IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Marriage of: FREDERICK SKUSEK Respondent, and SHEILA SKUSEK, nka SHEILA HERMAN, Appellant.	No. 38778-6-II ORDER GRANTING RESPONDENT'S MOTION FOR RECONSIDERATION OR FOR REVISION OF OPINION AND AMENDING OPINION

The Respondent has filed a motion for reconsideration or for revision of the opinion of this court filed on April 20, 2010. After considering the motion, Respondent's motion is granted.

The opinion filed in this case on April 20, 2010, is hereby amended by deleting the portion of the paragraph on page 8, which reads:

> But RCW 26.09.140 applies to proceedings under chapter 26.09 RCW, whereas chapter 26.19 RCW governs child support modifications. *See* RCW 26.09.140. Even if we were to consider awarding fees, the parties' relative financial resources do not necessitate fee sharing. As such,

The paragraph is further amended so that the sentence immediately following the deleted text shall read: "But because we grant relief to Herman, we decline to award Skusek attorney fees and costs on appeal."

IT IS SO ORDERED.

DATED this ___ day of _____, 2010.

_____
Van Deren, C.J.

_____
Houghton, J.

_____
Penoyar, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Marriage of: FREDERICK SKUSEK, Respondent, and SHEILA SKUSEK, nka SHEILA HERMAN, Appellant.	No. 38778-6-II UNPUBLISHED OPINION

Van Deren, C.J. — Sheila Skusek (now Sheila Herman) appeals the trial court's child support modification order, arguing that the trial court exceeded its authority by revising portions of the child support order that Frederick Skusek, her former husband, did not move to revise. She also contends, among other things, that the trial court abused its discretion by (1) miscalculating Skusek's income, (2) revising the effective date of the increased child support, and (3) failing to award her attorney fees. We reverse in part and remand for recalculation of child support and reconsideration of Herman's request for attorney fees.

FACTS

Herman and Skusek's marriage was dissolved in 1998. They had twin sons born in 1993. Roughly ten years after the original child support order, Herman asked the State to petition to

modify the child support because the children were older and the child support schedule[1] recognized the need for greater support amounts. The State filed a petition for modification on January 16, 2008.

Herman, Skusek, and the State each proposed child support worksheets[2] that showed widely differing calculations of Skusek's income. The State's calculations imputed income to Skusek from side jobs and included some interest income based on a three year average of his tax returns. Herman averaged Skusek's income over three prior years, including the two years before he retired, resulting in an income figure higher than the State's. Skusek challenged Herman's method of determining his income, pointing out that the poor economy had slowed work in the construction industry and that he had retired for medical reasons and was incapable of working full time. At deposition, Skusek admitted that he worked side jobs for cash in the past. He argued that side jobs were only sporadic and that he could no longer perform them due to his medical condition. Skusek also disputed the inclusion of interest income because he had already cashed in the certificates of deposit that he was awarded in the dissolution, therefore, he was not receiving interest income from them.

The State requested that payments of increased support begin January 16, 2008, the date it filed the modification petition. The superior court commissioner adopted the State's income figures and increased child support payments to $998 per month, retroactive to January 16, 2008.

Skusek moved for revision, challenging the the child support order and the worksheets

[1] RCW 26.19.011(2); former RCW 26.09.170(5) (2002).

[2] RCW 26.19.050.

because they (1) included interest and business income,[3] (2) did not reduce his income by long distance transportation expenses, (3) did not provide for incremental support increases, and (4) established the new support effective January 16, 2008. In revising the child support order, the trial court adopted Skusek's worksheets and his income calculations that, inter alia, deleted interest income and income from side jobs. It ordered monthly support payments of $760.98, effective July 2008.

Herman appeals.

ANALYSIS

I. Issues Before Trial Court on Revision

Herman first argues that the trial court exceeded its authority on revision by revising portions of the child support order that Skusek did not challenge.[4] We agree.

We review de novo the scope of a superior court's authority under a statute or court rule. *See In re Parentage of Smith-Bartlett*, 95 Wn. App. 633, 636-37, 640, 976 P.2d 173 (1999). On revision, "[t]he superior court's review is not limited to whether substantial evidence supports the commissioner's finding, but it is 'authorized to determine its own facts based on the record before the commissioner.'" *In re Marriage of Goodell*, 130 Wn. App. 381, 388, 122 P.3d 929 (2005) (emphasis omitted) (quoting *In re Marriage of Dodd*, 120 Wn. App. 638, 644, 86 P.3d 801

[3] We interpret the business income as that earned by Skusek in side jobs he performed while not employed by others.

[4] Skusek maintains that Herman's argument violates RAP 10.3 because she "assigns no error to that decision by the trial court[ ] and places the argument improperly in her statement of the case." Br. of Resp't at 14 n.4. But "[a] technical violation of the rules will not ordinarily bar appellate review where justice is to be served." *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn. App. 609, 613, 1 P.3d 579 (2000). Because the nature of Herman's argument is clear, we conclude that she sufficiently raises this issue for review.

(2004)); *see* RCW 2.24.050; RCW 26.12.215. But under Pierce County Local Rule (PCLR) 7(g)(3), "[a]ll motions and cross-motions [for revision] shall state with specificity any portion of the commissioner's order or judgment sought to be revised, identifying those portions by paragraph or page and line numbers. Any portion not so specified shall be *binding* as if no revision motion has been made." (Emphasis added.)

Here, Skusek did not contest the State's calculation of his earned income based on the State's records, income tax returns, and pension records; rather he wanted the trial court to deduct from those figures the interest income he no longer received and income from side jobs he could no longer perform. The trial court granted revision. But by fully adopting Skusek's worksheets that included earned income and pension figures that differed from the State's income figures, the trial court exceeded Skusek's specific challenges.[5] *See* PCLR 7(g)(3). Therefore, we hold that the trial court exceeded its authority in revising the child support order and we remand for recalculation of the support using the State's earned income and pension income, less the interest and side job income.

II. Child Support Modification

Herman further contends that the trial court abused its discretion by (1) subtracting interest and side job income from Skusek's gross income and (2) delaying the implementation of the modification of support to July, despite Skusek's agreement to the January 16, 2008, start

[5] Additionally, our extensive review of the evidence in the record does not show substantial support for the figures on Skusek's worksheets.

date in his answer to the petition.[6]

We review a trial court's decision to modify child support for an abuse of discretion.[7] *In re Marriage of Choate*, 143 Wn. App. 235, 240-41, 177 P.3d 175 (2008); *Goodell*, 130 Wn. App. at 388. A trial court abuses its discretion where its discretion is exercised on untenable grounds or for untenable reasons. *In re Marriage of Horner*, 151 Wn.2d 884, 893, 93 P.3d 124 (2004). But "[a] trial court does not abuse its discretion where the record shows that it considered all the relevant factors and the child support award is not unreasonable under the circumstances."[8] *State*

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[6] Herman further maintains that the trial court abused its discretion in granting a deviation because of the economic downturn, especially in the construction industry. Herman misinterprets the trial court's decision, as the trial court did not deviate from the standard calculation.

Herman also argues that the trial court abused its discretion by failing to find that Skusek was voluntarily underemployed by retiring early. But the trial court explicitly recited Skusek's health problems in its rationale and Herman fails to explain how the trial court abused its discretion in that regard.

Herman further claims that the trial court abused its discretion in granting Skusek an incremental child support increase without finding a significant hardship. But Herman misperceives the trial court's order, which specifically declined to order incremental payments, and this argument fails.

[7] Citing *In re Marriage of Flynn*, 94 Wn. App. 185, 190, 972 P.2d 500 (1999), Herman argues that de novo review is proper here because the trial court based its decision on written materials instead of live testimony. *Flynn* involved a parenting plan modification to relocate children out of state and Division Three concluded that appellate deference was unnecessary when a trial court considers only documentary evidence, like the parties' declarations. 94 Wn. App. at 187-90.

But Washington courts review child support modification orders for an abuse of discretion, even when the trial court ruled "based on affidavits alone." *In re Parentage of Jannot*, 149 Wn.2d 123, 128, 65 P.3d 664 (2003); *see In re Marriage of Choate*, 143 Wn. App. 235, 240-41, 177 P.3d 175 (2008). Accordingly, we use an abuse of discretion standard here.

[8] "Only the superior court's decision is at issue because 'once the superior court makes a decision on revision, the appeal is from the superior court's decision, not the commissioner's.'" *In re Marriage of Rideout*, 150 Wn.2d 337, 350 n.5, 77 P.3d 1174 (2003) (quoting *State v. Hoffman*, 115 Wn. App. 91, 101, 60 P.3d 1261, *rev'd on other grounds*, 150 Wn.2d 536, 78 P.3d 1289 (2003)).

ex rel. J.V.G. v. Van Guilder, 137 Wn. App. 417, 423, 154 P.3d 243 (2007).

Gross income broadly includes a parent's income "from any source" and excludes certain statutory exceptions. Former RCW 26.19.071(3) (1997). If the parent's income has changed, past income levels are "no longer of primary relevance." *In re Marriage of Payne*, 82 Wn. App. 147, 152, 916 P.2d 968 (1996). We presume that the trial court considered all available evidence in fashioning a child support order. *In re Marriage of Kelly*, 85 Wn. App. 785, 793, 934 P.2d 1218 (1997).

Here, the State's calculation of wages, salaries, and pensions was not an issue raised by Skusek on revision, and we held above that the trial court erred in revising unchallenged figures. But the trial court agreed with Skusek's argument to not include the income from past side jobs and interest, thus reducing his gross income for purposes of the child support calculation. We hold that this ruling was not an abuse of the trial court's discretion.

Next, Herman argues that the January start date for increased support was binding on the trial court. Under CR 8(d), "[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." In Skusek's response to the State's modification petition, he admitted under section 1.6 that "[t]he starting date of the modified child support order should be the date on which this petition [wa]s filed," namely, January 16, 2008. Clerk's Papers at 29.

But "[t]he trial court has discretion to make the modification effective upon the filing of the petition, upon the date of the order of modification, or any time in between." *In re Marriage of Pollard*, 99 Wn. App. 48, 55, 991 P.2d 1201 (2000). Thus, we hold that the trial court did not abuse its discretion in implementing the modified support effective July 2008.

III. Attorney Fees and Costs

Finally, Herman maintains that the trial court abused its discretion by not awarding her attorney fees because her needs exceeded Skusek's and because Skusek acted with intransigence. Both parties also request attorney fees on appeal.

An attorney fee award is "within the trial court's discretion." *In re Marriage of Mattson*, 95 Wn. App. 592, 604, 976 P.2d 157 (1999). The trial court can order a party in domestic relations actions to pay reasonable attorney fees, however, the court must generally balance the needs of the party requesting fees against the ability of the opposing party to pay the fees. RCW 26.09.140; *State ex rel. M.M.G. v. Graham*, 159 Wn.2d 623, 637, 152 P.3d 1005 (2007). Where the trial court failed to grant attorney fees, "[a] lack of findings as to either need or ability to pay [fees] requires reversal." *In re Marriage of Scanlon*, 109 Wn. App. 167, 181, 34 P.3d 877 (2001).

Herman requested attorney fees before the trial court on the revision motion, based on Skusek's intransigence, but the trial court failed to make an affirmative ruling on her request. Accordingly, on remand, the trial court should consider her request for attorney fees.

At the close of the argument in her brief about trial attorney fees, Herman includes a single sentence requesting attorney fees and costs on appeal without citing authority. But a party must devote a section of its opening brief to this request and cite applicable authority for justification. RAP 14.2; RAP 18.1(a), (b); *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998); *In re Marriage of Hoseth*, 115 Wn. App. 563, 575, 63 P.3d 164 (2003). "A party who fails to comply with this procedure is not entitled to an award of attorney fees." *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 772 n.17, 162

P.3d 1153 (2007). Accordingly, we do not award Herman attorney fees and costs on appeal.

Skusek also asks for attorney fees and costs on appeal under RAP 18.1 and RCW 26.09.140. But RCW 26.09.140 applies to proceedings under chapter 26.09 RCW, whereas chapter 26.19 RCW governs child support modifications. *See* RCW 26.09.140. Even if we were to consider awarding fees, the parties' relative financial resources do not necessitate fee sharing. As such, we do not award Skusek attorney fees and costs on appeal.

We affirm in part and reverse in part and remand for further proceedings consistent with this opinion.

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.

Van Deren, C.J.

We concur:

Houghton, J.

Penoyar, J.