IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of JENNIFER KAY AYLOR, Respondent, and SCOTT ROBERT AYLOR, Appellant.	)	No. 66351-8-I DIVISION ONE UNPUBLISHED OPINION FILED: August 8, 2011

Appelwick, J. — Aylor appeals pro se from an order of contempt and judgment against him. He argues that, because his basic child support obligation to Eldred was zero percent, his proportional share of day care expenses should also have been zero percent. He also argues that Eldred's motion for contempt was untimely filed and that a provision in their decree of

dissolution should not have been enforceable against him in a contempt proceeding. Because RCW 26.19.080(3) requires day care expenses to be paid in the same proportion as basic support, we reverse in part, affirm in part, and remand.

FACTS

Jennifer (Aylor) Eldred[1] and Scott Aylor's marriage was dissolved on October 27, 2008. They had two children, ages 3 and 7 at the time. The court found that Aylor's monthly net income was $2,413 and that Eldred's was $5,908. While the standard calculation of support would have required Aylor to pay $430 per month, the trial court decided to deviate from the standard calculation. The order of child support stated, as its reason for the deviation:

> See Exhibit 1, letter from [Eldred's attorney] to [Eldred] dated August 13, 2008 Re: Dissolution (Child Support and Maintenance). [Aylor] seeks spousal maintenance. In lieu of contesting his request, [Eldred] has agreed to waive child support payments for a period of two years.

Accordingly, the court ordered Aylor to begin paying support almost two years from the date of dissolution, on October 1, 2010. Section 3.15 of the 2008 order of child support, titled "Payment for Expenses not Included in the Transfer Payment," contained conflicting checked boxes. The sentence next to the first checked box stated: "Does not apply because all payments, except medical, are included in the transfer payment." The provision beside the second box was also checked, and contradicted the first box, stating:

[1] Jennifer Eldred's last name was Aylor at the time of the 2008 decree of dissolution.

> The [Eldred] shall pay __50__% and [Aylor] __50__% (each parent's proportional share of income from the Child Support Schedule Worksheet, line 6) of the following expenses incurred on behalf of the children listed in paragraph 3.1:
> [x] day care.
> [x] educational expenses.
> [x] long distance transportation expenses.
> [x] other: sports, lessons, other curricular activities.

(Alterations in original.) The child support schedule worksheet that the trial court used to calculate the parties' proportional share of income and basic support is not contained in the record. But, based on the court's findings about the parties' incomes, Aylor's proportional share of the combined monthly net income was 28 percent, and Eldred's was 72 percent.

On September 16, 2010 Aylor filed a motion and declaration for the adjustment of child support, asserting that his income was greatly reduced as of April 2009. He also submitted a child support worksheet he had filled out, indicating that his income, after deductions, was $1,668 (against Eldred's $6,524, after deductions); a 20 percent proportional share of Aylor and Eldred's combined income. On October 4, 2010, Eldred filed a counter motion for adjustment of child support, asking the court to uphold the original 2008 order of child support, and seeking, in relevant part, a 50 percent contribution from Aylor towards day care expenses dating back to the date of dissolution. She also submitted her own child support schedule worksheet, where she indicated that Aylor's income was $2,440 (against her $4,001); a 38 percent to 62 percent proportional split.

While there is nothing in the record to so indicate, Eldred asserts that the

original hearing on the parties' respective motions for the adjustment of child support was scheduled for October 18, 2010. She also asserts that, on that date, the trial court continued the hearing until November 3, 2010.

On October 27, 2010, Eldred filed a motion/declaration for an order to show cause re contempt. She sought a judgment for money she alleged she was owed: (1) towards past child care expenses; (2) for unpaid support during the month of October, 2010; and (3) for money that Aylor was required to pay Eldred in rent, based on a provision in the decree of dissolution, to cover the mortgage on the house Aylor lived in.

On November 3, 2010, the trial court held a hearing on the parties' motions for adjustment of child support and on Eldred's motion for contempt. The court ultimately entered judgment in Eldred's favor for $3,804 in unpaid daycare expenses and $2,280 in unpaid rent, for a total of $6,084. The court also entered a temporary order of child support, where it imputed Aylor's monthly income as $1,800 and Eldred's as $6,646, or 21 percent and 79 percent of their combined income. Under the standard calculation, the total monthly transfer amount from Aylor to Eldred was $185 for each child, for a total of $370. This order was only temporary, with the court setting a future review hearing six months out, for May 9, 2011, to consider Aylor's job status and income once it was less in flux.

Aylor timely appealed.

DISCUSSION

I. Day Care Expenses

Aylor argues that the trial court erred by requiring him to pay Eldred money for a portion of day care expenses from October 2008 through October 2010. He contends that, because his basic child support obligation during that period was zero percent, his proportion of day care expenses should also have been zero percent.

In 2008, the trial court and parties signed the order of child support governing the parents' respective support obligations. Under RCW 26.19.080(1), a parent's basic child support obligation is "allocated between the parents based on each parent's share of the combined monthly net income." The trial court calculated that at that time, Aylor's monthly net income was $2,413 and Eldred's was $5,908. Based on those amounts, the trial court concluded that Aylor's basic support obligation, under the standard calculation contemplated in RCW 26.19.080(1) would have been $430 per month, or 28 percent of their combined income. But, rather than require Aylor to pay this standard calculation support, the trial court ordered a deviation, under former RCW 26.19.075 (2008). Under that deviation, the trial court assigned 100 percent of the basic support obligation to Eldred and zero percent to Aylor for the first two years. That division of the basic support obligation was not contested and is not before us.

The question before us is whether Aylor was required, under the 2008 order of child support, to contribute to day care expenses, and if so, in what proportion. Here, the order itself contained two contradictory provisions. Based on the first checked box in section 3.15, the order stated that any day care

payments did "not apply because all payments, except medical, are included in the transfer payment." The second checked box in section 3.15, by contrast, stated that Aylor was responsible for paying 50 percent of day care expenses:

> The [Eldred] shall pay __50__% and [Aylor] _50__% (each parent's proportional share of income from the Child Support Schedule Worksheet, line 6) of . . .
> [x] day care.

This second statement, indicating that the parties' proportional share of income was fifty-fifty, did not match the proportionate share of the basic support obligation.

On November 3, 2010, the trial court recognized this error and disregarded the erroneous fifty-fifty distribution, in favor of a percentage distribution that actually reflected the parties' respective incomes; 28 percent for Aylor and 72 percent for Eldred. The trial court then entered judgment for unpaid day care in Eldred's favor for $3,804, which was 28 percent of the total $13,586 that Eldred had spent on day care over the two year period. Aylor argues that, the trial court's stated 28/72 split was again in error, because his basic child support obligation was zero percent for the first two years after dissolution, his proportional share of day care expenses should also have been zero percent based on RCW 26.19.080(3). We agree.

RCW 26.19.080(3) provides, in relevant part: "[Day care] expenses shall be shared by the parents in the same proportion as the basic child support obligation." (Emphasis added); In re Yeamans, 117 Wn. App. 593, 599-60, 72 P.3d 775 (2003) (this language is mandatory).

RCW 26.19.080(1) provides that Aylor's basic support obligation should be allocated based on his share of the parents' combined income. Former RCW 26.19.075 provides for a deviation, which in this case was granted to set Aylor's support obligation at zero percent, with the wife's concurrence. That deviation is not challenged.

When a deviation is granted, by definition, the proportion of basic support imposed on the obligor will not be the same as that parent's proportion of the parent's combined incomes. The extraordinary expense apportionment need not be in proportion to the parents combined net incomes where there has been a deviation in the basic support calculation. In re Marriage of Casey, 88 Wn. App. 662, 668, 967 P.2d 982 (1997) (no abuse of discretion apportioning all travel costs to father after deviation in basic support calculation making father responsible for 100 percent of basic support obligation); In re Paternity of Hewitt, 98 Wn. App. 85, 90, 988 P.2d 495 (1999) (the court abused its discretion requiring payment of more than a proportionate share of travel expenses where the court did not deviate from the standard calculation of basic support). For the period at issue here the proportion of basic support Aylor was ordered to pay after deviation was zero percent. Based on a plain reading of RCW 26.19.080(3) and the cited cases, Aylor's proportion of day care expenses was required to be the same as his basic support obligation proportion—zero percent. The court lacked authority to order a different allocation of daycare expense in 2008, relative to the deviated basic support obligation. And, the court lacked authority to modify support retroactively in 2010. Accordingly, we

hold that the trial court erred by entering judgment for Eldred for unpaid day care.

II. Contempt Proceedings

Eldred asserted three bases in support of her motion for contempt. First, she alleged that Aylor failed to pay support as required for the period of October 1, 2010 through November 1, 2010. Second, Eldred raised Aylor's alleged failure to comply with the order of child support by not paying day care expenses. And third, Eldred alleged that Aylor failed to comply with their decree of dissolution. The decree contained a provision requiring Aylor to "pay [Eldred] $2,012 per month for the mortgage (the total cost of the mortgage, tax, and insurance) on the first of every month."

When the trial court granted the motion for contempt, it did not enter findings on the first issue. That issue was not part of the trial court's basis for entering the order of contempt, and it is not before us. Instead, the order of contempt was based on the second and third bases raised by Eldred. The trial court found that Aylor had failed to comply both with the order of child support and with the decree of dissolution. The court entered judgment against Aylor for $3,804 in unpaid day care expenses and $2,280 in unpaid rent but imposed no additional sanctions. We reverse the judgment for unpaid day care expenses, as discussed above, leaving the failure to comply with the decree of dissolution as the remaining basis for the order of contempt.

Aylor argues that Eldred's motion for contempt was untimely and that the provision of the dissolution decree was unenforceable in a contempt proceeding.

A. Timeliness of the Motion for Contempt

Aylor argues that the trial court violated its own court rules by accepting Eldred's untimely motion for an order of contempt. Eldred filed her motion on October 27, 2010, and the hearing was conducted on November 3, 2010. Skagit County Superior Court Local Civil Rules (SCLCR) requires that any motion be filed and served at least nine days before the hearing. SCLCR 6(d)(2)(i). Because Eldred did not file her motion at least nine days before the hearing, the motion was untimely. Aylor argues that this error requires reversal.

But, an error is not grounds for reversal unless it was prejudicial to the defendant. State v. Grenning, 169 Wn.2d 47, 57, 234 P.3d 169 (2010). A violation of a court rule is generally not considered constitutional error, and we thus apply the harmless error test. State v. Robinson, 153 Wn.2d 689, 697, 107 P.3d 90 (2005). We consider whether "'the outcome of the trial would have been materially affected'" had the error not occurred. Grenning, 169 Wn.2d at 58 (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). Here, Aylor has failed to demonstrate or even allege that he was prejudiced by the trial court's decision to proceed with the hearing on November 3, 2010. He did not raise an objection to the timeliness of Eldred's motion at the hearing, nor has he demonstrated that the outcome of the hearing would have been any different if he had earlier notice.[2] We hold that any error by the trial court under

[2] Eldred asserts that the original hearing was set for October 18, 2010 and then continued until November 3, 2010. She argues that on October 18, 2010, the commissioner instructed her to file the motion for an order of contempt and that Aylor was present and heard that instruction. There is nothing in the record to support or refute this.

SCLCR 6(d)(2)(i) was harmless because it did not result in any prejudice to Aylor.

B. Enforcement of Property Distribution in a Contempt Proceeding

Finally, Aylor argues that the trial court erred by enforcing a property distribution provision of the decree of dissolution in a contempt proceeding. He relies on Decker v. Decker, 52 Wn.2d 456, 326 P.2d 332 (1958) for this proposition. But, Decker does not support his contention. RCW 7.21.010(1)(b) defines contempt of court as including the intentional disobedience of any lawful judgment, decree, order, or process of the court. Here, the decree of dissolution contained a provision requiring Aylor to pay Eldred $2,012 per month in rent for her mortgage, tax, and insurance on the home that Aylor lived in after the dissolution. In its November 3, 2010 order, the trial court found that Aylor had failed to pay $2,280 in rent, and he thus failed to comply with the 2008 decree of dissolution. This failure to comply with the decree is a proper basis for the trial court's finding of contempt under RCW 7.21.010. The trial court was entitled to consider whether Aylor had complied with the decree of dissolution. "In a civil contempt proceeding the trial court is not limited to a determination of the question of contempt, but is authorized to consider and determine to what extent the parties should perform the duties imposed upon them by the decree of dissolution." In re the Marriage of Wulfsberg, 42 Wn. App. 627, 632, 713 P.2d 132 (1986). We hold that the provisions of the decree of dissolution, and any question about Aylor's compliance with them, were within the trial court's discretion to address at the contempt proceeding. We affirm the judgment

against Aylor for the amount not paid for rent, as required by the decree of dissolution.

III. Eldred's Arguments

In addition to the four assignments of error and arguments raised by Aylor, Eldred also asserts 17 distinct arguments in her brief. Some of these arguments

are responsive to Aylor's and some are novel, raised for the first time on appeal, and beyond the scope of the trial court record. RAP 2.4(a) provides:

> The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.

Here, Eldred has not filed a notice of appeal or sought review of the trial court's decision. We decline to consider these arguments on appeal.

We reverse in part, affirm in part, and remand.

Appelwick, J.

WE CONCUR:

Cox, J.

Becker, J.