IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of Mitchel Krogseth,	)	No. 64807-1-I
Respondent,	)	DIVISION ONE
and	)	UNPUBLISHED OPINION
KRISTEN SMITH FLANIGEN,	)	
Appellant.	)	FILED: May 16, 2011

Appelwick, J. — Krogseth brought an action against his ex-wife Flanigen for the reimbursement of child support day care expenses in accordance with RCW 26.19.080(3), alleging that Flanigen did not actually incur such expenses for the prior 84 months. The trial court entered a judgment in Krogseth's favor for $32,684.10. Flanigen appeals. Because the record does not clearly reflect whether the trial court considered the equitable defenses of laches and estoppel, we reverse the judgment and remand for further proceedings.

FACTS

Mitchel Krogseth and Kristin Smith Flanigen were divorced in October 1998. They have two children, K.K. and R.K., who were seven and five at the

time of the dissolution. Under the 1998 order of child support, Krogseth began paying Flanigen monthly support for the two children: $497.90 for his basic support obligation, and $389.10 for his share of daycare expenses that Flanigen incurred, for a total of $887.00 per month. The order of support included a provision stating that "[t]he parent receiving support may be required to submit an accounting of how the support is being spent to benefit the child." It also provided for the periodic modification of support under chapter 26.09 RCW, allowing either party to initiate an adjustment every two years. RCW 26.09.170(7); CP 8.

Neither parent sought an adjustment or modification of the support order until October 2009, when Flanigen moved for postsecondary educational support for K.K., who was then 18 years old. At an October 23, 2009 hearing, the trial court ordered the parties to pay their proportional percentage of K.K.'s college expenses, which were determined to be $18,306 annually (or $1,525.50 per month). Under this plan, Flanigen pays her daughter's college expenses. Krogseth is required to pay his 40 percent share by paying Flanigen $610.20 each month. The trial court also adjusted the support owed for R.K., requiring Krogseth to pay $431.88 per month in support for him. Lastly, the trial court entered an arrearage judgment against Krogseth, finding that he had underpaid his support during July, August, and September 2009 and accordingly owed Flanigen $1,443.48. Neither party had legal counsel at the time of this modification in October 2009.

In November 2009, Krogseth retained counsel and brought a motion for

judgment for daycare expenses not incurred, under RCW 26.19.080. He alleged that Flanigen had not been paying for daycare expenses since 2002 and calculated the amount of the judgment owed to him as $389.10 x 84 months = $32,684.40. Flanigen argued pro se that it was unfair for Krogseth to seek reimbursement, when he had never sought an adjustment of the support throughout the seven years. She argued that if the child support had been adjusted to remove Krogseth's day care obligation, Krogseth's support would have remained nearly identical, because his basic support would have been adjusted upwards based on a recalculation of his income. The trial court was sympathetic to Flanigen's argument, stating: "Had [she] come in and we'd done the numbers crunching, the support probably would have gone a substantial amount higher." But, the trial court went on to state that it could not retroactively modify an order and ultimately found that under RCW 26.19.080(3), it lacked the discretion to do anything but impose the $32,684.40 judgment against Flanigen. The trial court offset the $1,443.48 arrearage judgment Krogseth owed, leaving a net judgment of $31,240.62. The court treated that judgment as an advanced credit towards the future $610.20 monthly payments Krogseth would owe to Flanigen for K.K.'s postsecondary educational expenses. The trial court also granted 30 days for Flanigen to produce old receipts or financial records of any day care expenses she had incurred. She was unable to do so in the time provided, since the records were from so long ago. Flanigen filed a motion for reconsideration that was denied on procedural grounds on January 20, 2010. She appeals.

DISCUSSION

Krogseth brought his motion for reimbursement of day care expenses not incurred in accordance with RCW 26.19.080. That provision provides, in relevant part:

> Day care and special child rearing expenses . . . . shall be shared by the parents in the same proportion as the basic child support obligation. If an obligor pays court or administratively ordered day care or special child rearing expenses that are not actually incurred, the obligee must reimburse the obligor for the overpayment if the overpayment amounts to at least twenty percent of the obligor's annual day care or special child rearing expenses. The obligor may institute an action in the superior court . . . for reimbursement of day care and special child rearing expense overpayments that amount to twenty percent or more of the obligor's annual day care and special child rearing expenses. Any ordered overpayment reimbursement shall be applied first as an offset to child support arrearages of the obligor.

RCW 26.19.080(3). The central issue here is the trial court's interpretation and application of that statute. The interpretation and applicability of a statute presents questions of law reviewed de novo. Grey v. Leach, 158 Wn. App. 837, 844, 244 P.3d 970, (2010). Additionally, where a commissioner's decision is based entirely on documentary evidence, review is de novo. In re Parentage of Hilborn, 114 Wn. App 275, 278, 58 P.3d 905 (2002); In re Marriage of Balcom, 101 Wn. App 56, 59, 1 P.3d 1174 (2000). We apply the de novo standard of review.

I. Consideration of Equitable Principles

Flanigen argues that the trial court should have considered the defenses of equitable estoppel and laches as a bar to Krogseth's claim for reimbursement under RCW 26.19.080(3). In support of this argument, she relies on In re

Marriage of Barber, 106 Wn. App 390, 23 P.3d 1106 (2001), an opinion from Division II of this court that squarely addressed this issue. Reimbursement of overpaid day care expenses is generally mandatory under RCW 26.19.080(3). Id. at 398. But, the Barber court reasoned that "nothing in RCW 26.19.080(3) prevents the party receiving the alleged overpayment from raising equitable defenses, including laches and equitable estoppel, as a bar to a request for mandatory reimbursement for overpaid day care costs under this statute." Id. Barber ultimately held that the trial court erred by failing to consider the equitable defenses, and it reversed the trial court judgment and remanded for further proceedings to consider those defenses. Id. at 398-99. Remand was deemed appropriate there because the trial court did not enter findings on the issue. Id. at 395. Absent such findings, the appellate court noted that "it is not clear whether the trial court decided not to apply equitable estoppel and laches because it concluded that they could not be applied to RCW 26.19.080(3) under any circumstances, or because it concluded that the elements of these doctrines were not met in this case." Id.

Here, the trial court record similarly lacks any findings about the possible application of these equitable defenses. During the proceedings, the commissioner stated that he did not think the resulting judgment against Flanigen was fair. But, he explained that based on his understanding of RCW 26.19.080(3), the statute made reimbursement mandatory, and left him no discretion:

> The argument that this court has heard many times, and

> understands it from a practical standpoint, but for which the legislature made no provision, is that parties tell me, just like Ms. Flanigen is, "Well, I didn't adjust the support and the amount I would be getting if it was just support would not be enough."
>
> . . . . Of course hindsight may be 20/20, but the legislature again said you're entitled to argue for a judgment if in fact there was no day care incurred. It's not a discretion for this Court.
>
> . . . .
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> Here the order had not been ajusted for many, many years. Do I think $400 is an appropriate amount?[1] No. But I've never seen you until this proceeding. Had you come in and we'd done the numbers crunching, the support probably would have gone a substantial amount higher.

The parties dispute what the commissioner intended when he stated that he lacked discretion. Flanigen argues that the commissioner here was sympathetic to her and wished that he could consider equitable defenses before granting the overpayment reimbursement, but that he believed he did not have the discretion to do so. Based on this interpretation, the commissioner would have erred as a matter of law, under the holding of Barber. 106 Wn. App at 398 (expressly allowing for the consideration of such equitable defenses). Krogseth, by contrast, contended at oral argument that what the commissioner really meant by his statements was that he lacked the discretion to retroactively modify the *amount of support* that Flanigen had been receiving over the past years. Based on this interpretation, the commissioner would merely have acknowledged that a retroactive adjustment to support is beyond the court's authority.

Here, as in Barber, the record does not make clear that the commissioner

[1] The commissioner was likely referring to the $497.90 per month that Krogseth owed for his basic support obligation, which would have been all that Krogseth paid per month if his support had not included the $389.10 day care portion.

considered and then rejected the equitable defenses. Accordingly, we reach the same result and reverse the judgment and remand the case back to the trial court to determine whether the facts support the elements of laches or equitable estoppel as a bar to Krogseth's request for reimbursement.

Krogseth argues that Flanigen should not be allowed to raise this issue on appeal, because she failed to preserve it by raising it before the trial court. Flanigen responds by pointing out that, although she was unrepresented by counsel and did not know the technical terms for the equitable principles, her arguments before the commissioner contained the same basic substance as an assertion of laches or equitable estoppel. For example, in her December 10, 2009 declaration, Flanigen stated:

> At no time over the past 11 years since the original Order of Child Support went into effect did Mr. Krogseth seek adjustment to the amount of child support owed . . . . It was only after the Order of Child Support was modified and a judgment on back child support issued on the 23rd [day] of October, 2009, that Mr. Krogseth hired an attorney and, in turn, sought a judgment against me, *retroactive to 2002*.

Flanigen also asserted the defenses of laches and equitable estoppel after the hearing, in her January 7, 2010 amended motion to the trial court. "Laches and Equitable Estoppel. Mr. Krogseth's motion for judgment of daycare [sic] under RCW 26.19.080(3) should be vacated because his delay in filing the motion was unreasonable, and the unreasonable delay has resulted in an injustice, hardship, and damage." (Boldface omitted.) In essence, Flanigen argued that Krogseth's delay in making any claim for overpayment changed her position and caused her injury: she lost her right to pursue a simultaneous adjustment in

support (that likely would have resulted in an increase in Krogseth's basic support obligation to offset any lost day care support); and she lost her ability to accurately account for the day care costs that she had incurred. A party may preserve an issue for review by arguing it without specifically citing to a legal theory or provision. See, e.g., Greenfield v. W. Heritage Ins. Co., 154 Wn. App 795, 801, 226 P.3d 199 (2010). We hold that Flanigen preserved this issue for appeal, despite initially failing to specifically name her legal theories while proceeding pro se before the trial court.

II. Limitation on Reimbursement of Overpayment Amount

Flanigen argues that under RCW 26.19.080(3), Krogseth is not entitled to receive the entire amount of his overpayment. Instead, she alleges that Krogseth, as the obligor, should only be entitled to reimbursement for the amount in excess of 20 percent (in other words, 80 percent) of the annual day care expense overpayment. The relevant part of the statute provides:

> If an obligor pays court or administratively ordered day care or special child rearing expenses that are not actually incurred, the obligee must reimburse the obligor for the overpayment if the overpayment amounts to at least twenty percent of the obligor's annual day care or special child rearing expenses. The obligor may institute an action in the superior court . . . for reimbursement of day care and special child rearing expense overpayments that amount to twenty percent or more of the obligor's annual day care and special child rearing expenses.

RCW 26.19.080(3). This is also an issue of statutory interpretation reviewed de novo. Grey, 158 Wn. App. at 844.

According to Flanigen's interpretation of the statute, the provision that an obligor can get reimbursed for overpayments "that amount to twenty percent or

more" of the annual expenses suggests that only the final 80 percent of the overpayment is subject to reimbursement. RCW 26.19.080(3). But, this interpretation is unsupported by a plain reading of the text, unsupported by case law, and would run counter to the intent of the statute. The more reasonable interpretation of the statute's plain language is that the 20 percent requirement is a threshold amount, and the *entirety* of any overpayment must be repaid, *if* the overpayment amount has cleared that preliminary 20 percent threshold to qualify for reimbursement. This second interpretation is the one that Krogseth urges the court to take, and it is far more in keeping with the language of the statute.

In support of her interpretation, Flanigen relies on only one case, quoting the dissenting opinion from In re Marriage of Fairchild: "[T]he statutory scheme contemplates that only *substantial* overpayments exceeding 20 percent of the annual obligation would be subject to refund." 148 Wn. App 828, 835, 201 P.3d 1053, 207 P.3d 449 (2009) (Korsmo, J., dissenting). But, this quote does nothing but restate the same potential ambiguity, and the remainder of Judge Korsmo's dissent actually undermines Flanigen's interpretation and supports Krogseth's. It goes on to state: "This statute does not set up a mechanism for reducing unpaid debt. It also is not concerned about minor overpayments, thus the 20 percent excess payment threshold for invoking court involvement." Id. This reinforces the notion that the 20 percent requirement was not instituted to reduce the total reimbursement amount, but rather was intended to serve as a threshold amount to be cleared before invoking court involvement. Once that threshold has been reached, nothing in RCW 26.19.080(3) suggests that an

obligor should not then be entitled to the full reimbursement amount of their overpayment. Statutes should be construed to give effect to their manifest purposes and to avoid absurd results. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003); State v. Stannard, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987). In accordance with this principle, we apply Krogseth's interpretation and reject Flanigen's. If Krogseth is found on remand to be entitled to reimbursement, that reimbursement should not be limited only to the overpayment in excess of the 20 percent threshold of his annual day care expenses.

III. Interest on the Judgment for Overpayment

Flanigen argues that the trial court erred by ordering interest in the amount of 12 percent per annum starting from the date of the judgment against her. She contends that this interest is unfair, in light of the fact that she must pay for their daughter's college tuition expenses up front in a lump sum, while Krogseth is only required to reimburse her on a monthly basis, at the rate of $610.20. The trial court's judgment and order for overpayment states that the $32,684.10 judgment against Flanigen is to be paid down gradually, "[b]y offset of father's post-secondary [sic] support obligations currently at the rate of $610.20 per month." Accordingly, Flanigen suggests two different possible alternatives for a more equitable way of handling this offset: (1) the $32,684.10 could be treated as a prepaid fund, not accruing interest, that Krogseth could draw from each month to pay his postsecondary support payments; or (2) if the $32,684.10 judgment continues to earn interest, she should be entitled to reduce that judgment by the full 40 percent (Krogseth's percentage of obligation) of any

postsecondary educational payment she makes for Kaitlin, at the moment when she makes that payment.

Whatever the perceived fairness, Flanigen provides no case law in support of her argument, nor does she assert that the trial court abused its discretion in the manner in which it offset the reimbursement. The 12 percent interest rate assessed on the $32,684.10 judgment against her was not subject to the trial court's discretion, but rather, was statutorily mandated by RCW 4.56.110(4) and RCW 19.52.020.[2] RCW 4.56.110(4) provides in relevant part, that "judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof." RCW 19.52.020, in turn, makes 12 percent per annum the maximum permitted rate. We hold that the trial court did not err in imposing 12 percent interest on the judgment.

IV. Attorney Fees

Krogseth asks this court to award him attorney fees and costs for the expense of responding to this appeal, based on his financial need and on Flanigen's ability to pay. RCW 26.09.140 provides this court with discretion to award attorney fees after considering the parties' relative ability to pay and the arguable merit of the issues raised on appeal. In re Marriage of Leslie, 90 Wn. App 796, 807, 954 P.2d 330 (1998). Here, Flanigen's appeal had merit, and both parties allege financial hardship while attempting to portray the other as

[2] The parties dispute the applicability of RCW 4.56.110(2), which mandates 12 percent interest for judgments for unpaid child support. But, this argument is moot—even if RCW 4.56.110(2) did not apply, 12 percent would be the appropriate interest under RCW 4.56.110(4).

financially comfortable and well-off. We decline to award attorney fees to Krogseth.

We reverse the judgment and remand for further proceedings.

WE CONCUR: