in the court of appeals of the state of washington

In the Matter of the Marriage of CHRISTINA T.E. GRADY, n.k.a. CHRISTINA T. EIDE, Respondent/ Cross-Appellant, and DOUGLAS A. GRADY, Appellant/ Cross-Respondent.	No. 66452-2-I DIVISION ONE UNPUBLISHED OPINION FILED: August 6, 2012

Becker, J. — At issue in this appeal are a parenting plan and child support order. The mother challenges a provision that allows the father, against whom a finding of domestic violence was entered, to have equal residential time with their children in 5 years. She also argues that the father had to be characterized as voluntarily underemployed because he reduced his time at work to 40 hours per week. The father contends the money provided to the mother by her parents to help out with child care expenses had to be characterized as income to the mother. We conclude all the contested rulings were within the trial court's broad discretion.

FACTS

Douglas Grady and Christina Eide were married in 2003. They have two

young children, a girl and boy aged two and five respectively at the time of trial in August 2010. Douglas is an intellectual property attorney in private practice. Christina is an anesthesiology resident at a Seattle hospital.

Douglas has a long-standing problem with anger management. During the marriage, he engaged in an escalating pattern of demeaning, disrespectful, controlling, coercive and physically violent acts in front of the children. The parties separated in 2009 after a particularly egregious domestic violence incident that occurred with the children present. Douglas demanded Christina's phone, began scissoring some of her undergarments into pieces when she did not give it to him, and held Christina forcefully down on the couch when she tried to leave with her daughter in her arms. Christina managed to escape and to alert 911. The police arrived and arrested Douglas.

Christina obtained a protective order. Douglas entered private psychotherapy and court-ordered domestic violence treatment therapy. The court permitted Douglas to have limited, supervised time with the children. The supervision requirement was eventually dropped after he completed the first phase of domestic violence treatment.

Christina filed for dissolution in July 2009. The parties resolved some aspects of the dissolution by mediation, but they sharply disputed the residential schedule. The court considered a 40-page report by a court-appointed parenting evaluator, Wendy Hutchins-Cook, PhD. Dr. Hutchins-Cook concluded that Christina should have primary decision-making authority, but that the parties were skilled and loving parents and it

would benefit the children to spend significant time with both of them. She recommended early limitations on Douglas's residential time, increasing to equal time with both parents after five years.

A seven-day trial took place in August 2010. Christina appeals the parenting plan that allocated decision making and residential time generally according to Dr. Hutchins-Cook's recommendation. Both parties appeal from the order of child support.

DOMESTIC VIOLENCE AS A LIMIT ON RESIDENTIAL TIME

Normally, the allocation of parents' residential time is to be guided by the seven factors set forth in RCW 26.09.187(3).[1] The statute provides that the "187" factors apply in any case where the limitations of RCW 26.09.191 are not "dispositive of the child's residential schedule." RCW 26.09.187(3)(a). Upon

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[1] Of the following seven factors, the court is required to give the first "the greatest weight:"

> (i) The relative strength, nature, and stability of the child's relationship with each parent;
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> (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
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> (iii) Each parent's past and potential for future performance of parenting functions as defined in *RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
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> (iv) The emotional needs and developmental level of the child;
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> (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;
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> (vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and
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> (vii) Each parent's employment schedule.

RCW 26.09.187(3)(a).

making a finding of a history of acts of domestic violence, the trial court must "limit" a parent's residential time. RCW 26.09.191(2)(a). Here, the trial court extensively discussed and applied the "187" factors. Over objection by Douglas, the court also made a finding of a history of acts of domestic violence. Christina contends the court erred by using the "usual" framework of the "187" factors instead of treating the finding of domestic violence as "dispositive." Residential allocations are reviewed for abuse of discretion. In re Marriage of Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 (1993).

The trial court largely adopted the recommendation of Dr. Hutchins-Cook, the parenting evaluator, for allocation of residential time. Dr. Hutchins-Cook acknowledged the history of domestic violence, but found Douglas had made considerable progress through therapy. She discussed each of the "187" factors in detail and concluded that they generally favored Christina, although she saw Douglas as much improved and observed both parties to be "attentive, skilled and loving parents." Douglas had proposed to base the children primarily with him in order to avoid the use of a nanny. Dr. Hutchins-Cook advised against this. "My view is that it would be too big a change for the children to be primarily based with their dad after a year with mom. I also believe it is too soon in terms of the children's, particularly [the son's] experience of his dad as unpredictable, angry and scary." She recommended that the court begin by allocating the children's residential time primarily with Christina in order to continue their life "as the children have experienced it so far and as is developmentally

appropriate."

Christina objected that the report by Dr. Hutchins-Cook did not give enough weight to the history of domestic violence. In its memorandum findings and order, the court defended the report's focus on the children's developmental needs:

> Some emphasis at trial was placed on Dr. Hutchins-Cook's inclusion or lack thereof of domestic violence in her recommendations. Her testimony that she did not do a D.V. assessment per se, and that her recommendations for the residential schedule are primarily developmentally based and not D.V. based are appropriate in the court's view both for the reasons she stated and also because there are a variety of other effective and safe ways of addressing the domestic violence history in the parenting plan and restraining order provisions.

The court adopted Dr. Hutchins-Cook's five pages of detailed analysis of the "187" factors into its memorandum findings and based the residential schedule on her recommendations. The court rejected Douglas's proposal that he immediately share equal residential time because in the court's view, during "his abuser rehabilitation" Douglas had "lost some objectivity about what might be best for" the children.

To address the requirement in RCW 26.09.191(2)(a) that Douglas' residential time be limited because of his history of domestic violence, the court set forth a residential schedule in which the children resided primarily with Christina. The court did not adopt Christina's proposed limitation, under which the children's residential time with Douglas would have gradually increased to 35 percent. Under the plan adopted by the court, the children will have incremental increases in their time with

Douglas until, after five years, the split in residential time between the two parents becomes 50/50. The plan gives Christina the express right to move for increased limitations on Douglas's residential time if she provides the court any evidence that Douglas has engaged in domestic violence toward her or abusive conduct toward either of the children.

Christina argues that the statutory requirement for a limitation upon residential time means that Douglas must be *permanently* limited to less than 50 percent residential time with the children. She contends the trial court should have placed the future burden upon Douglas to prove himself capable of parenting without a limitation on his residential time, rather than placing the burden upon her to prove that a continuing limitation is necessary. Christina contends the evidence presented at trial showed that the "187" factors overwhelmingly weighed in her favor as "the more involved and child-centered parent," and the court should have made her household the children's permanent primary residence when considering those factors in light of the significant history of domestic violence. Christina believes that the plan adopted by the court leaves her and the children insufficiently protected and puts too much responsibility on her to monitor her ex-husband's conduct.

Christina cites no case law to support interpreting RCW 26.09.191 as requiring that limitations imposed in an initial parenting plan must remain in place permanently. She argues the court should infer such a requirement because "nothing in the statute relieves the court of the ongoing obligation to comply with the mandate. . . . There is no

expiration date on this protection. Rather, the limitation is required until the court can find no risk under RCW 26.09.191(2)(n)." She misrepresents the statute. Subsection 191(2)(n) does not require that limitations remain in place "until" the court no longer finds a risk. Rather, it provides that a court must enter an express finding of no risk to the children if the court sees fit to impose *no limitations at all* upon a parent with a history of domestic violence. In this case, the plan limits the father to less than 50 percent residential time with his children for a substantial period of time, with the future allowance of 50 percent residential time conditioned on his avoiding anger and abusive behavior. We conclude the restrictions imposed by the trial court on the father's residential time are a "limit" within the meaning of RCW 26.09.191(2)(a). The parenting plan adequately fulfills the court's responsibility, as defined by statute, to treat domestic violence as a serious problem. Abundant evidence—including Dr. Hutchins-Cook's recommendation formed after five months of studying the family—supported the court's residential allocation. The court's analysis of the family situation was well-reasoned and neutral. We find no abuse of discretion.

GRANDPARENT CONTRIBUTIONS

Christina claimed monthly child care expenses of about $4,600, including $3,200 for a live-in nanny and $1,400 for part-time preschool tuition for both children. She did not ask the court to make Douglas share the entire $4,600 expense. She proposed allocation of a lower, hypothetical child care expense of $2,786 per month, representing what it

would cost to have both children in a full-time Montessori preschool and day care like the one the children attended during the parties' marriage.

On the third day of trial, Douglas cross-examined Christina about how she had been able to "make up the difference" between her declared monthly income of $4,591 and her claimed expenses of $8,848. She answered, "My parents are helping to pay for the nanny, which is the majority of the rest of the debt." Christina had not previously disclosed that she was receiving financial aid from her parents.

At the end of the trial, Douglas asked the court to include the grandparents' assistance in Christina's income. The court denied this request. The court accepted Christina's proposal to limit allocated day care expenses to $2,786 per month, leaving Christina responsible for paying any extra child care expenses above this amount.

On appeal, Douglas contends the court erred by refusing to increase Christina's income to account for the grandparents' contributions. But the child support statute specifically provides that income from gifts "shall not be included" in a parent's income calculation. RCW 26.19.071(4)(c). The trial court did not abuse its discretion by refusing to count the gifts from the grandparents as income to Christina.

On the child support calculation worksheet, the court gave Christina a "day care and special expenses credit" of $2,786. Douglas contends this credit was improper because Christina was paying for only part of the preschool expenses while her parents were paying

for the rest. This contention is without merit. Christina was actually incurring costs in excess of $2,786 per month for preschool tuition and the nanny's salary, distinguishing her situation from the case on which Douglas relies, In re Marriage of Scanlon, 109 Wn. App. 167, 175-76, 34 P.3d 877 (2001), review denied, 147 Wn.2d 1026 (2002). The fact that Christina's parents were helping her cover some portion of these expenses did not relieve Douglas of liability for proportionally sharing the full expense for his children's care as required by RCW 26.19.080(3). Douglas also cites Boisen v. Burgess, 87 Wn. App. 912, 921, 943 P.2d 682 (1997), review denied, 134 Wn.2d 1014 (1998), but that case is likewise not supportive of his position. The gifts in question were made by a third party directly to the children, their college, and their creditors, and accordingly were not recoverable by the mother in an action for reimbursement against the children's father.

Douglas also contends the court should have deviated from the standard child support calculation in light of the substantial financial assistance Christina was receiving each month from her parents. Gifts can be a valid basis for a court to deviate from the standard child support calculation. RCW 26.19.075(a)-(b). But, for two reasons, we conclude the trial court did not err by failing to grant a deviation. First, Douglas did not ask the trial court for a deviation. Second, the record does not actually establish how much assistance the grandparents were providing or whether Christina had any guarantee as to how long the assistance would continue. Douglas's argument on this issue springs entirely from one short sentence in

Christina's testimony in which she said her parents were "helping to pay for the nanny."

Douglas contends that by ignoring the money Christina received from her parents, the court violated a statute stating that "all income and resources of the parties before the court . . . shall be disclosed and considered." RCW 26.19.075(2). The record does not indicate that the court ignored the grandparents' assistance. The fact that the court denied Douglas's request to include the assistance in Christina's income shows that the court gave the issue due consideration.

Douglas's final argument is that Christina was required to disclose the assistance from her parents in her financial disclosures filed before trial and that her failure to do so until the third day of trial prejudiced his trial preparation.

In setting forth standards for determination of income in child support proceedings, the statute includes "gifts and prizes" as a category of income that "*shall be disclosed* but shall not be included" in the income calculation. RCW 26.19.071(4)(c) (emphasis added). The local court rules for King County superior court similarly require that financial declarations be supported by documentation of any non-taxable "gift" income. LFLR 10(b)(5).

But Douglas has failed to show that he was prejudiced by the belated disclosure. He asked no follow-up questions on cross-examination, and he did not ask for a continuance. He does not identify what form of discovery he would have undertaken or explain how his presentation of evidence would have differed if the disclosure had been made

earlier. His only specific allegation of prejudice is to say that if he had known about the grandparents' assistance before trial, at the very least he would have asked for a deviation from the standard calculation. But with several days of trial remaining, he had ample opportunity to request a deviation, yet he did not even mention the subject. He addressed the matter only briefly during his closing argument, at which time he merely requested that the court "acknowledge" or "account for" the contributions by either increasing Christina's income or reducing her expenses. He addressed the nanny contributions again at the presentation hearing two months after trial, but he did not argue for a deviation at that time either. Because Douglas has not shown that he was prejudiced by the belated disclosure, he is not entitled to relief.

In summary, we find no abuse of discretion in the trial court's handling of the grandparents' financial assistance with child care expenses.

FATHER'S INCOME

Christina has cross appealed the child support order, contending that Douglas was voluntarily underemployed at the time of trial and that the court erred by setting his annual income at $100,000 based on a 40-hour work week. Because historically he worked long hours, including weekends and vacations, she contends his current 40-hour work schedule does not constitute full-time employment.

The court determines whether a parent is voluntarily underemployed based upon the parent's "work history,

education, health, and age, or any other relevant factors." RCW 26.19.071(6). Under this statute, the court is required to impute income to a parent who is voluntarily underemployed. In re Marriage of Pollard, 99 Wn. App. 48, 52, 991 P.2d 1201 (2000). Where a parent is gainfully employed on a full-time basis, however, the court may not impute additional income "unless the court finds that the parent is . . . purposely underemployed to reduce the parent's child support obligation." RCW 26.19.071(6). A trial court's findings regarding voluntary underemployment and imputed income are reviewed for substantial evidence. In re Marriage of Stern, 68 Wn. App. 922, 928-29, 846 P.2d 1387 (1993).

Douglas's earnings exceeded $200,000 in the three years before trial—approximately $218,000 in 2007, $290,000 in 2008, and $211,000 in 2009. His billable hours fell off significantly as of January 2010 and stayed low during the months leading up to the August 2010 trial. The court found that his higher historical earnings were based on working hours "far in excess of full time" and that his current, less demanding work schedule was not an attempt to avoid child support.

Douglas provided substantial evidence to support these findings. He testified that he was currently working 40 hours per week and had not taken a vacation in 2010. Before the March 2009 incident of domestic violence that precipitated the dissolution, he had been working about 60 hours per week, but the stress was extreme. After that incident, he committed to billing fewer hours in order to "recalibrate" his "work-life balance." The managing partner of Douglas's firm confirmed that Douglas

had transitioned into a shorter work week with a flexible schedule that allowed him to work part-time from home in order to give more attention to parental duties.

Christina contends a 40-hour work week is not full-time employment as a matter of law for someone who has chosen a highly competitive field. The statute does not define "full-time." This court has looked to the dictionary meaning of the term as "working the amount of time considered customary or standard." Schumacher v. Watson, 100 Wn. App. 208, 997 P.2d 399 (2000).

Christina cites no authority indicating that a court may not deem a 40-hour work week to be customary or standard for busy professionals. In the cases she cites where courts have imputed income based on underemployment, the parents worked *far fewer* than 40 hours per week. Schumacher, 100 Wn. App. at 215 (underemployed father worked 8.9 days per month); DewBerry v. George, 115 Wn. App. 351, 357, 62 P.3d 525 (underemployed father worked 20 hours per week), review denied, 150 Wn.2d 1006 (2003); In re Marriage of Didier, 134 Wn. App. 490, 140 P.3d 607 (2006) (father an *unemployed* missionary), review denied, 160 Wn.2d 1012 (2007); Pollard, 99 Wn. App. 48 (mother an *unemployed* homemaker).

The child support order requires Douglas to provide updated proof of his income every 6 months until 2015. If his income is even 10 percent higher than the $100,000 calculated by the court, Christina "may seek adjustment of child support," with any adjustment effective the month the motion is filed. Thus, the order has a built-in mechanism to assure

Christina is treated fairly if Douglas's income turns out to be higher than predicted. Indeed, the record reflects that she obtained an adjustment on this basis in May 2012.

In summary, we find no abuse of discretion in the court's decision not to impute additional income to Douglas.

Both parties seek attorney fees on appeal under RCW 26.09.140. Both parties carry debt and have significant expenses, but they are both gainfully employed in their respective professions and possess adequate resources to pay their own fees. We deny both requests for attorney fees on appeal.

Affirmed.

Becker, J.

WE CONCUR:

Dwyer, J.

Appelwick, J.