IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of:	)	**No. 28467-1-III**
CHRIS CHARLES HOOPER,	)	
Respondent,	)	**Division Three**
and	)	
DEE ALYCE ZDUNIAK,	)	
Appellant.	)	**UNPUBLISHED OPINION**

Sweeney, J. — This case comes before the court for review of a trial court order modifying visitation rights and support obligations in a dissolution decree. These are discretionary decisions. We conclude there is no showing of an abuse of that discretion and we affirm the court's order.

FACTS

Dee Zduniak and Chris Hooper divorced in 2006. They are the parents of a nonverbal, severely autistic son, Desi. The final parenting plan called for shared custody of Desi.

Ms. Zduniak is a registered nurse. She works every other week on Monday and Thursday from noon until 12:30 a.m. Every other weekend she works Friday and Saturday from noon until 12:30 a.m. Mr. Hooper is also a registered nurse. He works three eight-hour shifts per week. Desi requires constant supervision. He is very active and often runs into things.

Ms. Zduniak moved to modify the parenting plan in May 2007 to reduce Mr. Hooper's time with Desi. She claimed that Mr. Hooper could not handle the shared time arrangement because of Desi's special needs. She reported that Mr. Hooper claimed that Desi had become a danger to his new infant son. A modified parenting plan and order for child support was entered in December 2007. The court designated Ms. Zduniak as the primary residential parent. The order required Mr. Hooper to pay $791.20 per month for child support. The $791.20 included Mr. Hooper's contribution toward day-care expenses for Desi. At that time, Desi's total monthly day-care expenses were $678.

In November 2007, Ms. Zduniak told the Washington State Department of Children and Family Services and Desi's physicians that Mr. Hooper was abusing him. She said that Mr. Hooper whipped Desi, burned him with cigarettes, poisoned him with tungsten, and locked him in a shed. Ms. Zduniak also named Mr. Hooper as a suspect in the burglary of her home.

Mr. Hooper moved to temporarily suspend his visits with Desi to address the allegations. The court granted his motion. Mr. Hooper moved to have Ms. Zduniak held in contempt for interfering with his visitation by her allegations of abuse. He claimed they were unfounded. Ms. Zduniak petitioned to modify the parenting plan to limit Mr. Hooper's time with Desi to two hours every other Sunday. She claimed that overnight visits with Mr. Hooper put Desi at risk.

The court heard three days of testimony at an adequate cause hearing and found that Ms. Zduniak's allegations were unfounded. The court, however, denied Mr. Hooper's motion to find Ms. Zduniak in contempt after finding that she had not directly interfered with the parenting plan by her allegations. The court then entered a temporary order that provided Mr. Hooper with visitation of alternating Sundays from 9:00 a.m. to 3:00 p.m. The court also denied Ms. Zduniak's request for the increased child-care costs she incurred, while Mr. Hooper's visitation was suspended, because "Ms. Zduniak . . . started this ball rolling with these allegations which, again, I have found to be unfounded." Report of Proceedings (RP) at 510. The court found adequate cause based on the needs of Desi and ordered a trial to determine what contact each parent should have with him. RCW 26.09.270.

Ms. Zduniak changed her position at trial to request a return to the previous

parenting plan. The court found that Mr. Hooper did not abuse Desi. The court adjusted the child support based on day care and ordered the parenting plan back to what it had been in 2007. The court ordered Ms. Zduniak to pay for the extra care expenses she incurred after her allegations and attempt to reduce Mr. Hooper's time with Desi. The court denied Mr. Hooper's request for attorney fees.

On August 18, 2009, the parties again appeared in court, this time on Mr. Hooper's motion to amend and clarify findings and on Ms. Zduniak's motion for reconsideration and clarification. Mr. Hooper's attorney came to the hearing with an order of support signed by the parties. The court made additional rulings and the parties understood they were to work together on a new order. Following the hearing, Mr. Hooper's attorney gave Ms. Zduniak's attorney a support order with changes penciled in. Ms. Zduniak's attorney signed the order, filed it with the court, and the court signed it. The court entered the final support order on August 19, 2009.

On September 9, 2009, the court held a hearing to finalize the order that the parties were instructed to work on. Mr. Hooper's attorney presented a final child support order to the court. But the parties discovered that the court had already entered the August 19, 2009 order. Ms. Zduniak's attorney admitted he had prematurely submitted the August order and orally moved the court for reconsideration. Ms. Zduniak continued to contest

the court's original calculation of support. The court allowed the parties to modify the August order to account for some variations during the summer months. This record, however, does not reflect a decision by the court to vacate the August order. Ms. Zduniak appealed the August 19, 2009 order of support on September 15, 2009.

After the September 9, 2009 hearing, Mr. Hooper redrafted the final order of support and submitted it to the court. This modified order was entered September 22, 2009. The September order differs from the August order only in that it adjusts the transfer payment to Ms. Zduniak upward by $15 per month to avoid having a different transfer payment for the summer months. Mr. Hooper cross-appealed the September order. He argues we do not have jurisdiction to hear the appeal because the August order was not the final order and the trial judge improperly refused to award his attorney fees.

DISCUSSION

Jurisdiction

Mr. Hooper first challenges our authority to review the case in the first place. He contends that Ms. Zduniak failed to appeal the final order of support. Her notice of appeal, filed September 15, 2009, seeks review of the "Order of Child Support" entered on August 19, 2009. Mr. Hooper argues that the September 22, 2009 order of child support superseded the August order and, therefore, that was the order she had to appeal.

Jurisdiction is a question of law so our review is de novo. *Crosby v. Spokane County*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999). Timely notice of appeal is a prerequisite to appellate jurisdiction. RAP 5.2; *In re Marriage of Maxfield*, 47 Wn. App. 699, 710, 737 P.2d 671 (1987). RAP 5.2(a) requires that a notice of appeal be filed within 30 days after entry of the trial court decision. If a notice of appeal is not filed "within 30 days of entry of an appealable order, the appellate court is without jurisdiction to consider it." *Maxfield*, 47 Wn. App. at 710.

Mr. Hooper argues that the August order was entered by mistake and the parties implicitly agreed to vacate the order at the September 9, 2009 hearing. He directs our attention to a statement made by Ms. Zduniak's counsel:

> The only other thing I'd need to do is to make sure we understand that Your Honor doesn't intend to modify the existing order that contains the thoughts that – the causes that direct the issuance of a parenting plan and support order other than as we had done here.
>
> The language of that original order that was carefully crafted and agreed was entered 12/13/07, not modified, expressly modified here today, remains the order of the Court, I take it, this new order is not to replace, alter or vacate the previous order is essentially what I want the Honor – Your Honor and Counsel to understand my understanding is.

RP at 784.

The trial judge did not respond to counsel's understanding of the orders nor was he required to. We need not search the record for implicit agreements made by the parties.

See Heilman v. Wentworth, 18 Wn. App. 751, 754, 571 P.2d 963 (1977). A final order was entered on August 19, 2009 and Ms. Zduniak timely appealed that order.

This court's permission is necessary after a notice of appeal only if the trial court makes a determination that "will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision." RAP 7.2(e). A trial court runs afoul of RAP 7.2(e) only if the subsequently entered order or judgment affects the outcome of any issues accepted for review. RAP 7.2(e); *State ex rel. Shafer v. Bloomer*, 94 Wn. App. 246, 250, 973 P.2d 1062 (1999).

Ms. Zduniak appeals the August 19, 2009 order of support. She contends that the day-care payments were improperly calculated and the court erred by requiring her to bear the increased costs of care during the proceedings. All of that is covered in the August order. The September 22, 2009 order differs only in that it adjusts the transfer payment upward by $15 per month.

The trial court, then, did not violate RAP 7.2(e) when it filed the subsequent orders because the essential challenges remained the same—calculation and assignment of child support. RAP 7.2(e) (the permission of the appellate court must be obtained only if the trial court's ruling changes the decision which has been appealed).

We have jurisdiction. The subsequent September order after review certainly does not impair our ability to review.

Child Support Calculation

We begin our discussion of the issues here with a couple of observations. First, this is a dissolution case and so we review the judge's decision mostly for abuse of discretion. *In re Marriage of Griffin*, 114 Wn.2d 772, 776, 791 P.2d 519 (1990). Second, this deferential standard of review is prompted by the need for finality in these matters. *In re Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985). Indeed, the financial and emotional toll exacted by these dissolution cases militates in favor of finality and against appellate "tinkering" with the trial judge's decision. *Id.*

Ms. Zduniak first contends that the court abused its discretion in setting day-care expenses. She argues that RCW 26.19.080 authorizes the court to order payment of child-care expenses in proportion to the child-care paid by each parent. Desi suffers from autism to the extent that his condition requires 24-hour care. Ms. Zduniak claims that she provides the bulk of the parental care for Desi as evidenced by all of the parenting plans filed in this matter. She also argues that the trial court abused its discretion when it used respite money received by her from the Division of Developmental Disabilities (DDD) to offset her monthly work-related child-care expenses. She argues that WAC 388-845-

1620 strictly prohibits the use of respite care funds for day-care expenses incurred while the parent works. Ms. Zduniak contends that the current order forces her to work every weekend that Mr. Hooper has Desi. Ms. Zduniak argues that she needs day-care reimbursement so that she can have time off while Desi is with Mr. Hooper. She claims that she has given up all social activities and maintenance of her home because of the commitments to Desi.

Again, our review is for abuse of discretion. *Griffin*, 114 Wn.2d at 776. We will not disturb findings supported by substantial evidence. *Griffin*, 114 Wn.2d at 779.

Child-care Calculation

Basic child support does not typically include day-care expenses. *In re Marriage of Mattson*, 95 Wn. App. 592, 599, 976 P.2d 157 (1999). The court, however, has discretion to order necessary and reasonable expenses that should be shared by the parties in proportion to the child support order. RCW 26.19.080(3), (4). The terms "necessary and reasonable expenses" and "day care" are interpreted in a manner that serves the best interest of the child. *Mattson*, 95 Wn. App. at 600.

Here, the court calculated that Ms. Zduniak works Mondays and Thursdays from noon to midnight on alternating weeks. On the other week, she works Fridays and Saturdays from noon to midnight. And Desi will be with Mr. Hooper on Fridays and

Saturdays. The court then concluded that Ms. Zduniak requires child care for the Mondays and Thursdays she works. This equals about 5 working days per month.

The court found that Ms. Zduniak goes to work around 11:30 a.m. and gets home at 12:30 a.m. the next day. Desi requires child care from 2:00 p.m. when he gets home from school until 8:00 a.m. the next day when he goes to school. So, Ms. Zduniak needs child care for 18 hours per work day for 5 days per month for a total of 90 hours per month (18 hours x 5 days = 90 hours). The cost of day care for an autistic child is $12 per hour. The court concluded that the total cost of day care per month is $1,080 (90 hours x $12 per hour = $1,080).

The court first calculated day-care expenses that were necessary and reasonable. The calculation included Desi's caretaking needs and balanced those needs with the work schedule of the parents. Ms. Zduniak's invitation to consider her social time would move us into the area of appellate "tinkering" that we should avoid. *Landry*, 103 Wn.2d at 809. The trial court did not abuse its discretion.

Respite Care Deduction

Ms. Zduniak contends that the court abused its discretion by deducting state provided respite care from the calculated day-care total. She argues that the child-care total was based entirely on the time she was working and respite funds may not be used

for time a parent is at work.

Respite care is short-term intermittent relief for persons normally providing care for waiver individuals.[1] WAC 388-845-1600. It is limited:

> (1) The DDD assessment will determine how much respite you can receive per chapter 388-828 WAC.
> (2) Prior approval by the DDD regional administrator or designee is required:
> (a) To exceed fourteen days of respite care per month; or
> (b) To pay for more than eight hours in a twenty-four hour period of time for respite care in any setting other than your home or place of residence. This limitation does not prohibit your respite care provider from taking you into the community, per WAC 388-845-1610(2).
> (3) Respite care cannot replace:
> (a) *Daycare while your parent or guardian is at work*; and/or
> (b) Personal care hours available to you. When determining your unmet need, DDD will first consider the personal care hours available to you.

WAC 388-845-1620 (emphasis added).

Again, the court set day-care expenses at $1,080 per month. The State pays Ms. Zduniak $492 per month for respite care. The court deducted the respite care funds for a total day-care expense of $588 ($1,080 – $492 = $588). It then split that sum equally between the parents. Mr. Hooper's share was $294 per month when Desi is in school.

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[1] "Home and community based services (HCBS) waivers are services approved by the Centers For Medicare and Medicaid Services (CMS) under section 1915(c) of the Social Security Act as an alternative to intermediate care facility for the mentally retarded (ICF/MR) care." WAC 388-845-0005(1).

The court adjusted that amount upward to $354 for day-care expenses in the summer because Desi is only in school until noon.

The monthly calculation was based on the court's determination that Ms. Zduniak needed child care for 18 hours per workday for five days per month. Mr. Hooper responds that the "18 hours per work day" includes child care while Ms. Zduniak is at work and after she returns home in the evening. He argues that the trial court assigned 10 hours of care per day while Ms. Zduniak is at work from 2:00 p.m. until 12:00 a.m. The remaining 8 hours of care per day were assigned for the time she is not at work from 12:00 a.m. until 8:00 a.m. Mr. Hooper calculates a monthly breakdown of $600 for care while at work and $480 for care while not at work. He admits the $492 deduction for respite care is $12 over the $480 per month required for care while not at work. He argues it is a nominal overpayment. We agree. "De minimis" means "[t]rifling; minimal. . . . . (Of a fact or thing) so insignificant that a court may overlook it in deciding an issue or case." Black's Law Dictionary 496 (9th ed. 2009).

Respite care cannot replace day care while a parent is at work. WAC 388-845-1620(3)(a). Ms. Zduniak works from 12:00 p.m. until 12:00 a.m. on the scheduled days. The court determined a need for 18 hours of child care per workday. Accounting for the time Desi is in school leaves approximately 8 hours in which Ms. Zduniak is at home and

needs child care. The court then properly deducted the respite funds Ms. Zduniak receives from the state for the care of Desi.

Ms. Zduniak argues that her work obligations coupled with the demands of raising an autistic child results in an exhausting schedule. She contends that she needs the day-care reimbursement so that she can have an occasional weekend off. But that does not show how the trial court abused its discretion by following the language of WAC 388-845-1620(3)(a).

Imputation of Income

Ms. Zduniak points out that the trial court did not impute income to Mr. Hooper. Ms. Zduniak argues that Mr. Hooper works for only three eight-hour shifts per week as a registered nurse and the court, then, should have concluded that he was underemployed. She has not assigned that as error, nor has she briefed the issue or shown how the court erred by refusing to impute income on Mr. Hooper.

That said, again, the assignment of error is reviewed for abuse of discretion. *In re Marriage of Shui*, 132 Wn. App. 568, 588, 125 P.3d 180 (2005). The trial court abuses its discretion if it exercises its discretion on "'a ground, or to an extent, [that is] clearly untenable or manifestly unreasonable.'" *In re Marriage of Curran*, 26 Wn. App. 108, 110, 611 P.2d 1350 (1980) (alteration in original) (quoting *In re Marriage of Nicholson*,

17 Wn. App. 110, 114, 561 P.2d 1116 (1977)). A court must impute income to a parent who is voluntarily unemployed or underemployed in order to prevent a parent from avoiding his or her child support obligation. RCW 26.19.071(6).

The court concluded that there was no showing that the parties' incomes had substantially changed from the last support order entered December 13, 2007. The trial court did not abuse its discretion by refusing to impute income to Mr. Hooper.

Increased Child-Care Expense During the Court Proceedings

Ms. Zduniak contends that the judge abused his discretion when he required her to pay for the additional child support payments after Mr. Hooper voluntarily suspended his visitation with his son.

A court abuses its discretion by making a decision based on findings of fact that are not supported by the record. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). The court has discretion to order necessary and reasonable child-care expenses that should be shared by the parties in proportion to the child support order. RCW 26.19.080(3), (4). The terms "necessary and reasonable expenses" and "day care" are interpreted in a way that meet the best interest of the child. *Mattson*, 95 Wn. App. at 600.

Ms. Zduniak argues that Mr. Hooper unilaterally suspended his visits with Desi.

Ms. Zduniak believes the court wrongly forced her to bear the entire expense simply because she reported injuries to her son. The judge found that Ms. Zduniak's multiple allegations of abuse were unfounded. The court scolded Ms. Zduniak for continuing to make allegations even after investigations cleared Mr. Hooper:

> Ms. Zduniak is alleging that Mr. Hooper has been abusing this child for three years, and I find that totally incredible based upon the fact that if she believed three years ago that Mr. Hooper was abusing this child and she sat on it for three years, that – no good parent would possibly do that that actually believed the child was being abused.
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> . . . . [T]his last allegation of abuse that came up last summer was fully investigated. Department of Social and Health Services has cleared Mr. Hooper of any involvement in any abuse, and I have a problem, frankly, with a child that every time he comes back from the father is inspected head to toe by the other parent and then pictures are taken of the child.
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> That [is] on the edge of abuse in and of itself, in my opinion. But, of course, if a child is actually being abused, of course, a parent wants to report it and they should report it. But in this particular situation, I cannot find that there was any justifiable belief that a reasonable person would have that this child was being abused.
>
> Ms. Zduniak said that Desi sometimes has to be restrained and she said she herself squeezes the child and holds him. Well, that in itself could put bruises on a child, but that certainly would not be child abuse. He's also a child that apparently is very active. He hits things, he runs into things and certainly it would not be unusual for a child like that to have bruises on his body.
>
> And then this incident with the allegation that somehow Mr. Hooper broke into Ms. Zduniak's house and stole her recorder and whatnot. There's absolutely – apparently, according to the police – there's just no evidence to show that Mr. Hooper was in any way involved in that, and that causes me concern also.

RP at 505-06; Clerk's Papers (CP) at 253-55.

The Department of Children and Family Services investigated the allegations and concluded they were unfounded. The police investigated the allegations and concluded that they were unfounded. Desi's treating physician concluded that the allegations of abuse were unfounded.

The trial court then reasonably concluded that the extra child-care expenses were Ms. Zduniak's responsibility because her allegations were unfounded. The court did not abuse its discretion by ordering Ms. Zduniak to pay for the reasonable and necessary child-care costs during the proceedings.

Mr. Hooper's Attorney Fees

Mr. Hooper contends that the court erred when it refused to order Ms. Zduniak to pay his attorney fees since her petition was brought in bad faith. He argues that former RCW 26.09.260(11) (2000) mandates a trial court to award attorney fees to the non-moving parent when bad faith is found.

As with the other question raised by this appeal, we review a trial court's denial of attorney fees for abuse of discretion. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 148, 859 P.2d 1210 (1993). "If the court finds that a motion to modify a prior decree or parenting plan has been brought in bad faith, the court shall assess the attorney's fees and

court costs of the nonmoving parent against the moving parent." Former RCW 26.09.260(11). Bad faith means "[d]ishonesty of belief or purpose." Black's Law Dictionary 159 (9th ed. 2009). Bad faith occurs when a party intentionally brings a claim with an improper motive or purpose. *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 929, 982 P.2d 131 (1999).

The court found that Ms. Zduniak's allegations of abuse were unfounded and scolded her. The court denied Mr. Hooper's motion for contempt finding that Ms. Zduniak had not directly denied Mr. Hooper's court-ordered visitation with Desi. We will defer to the court's conclusion that Ms. Zduniak did not intentionally petition with improper motive. *Weyerhaeuser v. Tacoma-Pierce County Health Dep't*, 123 Wn. App. 59, 65, 96 P.3d 460 (2004).

The trial court's refusal to award attorney fees based on bad faith was not unreasonable and, therefore, the court did not abuse its discretion.

Fees on Appeal

Both parties seek attorney fees on appeal pursuant to RAP 18.1 and RCW 26.09.140. Mr. Hooper also repeats his bad faith argument under former RCW 26.09.260(11), requests sanctions under RAP 18.9, and asks for costs under RAP 14.2 and 14.3.

RAP 18.1 allows a grant of attorney fees on appeal where applicable law provides for attorney fees. RCW 26.09.140 provides that this court may grant reasonable attorney fees and the costs of defending any proceeding under chapter 26.09 RCW.

We must consider "the needs of the requesting party" and "the other party's ability to pay." *In re Marriage of Robertson*, 113 Wn. App. 711, 716, 54 P.3d 708 (2002). Here, we conclude that there has not been an adequate showing of need or that either party has the ability to pay the other party's attorney fees. Both parents appear financially able to pay an attorney as they are gainfully employed as registered nurses. Their requests for fees are denied.

RAP 14.2 and 14.3 authorize an award of costs, including statutory attorney fees, to the substantially prevailing party on appeal.

We affirm the order of the superior court and we award Mr. Hooper his costs and statutory attorney fees only.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Kulik, C.J.

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Korsmo, J.