existing provisions of a child support order to the parties' current circumstances. *Id.*

Additionally, analysis of the total monthly amount that Jeremy provides in child support, private school tuition and payment of 100% of the children's other expenses puts his monthly contribution for his children at around \$6,000 per month. (\$1,728 child support transfer payment + \$3,800 per month private school tuition + \$500 per month other expenses (estimated). The fact that Jeremy pays child support and for all of the costs the private school tuition and for the children's other expenses benefits Anne greatly since it lessens her financial obligations for the children.

6. Fees and Costs on Appeal Should Not be Awarded to Appellant.

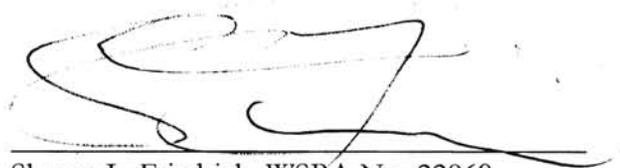
Anne is not entitled to an award of attorney fees and costs as she is employed full time at Starbucks earning \$95,000 annually. As stated above, she has the ability to pay her own attorney's fees and costs. To the contrary, Jeremy should be awarded attorney fees and costs for having to respond to this appeal that was filed in bad faith.

III. CONCLUSION

The trial court did not err in modifying the 2010 Order of Child Support based on the fact that the incomes of parties had changed and the fact that it had been more than 24 months since the 2011 Order of Child Support was entered.

Jeremy respectfully ask this Court to affirm the trial court's orders.

RESPECTFULLY SUBMITTED this 27th day of June 2014.

A handwritten signature in black ink, appearing to be 'S. Friedrich', written over a horizontal line.

Sharon L. Friedrich, WSBA No. 22869
Attorney for Respondent