IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Marriage of: TRACEY L. HECKMAN, Respondent, and JAMES C. HECKMAN, Appellant.	No. 38253-9-II UNPUBLISHED OPINION

Houghton, P.J. — James Heckman appeals from a trial court order relating to the dissolution of his marriage, arguing that it improperly set a maintenance start date and incorrectly set child support. We affirm in part, reverse in part, and remand.

FACTS

Tracey and James Heckman[1] married in 1996 and separated in 2006. They have three sons.

In May 2007, Tracey and James entered into four CR 2A[2] agreements to resolve dissolution-related financial issues and to set a parenting plan. The spousal maintenance and child

[1] We refer to the parties by their first names for clarity, intending no disrespect.

[2] CR 2A states: "No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same."

support agreement stated that James would pay Tracey $7,500 per month in combined child support and spousal maintenance. It allowed the trial court to allocate later what portion of the total payment would be child support. The agreement also stated, "The spousal maintenance shall be paid for thirty-six (36) months from the date the decree of dissolution is entered." Clerk's Papers (CP) at 44. James began paying the $7,500 per month in June 2007.

On April 1, 2008, the parties appeared in court to set the child support amount. Tracey asked the trial court to order child support above the standard calculation of $1,917 per month "because of the income and the lifestyle of the parties" in order to allow the children to maintain a "lifestyle is commensurate with the parent's income, resources, and standards of living." Report of Proceedings (Apr. 1, 2008) (RP) at 5, 8; *see also* RCW 26.19.001.[3]

Tracey submitted a declaration noting that maintaining her children's current lifestyle requires more than $14,000 per month. She argued that James made a minimum $500,000 in annual salary, plus additional income, and that her income was less than $2,000 per month.

Tracey presented evidence of the parties' upscale lifestyle. She noted that before the separation (1) the family was building a waterfront home on Bainbridge Island; (2) the family often rented ski houses by the season at Whistler and later purchased a condominium there; (3) the family often ate at expensive restaurants and traveled annually to Hawaii; (4) the children ski raced, attended private school, and wore expensive clothing; and (5) James owned a lake house and water-ski boat in Port Angeles.

[3] RCW 26.19.001 states, in relevant part: "The legislature intends, in establishing 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 parents' income, resources, and standard of living."

James countered that before the trial court may increase child support payments, it must make "specific findings of fact which are based upon facts in evidence." RP at 18. Further, he argued that the trial court needed to examine the "relative needs of the children . . . not the resources of the individual parties," in setting child support. RP at 20. He added that most of the wealth that he had was the "result of postseparation actions and activities," such as a new job with bonuses. RP at 24. He stated that he pays equally for most of the children's expenses and activities. He also questioned whether Tracey's list of child-rearing expenses accurately reflected spending on the children, as opposed to her spending it on her own lifestyle. Finally, he suggested setting a monthly payment of $1,500 per child as support.

At a hearing on the matter, the trial court noted that it followed the reasoning in two cases, *In the Matter of the Marriage of McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007), and *In the Matter of the Marriage of Daubert*, 124 Wn. App. 483, 99 P.3d 401 (2004). It agreed with James that it could not simply extrapolate[4] the standard child support amounts to account for his large income; rather, it had to look to the children's needs in setting the amount. The trial court agreed with Tracey that the family enjoyed a very high standard of living, and it stated that it sought to minimize the income disparity and lifestyle differences as the children traveled between homes. The trial court ordered $1,500 per child, for a total of $4,500 per month in support payments.

The trial court then entered an order of child supporting this decision. The trial court's

[4] Extrapolation means to "mechanically extend[] the economic table" for support applicable to lower incomes to set support payments for higher incomes not set out in the table. *McCausland*, 159 Wn.2d at 617.

findings of fact stated: [5]

> 1. The parties have negotiated child support amounts and have reached agreements in the past.
>
> 2. Mr. Heckman has paid child support in excess of the transfer payment as a result of these agreements.
>
> 3. The amount of income of the parties exceeds the presumptive and advisory amounts of the Child Support Schedules. Mr. Heckman in tax year 2007 has had an income of over $100,000 per month, and currently [earns] the approximate amount of $41,666 per month. The mother is working part time and has as a result of her voluntary underemployment income [is] imputed to her at the sum of $1,957 per month.
>
> 4. The mother has relied upon the amounts of child support previously paid by the father, and the children have been exposed to an expanded lifestyle by both parents.
>
> 5. The parties and their children have had an extravagant lifestyle based upon the income of the father.
>
> 6. The basic needs of the children are well met by the Child Support Schedules, which [have] been set up to say what the minimum needs are [for] children.
>
> 7. The children of [sic] the beneficiaries of the father's expanded wealth and enjoyed activities such as the following:
>
> a. Generous food allowances, expensive food and often eating in restaurants.
> b. Expensive high-end clothing.
> c. Vacations to exotic locations.
> d. Private clubs that the parents belong to including a beach club on Lake Washington, a country club and the Washington Athletic Club.
> e. Skiing.
> f. Private education.
> g. Multiple homes, on Bainbridge Island, at Whistler, and a lake home at Port Angeles.
>
> 8. That the court must try to create some balance between the children's transfers back and forth between the parents who have grossly . . . dissimilar incomes. It would be detrimental to the overall relationship that the children have with one parent if that parent [has] at a significantly different standard of living than the other.
>
> 9. That in establishing child support the court is taking into consideration the fact that the father is by agreement paying 100% of the private education of the

[5] The trial court grouped its various findings as subsections under its finding of fact 3. For clarity, we refer to those subsections as findings of fact.

> children.
>
> 10. The court is required to and has looked at the basic needs of the children, the standard of living of the parties and the children, the special, medical, educational and financial needs of the children. The court's evaluation of the standard of living is separate and apart from the basic needs of the children. The court is applying the standards as enunciated in *McCausland v. McCausland*, 129 Wash. App. 390, 118 P.3d 944 (2005), and *Daubert/Rusch*.

CP at 151-52.

On August 1, 2008, the parties appeared in court for a second time and discussed the start date for the child support payments. The trial court set a June 2007 child support payment start date, the month after the parties signed the CR 2A agreements. The parties also disputed the start date for the 36 months of spousal maintenance. James asserted that, like the child support payments, the 36-month period started in June 2007, the month after the parties signed the CR 2A agreements setting a $7,500 total for support and maintenance. Tracey responded that the CR 2A agreement with respect to maintenance stated it would continue for 36 months from the date of the entry of the dissolution decree. The trial court agreed with Tracey. James appeals.

ANALYSIS

I. Spousal Maintenance Start Date

James first contends that the trial court erred when it started the child support payments in June 2007, without doing the same for spousal maintenance. He argues that Tracey conceded that all payments should start in June 2007 when she argued for the June 2007 start date for child support payments.

To support his argument, James relies on *Rhone v. Butcher*, 140 Wn. App. 600, 166 P.3d 1230 (2007), *review denied*, 163 Wn.2d 1057 (2008), which allows reformation of a written

contract if the document does not reflect the parties' intent and is based on a mutual mistake of fact. He maintains that the later start date of the 36-month period for maintenance payments "results in a 14 month spousal maintenance windfall of what was, by the terms of the CR 2A [agreement] to be a 36 month maintenance obligation." Appellant's Reply Br. at 1.

Tracey responds that the CR 2A agreement the parties signed states that spousal maintenance "shall be paid" for 36 months "from the date the decree of dissolution is entered." CP at 44. The agreement did not contain any deadline or date for child support and, thus, she asserts that she did not take inconsistent positions or concede in any way that the written CR 2A agreement does not reflect her intent regarding the duration of maintenance payments.

We interpret a CR 2A agreement the same as any other written contract. *In the Matter of the Marriage of Ferree*, 71 Wn. App. 35, 39-40, 856 P.2d 706 (1993). We begin our contract interpretation by ascertaining the parties' objective intent. *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). In doing so, we may not impose obligations that never before existed. *Wagner v. Wagner*, 95 Wn.2d 94, 104, 621 P.2d 1279 (1980). The mutual mistake doctrine allows reformation of a contract when the parties shared an identical intent when they entered into the contract but the document does not accurately express that intent. *Rhone*, 140 Wn. App. at 607-08 ("Where a purported agreement does not reflect a meeting of the minds, the courts should resolve such disputes in the way most likely to enforce the parties' expectations.").

The parties clearly intended for James to pay spousal maintenance for 36 months, as calculated by subtracting the child support amount from the agreed $7,500 per month total. Tracey's position, and the trial court's determination, led to spousal maintenance in excess of the

amount and duration the parties contemplated. Because the trial court directed James to pay $7,500 per month starting in June 2007, we conclude that the 36 months of spousal maintenance began at that time. Thus, we reverse and remand with instructions to order that spousal maintenance started on the same date as child support, June 2007.

II. Child Support

James next contends that the trial court erred in setting child support. He raises a number of arguments that we address in turn.

We review child support orders for an abuse of discretion. *McCausland*, 159 Wn.2d at 616. We do not substitute our judgment for the trial court's unless it bases its decision on untenable or unreasonable grounds. *In the Matter of the Marriage of Leslie*, 90 Wn. App. 796, 802, 954 P.2d 330 (1998). We review a trial court's findings of fact for substantial evidence, that is, "evidence sufficient to persuade a rational person of the truth of the premise." *State ex rel. J.V.G. v. Van Guilder*, 137 Wn. App. 417, 423, 154 P.3d 243 (2007).

A. Departure from Standard Support

James first contends that the trial court improperly treated the departure from the standard support amount as a deviation under RCW 26.19.075, and, thus, it did not apply the correct standard to determining the amount of support payments. He also asserts that the trial court entered only cursory findings of fact[6] insufficient to support the excessive payments. He maintains *McCausland*, 159 Wn.2d at 615, 620-21, rejected that the deviation standard applied to situations in which a court increases support payments due to high income. He adds that the trial

[6] We address the evidence supporting the findings below, but note that we do not agree that the findings are cursory so as to preclude review.

court's citation to the overruled the court of appeals' *McCausland* opinion in its written findings of fact demonstrates the trial court did not follow the law.

Former RCW 26.19.020 (1998) states that for child support predicated on incomes over $7,000 per month, "the court may exceed the advisory amount of support . . . upon written findings of fact." The trial court entered findings of fact detailing the "extravagant lifestyle" enjoyed by the children. CP at 151. The written order stated that the trial court set support in excess of the advisory amount based on the findings. And in its findings, the trial court set child support in excess of the standard calculation based on "[p]ossession of wealth" and "the standard of living based upon the income of the father and the life style that they have enjoyed." CP at 154.

The Supreme Court's *McCausland* opinion rejected extrapolation as a means for calculating support in cases involving excessive incomes. 159 Wn.2d at 620. Instead, it directed trial courts to analyze the following factors: "(1) the parents' standard of living and (2) the children's special medical, educational, or financial needs, when entering its written findings of fact." *McCausland*, 159 Wn.2d at 620. It added that these factors were not exclusive. *McCausland*, 159 Wn.2d at 620.

1. Correct Standard

James focuses on the use of the term "deviate" in the written order, as well as the trial court's citation to the overruled the court of appeals' *McCausland* decision. *McCausland* uses the terms "deviation" and "extrapolation" interchangeably. 159 Wn.2d at 614. In fact, the petitioner in that case asked our Supreme Court to clarify "the use of extrapolation in determining

child support obligations." *McCausland*, 159 Wn.2d at 614.

The record does not support James's argument that the trial court misunderstood the process and did not follow the Supreme Court's *McCausland* opinion. Here, although the written order uses the term "deviates" to explain a departure from the recommended support amounts, a review of the April 1, 2008 hearing shows that the trial court and Tracey agreed with James that the trial court could not simply extrapolate using his income to arrive at a support amount. CP at 154.

At argument below, both parties and the trial court discussed the Supreme Court's *McCausland* opinion in depth. Moreover, the trial court clearly understood that it needed to conduct a fact-finding process using the factors set out in *Daubert*. In fact, the written order cites *Daubert* and *Rusch*. *Rusch v. Rusch*, 124 Wn. App. 226, 98 P.3d 1216 (2004). The trial court followed the correct standard and James's argument fails.

2. Possession of Wealth

James next contends that because the trial court proceeded as if it were deviating from the maximum advisory level of support, it impermissibly based its decision on the father's possession of wealth. RCW 26.19.075(1)(a)(vi). Tracey responds that that trial court properly considered the *Daubert/Rusch* factors: the parents' standard of living and the children's needs.

McCausland prohibits using parental income as the basis for deviation or extrapolation. Rather, it directs that "the amount of child support must be based on the correlation to the child's or children's needs." *McCausland*, 159 Wn.2d at 620 n.6. This amount must be "commensurate with the parents' income, resources, and standard of living." *McCausland*, 159 Wn.2d at 621.

"[O]rthodontia, summer camp, college test preparation classes, computers, and travel for extra-curricular activities or cultural experiences are within the appropriate bases for additional support." *In the Matter of the Marriage of Krieger*, 147 Wn. App. 952, 961, 199 P.3d 450 (2008).

The trial court's findings of fact detail the high standard of living that the children enjoyed. The findings add that "the court must try to create some balance between the children's transfers back and forth between the parents." CP at 152. The trial court expressed these concerns at the hearing. The detailed findings, while they mention the father's income, base the increased payments not on the income, but on the lifestyle that income created and the corresponding increased children's needs commensurate with that lifestyle. Consequently, the trial court did not abuse its discretion. It issued findings of fact consistent with the *Daubert* standard and James's argument fails.

B. Improper Cost Allocation

James further contends that the trial court did not follow former RCW 26.19.080 (1996).[7]

[7] Former RCW 26.19.080 states, in relevant part:

> (1) The basic child support obligation derived from the economic table shall be allocated between the parents based on each parent's share of the combined monthly net income.
>
> (2) Ordinary health care expenses are included in the economic table. Monthly health care expenses that exceed five percent of the basic support obligation shall be considered extraordinary health care expenses. Extraordinary health care expenses shall be shared by the parents in the same proportion as the basic child support obligation.
>
> (3) Day care and special child rearing expenses, such as tuition and long-distance transportation costs to and from the parents for visitation purposes, are not included in the economic table. These expenses shall be shared by the parents in the same proportion as the basic child support obligation.

He asserts that it included skiing and ski racing costs in the child support amount, as opposed to requiring both parents to share the costs pro rata.

Tracey counters that James "offers no citation that supports his conclusion that going skiing was considered by the legislature in the same category as tuition to attend school." Resp't's Br. at 11. She adds that the *Daubert* court considered items such as trips, extra-curricular activities, and computers as appropriate bases for increased support payments and that skiing similarly falls under general child support guidelines, as opposed to a type of activity the pro rata section of the statute covered.

Tracey cannot rely on *Daubert*. In that case, the trial court concluded that

> [o]rthodontia is an appropriate basis for additional support under RCW 26.19.080(2). Summer camp, SAT prep classes, computers and travel for extra-curricular activities or cultural experiences are within the appropriate bases for additional support under RCW 26.19.080*(3)*.

Daubert, 124 Wn. App. at 497 (citations omitted) (emphasis added). Thus, *Daubert* considered extra-curricular expenses as ones shared pro rata under section three of the statute.

Consequently, following *Daubert*, the trial court should not have included the ski-racing-related expenses in the basic child support obligation. RCW 26.19.080(1). Nevertheless, as explained below, even without the skiing expenses, the remaining six of the seven factors the trial court relied on support its child support order.

C. Challenges to Factual Support for Various Expenditures

James further contends that substantial evidence does not support the trial court's findings of fact 1, 2, 4, 5, 8, and 10. He also questions whether any facts support the trial court's determination that Tracey would provide any ski activities for the children,[8] buy "high-end"

clothing for the children, take the children on vacations, or eat out with them. And he contends that the trial court did not follow *Daubert* because it failed to require substantiation of Tracey's future alleged child-rearing expenses.

In findings of fact 1 and 2, the trial court found that the parties previously negotiated support payments in excess of the transfer payment. In findings of fact 4 and 5, the trial court found that Tracey relied on previously-paid child support and that the children were exposed to an "expanded lifestyle" and "extravagant lifestyle" by both parents tied to the father's income. CP at 151. In finding of fact 8, the trial court explained that it attempted to "create some balance between the children's transfers back and forth between the parents who have grossly dissimilar incomes" and that it "would be detrimental to the overall relationship that the children have with one parent if that parent at [sic] a significantly different standard of living than the other." CP at 152. In finding of fact 10, the trial court cited the overruled court of appeals decision in *McCausland*, 129 Wn. App. 390.

1. Clothing, Travel and Meals

James argues that the additional claimed expenses, such as clothing and expensive meals, lack any support. In particular, he asserts that Tracey made no attempt to show these costs are the children's rather than hers.

Tracey counters that she submitted a declaration stating that the costs of maintaining the children in an enhanced lifestyle would be approximately $14,000 per month. She also submitted

[8] Because the trial court should not have included skiing related expenses as a basis for ordering support, we do not address James's argument that Tracey did not establish that she paid anything for the children's skiing activities.

a financial declaration detailing meal and clothing costs. The financial declaration also contains a listing of her personal monthly expenses.

At the hearing below, the parties disputed the amounts necessary to support the children, and James questioned the amount of money Tracey actually spent on the children. Tracey appeared at the hearing and presented a sworn statement. The trial court heard argument on the children's standard of living and determined that $1,500 per month per child was the proper child support amount.

James contends that to make a proper award, the trial court needed evidence to document the future necessity of increased expenditures. He asserts that it had to segregate Tracey's own expenditures.

James cannot rely on *Daubert* for the proposition that future expenses must be documented in this case. Here, Tracey provided financial statements and declarations to support an ongoing need to maintain an enhanced lifestyle for her children. Whereas, the questioned activities in *Daubert*—high school band travel or one-time or limited term expenses—had a natural end point and the parties did not submit documentation to show that the expenses would continue through the support period. 124 Wn. App. at 497, 489.

Although James questioned how Tracey spent the child support, she presented multiple financial documents/declarations detailing the children's needs. The trial court properly weighed both arguments and examined the documents in determining the amount of support. It did not abuse its discretion in setting the child support amount. Further, the trial court's written findings of fact demonstrate that it focused on the children's needs, not Tracey's, in setting the support

amount. *Krieger*, 147 Wn. App. at 963-64. Again, James's argument fails.

2. Previous Agreements

James challenges takes issue with the trial court's finding of fact that the parties had previously negotiated child support amounts in excess of the standard transfer payment. Before the trial court, he argued that the parties had previously negotiated a single undifferentiated child support and maintenance payment of $9,000 per month. At a previous hearing, Tracey told the trial court that the $9,000 payment consisted of $3,000 per month in support and $6,000 per month in maintenance.

A temporary child support order confirms that James paid $3,000 per month in child support as a "compromise amount." CP at 3. The record supports the trial court's findings of fact 1 and 2.

3. Reliance on Support and Creation of an "Enhanced Lifestyle"

James argues that Tracey presented no evidence that she continued to expose the children to attributes of what the trial court called an "enhanced lifestyle" in the post-separation period. He asserts that she failed to show that "the children expect her to perpetuate any of the aspects of that lifestyle when they are with her." Appellant's Br. at 24.

Tracey responds that aside from a minimal amount of imputed income, she relied entirely on the previously negotiated $9,000 per month payment (and the CR 2A $7,500 payment) to provide for herself and the children. She submitted declarations detailing her and her children's lifestyle pre- and post-separation.

Tracey's declarations support the trial court's findings that the children had and continued

to enjoy an enhanced lifestyle, and they should be able to continue in this fashion with both parents. Substantial evidence supports the trial court's findings of fact 4 and 5.

4. Balance in the Children's Transfers Between Households

James next contends that the trial court improperly proceeded on the assumption that it had the right to examine the "'disparity that exists when children travel between the homes, and how they make that adjustment.'" Appellant's Br. at 27. He argues that the *McCausland* court did not set forth this factor. Appellant's Br. at 27.

The *McCausland* opinion does not limit the trial court to only the analysis to those factors it enunciated. The *McCausland* opinion expressly states that the *Daubert* factors it cites are non-exclusive. *McCausland*, 159 Wn.2d at 620. Further, RCW 26.19.001 directs the trial court to examine the parents' standard of living when setting child support payments. Consistent with this, a trial court must try to maintain the "children's standard of living at a level commensurate with that of both parents" and the children's standard of living should not reflect that of the lower-earning parent and, thus, be "lower than it would be if the parents were still married." *Krieger*, 147 Wn. App. at 967.

These considerations demonstrate that substantial evidence supports the trial court's finding of fact 9. The trial court did not abuse its discretion and properly awarded child support to maintain a consistent lifestyle as the children moved between these two households.

5. Misapplication of the Law

James finally argues that the trial court applied the overruled court of appeals decision in *McCausland*, 129 Wn. App. 390, by referring to it in finding of fact 10.[9] As we previously

discussed, although the trial court's order cites the overruled case, the discussion at the April 1, 2008 support hearing clearly demonstrates that both parties and the trial court understood that the later Supreme Court case applies. *McCausland*, 159 Wn.2d 607. And consistent with our Supreme Court's *McCausland* opinion, the trial court clearly understood that it needed to conduct a fact finding process using the factors set out in *Daubert.* In fact, the written order cites *Daubert* and *Rusch*. The trial court applied the correct standard.

III. Attorney Fees

Tracey requests attorney fees under RCW 26.09.140 and RAP 18.1.[10] RCW 26.09.140 allows fees on appeal based on the parties' relative ability to pay and the merit of the issues raised on appeal. *In the Matter of the Marriage of Muhammad*, 153 Wn.2d 795, 807, 108 P.3d 779 (2005). Tracey submitted a financial declaration indicating both her need and James's ability to pay and her counter arguments, for the most part, have merit. Accordingly, we award Tracey her reasonable attorney fees and costs on appeal.

Affirmed in part, reversed in part, and remanded.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Houghton, P.J.

[9] At argument before us, Tracey's counsel described it as essentially a scrivener's error.

[10] Tracey's brief cites RCW 26.09.160, but this statute applies to fees in contempt proceedings and does not apply here. We assume she means RCW 26.09.140.

We concur:

_____
Bridgewater, J.

_____
Van Deren, C.J.