

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re

VERNON RUSSELL BLANK,

Respondent,

and

AMANDA L. BLANK,

Appellant.

No. 39483-9-II

UNPUBLISHED OPINION

Quinn-Brintnall, J. — A trial court entered a final order of child support ordering Amanda Blank to pay Vernon Blank \$5,248.15 in overpaid child support. Amanda¹ appeals the order, asserting that the trial court failed to conduct a de novo review of the record of the proceeding before the commissioner resulting in an improper calculation of Vernon's income. Amanda further argues that the trial court impermissibly modified a tax exemption provision in the child support order, erred when it did not award her reasonable attorney fees, and that the superior court judge was biased.

¹ The first names of the parties are used for the ease and clarity of the reader.

We hold that the record of the trial court proceedings does not contain the trial court's explanation of its basis for denying Amanda's motion to revise the final order for child support and fails to demonstrate how it calculated Vernon's child support obligation. Because the record does not adequately support the trial court's ruling as to Vernon's income, its rulings regarding tax exemptions and attorney fees are not supported by substantial evidence. The record does not support Amanda's claim of trial court bias which, in any event, is moot. Accordingly, we vacate the trial court's final order for child support and remand for further proceedings.

FACTS

Vernon and Amanda divorced on December 29, 1993. They have two children, Adam and Ryan. On July 31, 2008, Vernon filed a petition for modification of child support, requesting the court (1) enter a new order for child support payments, (2) order repayment or credit for overpaid child support, and (3) award alternating years for tax exemptions between Vernon and Amanda.

On December 29, 2008, Vernon filed a motion for an order setting child support for Ryan, a minor child. Subsequent filings by the parties show an \$8,935 difference between what Amanda and Vernon each allege as Vernon's true monthly net income. Amanda asserts that Vernon fraudulently concealed his income behind his solely-owned business. Vernon denies any such concealment of income.

On March 18, 2009, a superior court commissioner heard Vernon's motion. Without reviewing the substantial volume of documents before him, the commissioner requested each party submit a three-page letter summarizing their position and directing him to key documents for review. The three-page summaries are not a part of the record before this court.

On March 31, 2009, the commissioner issued a letter ruling which concluded Amanda's

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income to be her asserted \$4,738 and Vernon's income to be \$7,600 for a support obligation for Ryan at \$750 per month. The letter did not articulate the methodology used to calculate these income amounts. The commissioner's final order also modified a tax exemption provision permitting Vernon to claim Ryan as a dependent in alternating years and awarded Vernon \$5,248.15 in overpaid child support. Both parties' requests for reasonable attorney fees were denied.

Amanda moved to revise the final order on the grounds that (1) the order should have been temporary, (2) the commissioner incorrectly found Vernon's income to be \$7,600, (3) the tax exemption provision should not have been changed because the issue was not argued in Vernon's motion for an order setting child support for Ryan, and (4) she should have been awarded reasonable attorney fees in light of Vernon's intransigence. Vernon also moved for revision, asserting that (1) he was entitled to interest on the overpaid child support, (2) the commissioner had incorrectly calculated Amanda's income, and (3) he was entitled to attorney fees.

On May 22, 2009, the trial court heard the parties on Vernon's motion for revision. Unlike the commissioner, the trial court stated it "read everything" in the record before it prior to the hearing. Report of Proceedings (RP) (May 22, 2009) at 12. Upon hearing argument, the trial court found there was no evidence of fraudulent behavior. But the trial court did make several comments regarding its opinion as to Amanda's motives for challenging Vernon's income claims. With respect to finding Vernon's income for purposes of setting child support, the trial

court stated, “I reviewed [the commissioner’s] order and his method for reaching the income. It actually seemed to me to make some sense. I’m not going to change it.” RP (May 22, 2009) at 23. Ultimately, the trial court did not change any significant portion of the order, retained jurisdiction, denied both parties attorney fees and issued the order as final. Amanda timely appeals.

DISCUSSION

Vernon’s Income Determination

Amanda contends that the trial court erred by failing to conduct a de novo review of the record in calculating Vernon’s true net income for purposes of modifying child support. To the extent the trial court failed to enter or articulate findings of fact and conclusions of law to support its determination, we agree.

We review a trial court’s modification of child support for abuse of discretion. *In re Marriage of Schumacher*, 100 Wn. App. 208, 211, 997 P.2d 399 (2000) (citing *In re Marriage of Peterson*, 80 Wn. App. 148, 152, 906 P.2d 1009 (1995), *review denied*, 129 Wn.2d 1014 (1996)). We will not substitute our judgment for that of the trial court unless the trial court’s decision rests on unreasonable or untenable grounds. *Leslie v. Verhey*, 90 Wn. App. 796, 802-03, 954 P.2d 330 (1998) (citing *In re Marriage of Griffin*, 114 Wn.2d 772, 779, 791 P.2d 519 (1990); *Pollock v. Pollock*, 7 Wn. App. 394, 399, 499 P.2d 231 (1972)), *review denied*, 137 Wn.2d 1003 (1999). Thus, substantial evidence must support the trial court’s findings of fact. *Schumacher*, 100 Wn. App. at 211 (citing *Peterson*, 80 Wn. App. at 153). Substantial evidence is evidence sufficient to persuade a fair-minded rational person of the truth of the declared premise.

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v. SHARE, 106 Wn.2d 212, 220, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050 (1987); *see also In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004) (an appellate court will uphold challenged findings of fact and treat the findings as verities on appeal if the findings are supported by substantial evidence). We may not disturb findings of fact supported by substantial evidence even if there is conflicting evidence. *In re Marriage of Lutz*, 74 Wn. App. 356, 370, 873 P.2d 566 (1994).

The record does not contain written findings or an oral ruling adequately setting out the basis for the trial court's ruling regarding Vernon's income. Contrary to Vernon's contention, the trial court's statement that the commissioner's method "seemed to me to make some sense" is not evidence, let alone the substantial evidence, required to support a finding that Vernon's monthly income was \$7,600 during the period of child support modification. RP (May 22, 2009) at 23; *see State v. Ramer*, 151 Wn.2d 106, 113, 86 P.3d 132 (2004) ("the superior court reviews both the commissioner's findings of fact and conclusions of law de novo based upon the evidence and issues presented to the commissioner"). Accordingly, we hold that the trial court's finding of a \$7,600 monthly income amount for Vernon is not supported by substantial evidence.

Modification of Tax Exemption Provision

Amanda contends that the trial court's modification of the tax exemption provision denied procedural due process.² Because this tax exemption will be decided on remand we do not address it here.

² Vernon requested a change in the allocation of tax exemptions in his petition for modification of child support. But he did not include the issue in his subsequent written motion for an order setting child support. It was only after the commissioner's ruling in Vernon's proposed final order of child support that the modified tax exemption provision appeared before the commissioner who signed the order over Amanda's objections.

Attorney Fees

We review a trial court's award of attorney fees for an abuse of discretion. *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 519, 910 P.2d 462 (1996). A court may award costs and attorney fees in a modification proceeding after considering the parties' financial resources. *Stout v. Stout*, 89 Wn. App. 118, 126, 948 P.2d 851 (1997). The court must balance the needs of the requesting party against the other party's ability to pay. *Stout*, 89 Wn. App. at 126. But trial courts must exercise their discretion on articulable grounds, making an adequate record so the appellate court can review a fee award. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632, 966 P.2d 305 (1998). Further, the trial court must enter findings of fact and conclusions of law to support an attorney fee award. *Mahler*, 135 Wn.2d at 435. "[A]bsence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record." *Mahler*, 135 Wn.2d at 435.

Here, the trial court did not reference adequate support for its calculation of Vernon's monthly income and a review of a fee award based on each party's ability to pay is precluded. Accordingly, we hold that the record is inadequate to support denial of an attorney fee award and remand for further proceedings consistent with this opinion.

Bias

Amanda contends the trial court's statements regarding Amanda's motives create an appearance of bias or unfairness warranting recusal. Amanda objected to the trial court retaining jurisdiction over the case because of what she perceived to be the court's bias during the May 22,

2009 hearing.³ Following the hearing, Amanda submitted a motion to vacate final order of child support and requesting that the trial judge recuse herself. The trial court heard and denied the motions on June 12, 2009.

A trial court is presumed to perform its functions regularly and properly without bias or prejudice. *In re Marriage of Meredith*, 148 Wn. App. 887, 903, 201 P.3d 1056 (citing *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 841, 14 P.3d 877 (2000)), review denied, 167 Wn.2d 1002 (2009). We review a trial court's denial of a motion that it recuse for an abuse of discretion. *Meredith*, 148 Wn. App. at 903 (citing *Wolfkill*, 103 Wn. App. at 840). Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct require that a judge disqualify him or herself from hearing a case if that judge is biased against a party or if his or her impartiality may be reasonably questioned. *Meredith*, 148 Wn. App. at 903 (citing *Wolfkill*, 103 Wn. App. at 841). The test for determining whether a judge's impartiality might reasonably be questioned is an objective one that assumes the reasonable person knows and understands all the relevant facts. *Sherman v. State*, 128 Wn.2d 164, 205-06, 905 P.2d 355

³ Specifically, Amanda argues that the following statements made by the trial court demonstrate bias or the appearance of bias,

Well, I can see why [Amanda] wants to go back to the future. We're here in 2009.
We are no longer in 2004.

RP (May 22, 2009) at 23.

What I did see is [Amanda] pulling up every expense she could use as a personal expense. . . . She's saying [Vernon's] income is nearly double what it was in 2004. I don't think that's the case. I'm not convinced of that.

RP (May 22, 2009) at 23.

I think that, frankly, that's indicative of [Amanda's] motivations in this case, which at this point are suspect. With the limited amount of child support that's remaining to her, this appears to be vindictive. The only really ongoing pattern I see is these two parties can't get along and need the Court to resolve every one of their disputes, apparently.

RP (May 22, 2009) at 27.

(1995). The party claiming bias or prejudice must support the claim with evidence of the trial court's actual or potential bias. *State v. Dominguez*, 81 Wn. App. 325, 328-29, 914 P.2d 141 (1996).

The statements Amanda cites are not evidence of the trial judge's actual or potential bias. Rather, the statements evince the trial court's credibility determination with respect to Amanda's contentions. Credibility determinations are for the trier of fact and we do not review them. Amanda has failed to produce evidence that would lead a reasonable person to believe the trial court was biased or prejudiced against her independent of its determination that her claims were incredible and frivolous. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). In any case, because the trial judge in question is no longer a superior court judge, the case will necessarily be heard by a different superior court judge and the issue is now moot.

Attorney Fees on Appeal

Citing RCW 26.09.140, both parties request attorney fees on appeal. Amanda argues that this court should exercise its discretion to award her the fees in light of Vernon's alleged intransigence in continuing to misrepresent his income. But we decline to find intransigence where the trial court did not. *See Goodman v. Darden, Doman & Stafford Assoc.*, 100 Wn.2d 476, 483, 670 P.2d 648 (1983) (appellate review is limited to determining whether a trial court's findings are supported by substantial evidence and, if so, whether the findings in turn support the conclusions of law). Vernon has not filed the necessary financial declaration to consider an award in his favor. Accordingly, we decline to award attorney fees to either party on appeal.

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We vacate the final order of child support 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.

QUINN-BRINTNALL, J.

We concur:

HUNT, P.J.

VAN DEREN, J.