IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Matter of the Parentage of:	)	**No. 28638-0-III**
PIPER ALDEN, ELLEOT ALDEN,	)	
	)	**Division Three**
SARA BURNS,	)	
Appellant,	)	
	)	**UNPUBLISHED OPINION**
and	)	
RYAN HODGE,	)	
Respondent.	)	

Kulik, C.J. — Sara Burns and Ryan Hodge had two children during their relationship.[1] When the couple separated, the children were preschool age. Ms. Burns challenges the validity of the final parenting plan entered in the Spokane County Superior Court. We conclude that the parenting plan was a valid, enforceable agreement, and we

[1] The record does not contain a dissolution decree or a statement that the parties were ever actually married. One of the challenged decisions is the trial court's "Findings of Fact and Conclusions of Law on Petition for Residential Schedule/Parenting Plan or Child Support," which includes the finding that Mr. Hodge is the acknowledged father who signed the acknowledgement of paternity. Clerk's Papers (CP) at 11. The marital status of the parties has no bearing on this case.

affirm the trial court in all respects.

FACTS

Little is revealed in this record regarding the relationship of Ms. Burns and Mr. Hodge other than that they lived in Spokane with their two young children and are now separated. Their parenting plan negotiations apparently were contentious. After interviewing the couple and conducting an investigation, the guardian ad litem (GAL) recommended against joint custody because the parties could not be expected to communicate well enough to make joint decisions regarding the children. At a pretrial hearing, however, the parties agreed to engage in mediation without their attorneys or the GAL.

The mediation was held on October 20, 2009, with mediator Tim Harkins. The parties agreed on the residential schedule and that Mr. Hodge would pay a reduced child support payment of $300 per month. At first, Ms. Burns agreed to share custody, with neither parent holding the designation of primary caregiver. Mr. Hodge claimed that he had been the primary caregiver before the separation. The agreed upon residential schedule gave Ms. Burns custody 114 hours and Mr. Hodge 54 hours on some weeks and, on alternating weeks, gave Ms. Burns 93 hours and Mr. Hodge 75 hours. Mr. Hodge insisted that he would agree to the residential schedule only if he was designated joint

legal custodian, with joint decision making authority.

At some point during mediation, Ms. Burns called her sister, a family law attorney, for advice. After this conversation, Ms. Burns refused to agree to the joint custody designation. Mediation stalled, and the parties left without signing an agreement.

That night, Mr. Hodge called Ms. Burns about 10 times and tried to get her to agree to the joint custody designation. He told her it could get "'ugly'" if she did not sign, and certain unfavorable things could be revealed about her if the parties went to trial. Report of Proceedings (RP) at 13. Eventually, Ms. Burns texted Mr. Hodge that she would sign the mediation agreement—with the joint custody designation—the next day at Mr. Harkins's office. At trial, she claimed she agreed to sign just to "get him off [her] back." RP at 13. Mr. Hodge called Mr. Harkins and had him draft the proposed parenting plan as negotiated, including joint custody. But Ms. Burns did not appear for the signing and told Mr. Hodge she had to go to the hospital instead due to a migraine. She never signed the agreement.

Trial was set for October 28, 2009. The parties originally agreed that the only issue before the court would be the designation of custody. Ms. Burns's counsel earlier that week had sent an agreed parenting plan to Mr. Hodge's counsel. This was the plan reached in mediation, including the residential schedule and child support of $300 per

month. Minutes before trial, however, Ms. Burns balked at the child support amount. Her counsel explained to the court that Ms. Burns agreed to $300 before she discovered information regarding Mr. Hodge's income. Ms. Burns, who was receiving food stamps, claimed that her temporary support payment of $450 was barely sufficient and that a child support payment of $300 would be a hardship on the children. Mr. Hodge's counsel objected to reconsideration of the child support issue. Noting that both parties recognized that there was a partial settlement agreement, and that Ms. Burns had agreed to the terms of that agreement except for the legal designation of custody, the trial court declined to consider the child support issue.

At trial, Ms. Burns testified that although she told Mr. Hodge she would sign the mediated parenting plan giving him joint custody, she never actually intended to sign it. The GAL testified telephonically on the relationship of the parties. He described Ms. Burns as somewhat passive in stressful situations and Mr. Hodge as more assertive. On rebuttal, Ms. Burns's attorney asked to put Ms. Burns on the stand again to testify about the couple's domestic violence history. Mr. Hodge objected that no domestic violence restrictions were included in the parenting plan. The trial court sustained the objection because the issue was raised too late in the parenting plan process and because Ms. Burns's lay opinion would not be helpful.

The trial court concluded that the parties were on an equal footing at the mediation, which resulted in a proposed parenting plan that designated the parents as joint custodians. Even after Ms. Burns had the additional input from her sister, the court continued, she indicated to Mr. Hodge that she would sign the proposed parenting plan. The court held that the parties had an enforceable settlement agreement. Ms. Burns appeals the final parenting plan, the findings of fact and conclusions of law, the final order of child support, and the judgment and order establishing the residential schedule, parenting plan, and child support.

ANALYSIS

Ms. Burns first contends she and Mr. Hodge never reached a binding agreement on the proposed parenting plan. Citing CR 2A, she argues that the agreement is unenforceable because the parties did not agree on all of its terms and she did not sign the mediator's draft of the agreement.[2]

Although the record does not contain many of the documents filed by the parties, we may assume that Mr. Hodge moved the court to adopt the settlement provisions

[2] Ms. Burns also contends statements she made to the mediator were privileged and inadmissible as evidence under RCW 7.07.030 and RCW 7.07.050 of the uniform mediation act, chapter 7.07 RCW. She raised no objection to any testimony regarding mediation at trial, however, and therefore waived the issue on appeal. RAP 2.5(a); *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008).

memorialized in Mr. Harkins's draft of the proposed parenting plan. A motion to enforce a settlement agreement is like a summary judgment motion. *Lavigne v. Green*, 106 Wn. App. 12, 16, 23 P.3d 515 (2001). Consequently, review is de novo. *Id.*

Enforcement of a settlement agreement is governed by CR 2A, which generally states that unsigned, disputed agreements in a legal proceeding are not enforceable:

> No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

The rule applies only when the agreement was made "in respect to the proceedings in a cause" and when the "purport" of the agreement is genuinely disputed. *In re Marriage of Ferree*, 71 Wn. App. 35, 39, 856 P.2d 706 (1993). In this case, the settlement agreement was in writing, but it was not signed by Ms. Burns or her attorney. Therefore, our first question is whether CR 2A applies and prevents the trial court from considering and enforcing the mediated parenting plan.

Clearly, the agreement memorialized by the mediator was made in respect to the parenting plan proceedings, meeting the first of the CR 2A criteria. The issue then is whether Ms. Burns genuinely disputed the purport of the agreement. *Lavigne*, 106 Wn. App. at 19; *Ferree*, 71 Wn. App. at 40-41. A genuine dispute is one that is "over the

existence or material terms of the agreement, as opposed to a dispute over its immaterial terms." *Ferree*, 71 Wn. App. at 40. Once the material terms are agreed upon, a party's remorse or second thoughts about the agreement are insufficient to show a genuine dispute. *Lavigne*, 106 Wn. App. at 19.

Usually the moving party carries the burden of proving that there is no genuine dispute over the existence and material terms of a settlement agreement. *Ferree*, 71 Wn. App. at 41. But sometimes this burden is relieved by discussions in open court. *Id*. In this case, as in *Ferree*, the nonmoving party admitted that she agreed to sign the proposed parenting plan as drafted by the mediator. Ms. Burns contends, however, that she never subjectively intended to sign and only agreed because she was being harassed by Mr. Hodge.

"Settlement agreements are governed by general principles of contract law." *Morris v. Maks*, 69 Wn. App. 865, 868, 850 P.2d 1357 (1993). In interpreting settlement agreements, the court attempts to determine the intent of the parties by focusing on the objective manifestations expressed in their agreement. *McGuire v. Bates*, 169 Wn.2d 185, 189, 234 P.3d 205 (2010). The subjective intent of the parties is irrelevant as long as we can impute an intention that corresponds to the reasonable meaning of the actual words used. *Id.* Under the "context rule" adopted in *Berg v. Hudesman*, 115 Wn.2d 657,

667-69, 801 P.2d 222 (1990), the court may consider extrinsic evidence to discern the meaning or intent of the words used in the agreement, but this evidence will not be considered if it merely shows a party's subjective intent or if it contradicts the words used. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 693-95, 974 P.2d 836 (1999). Ms. Burns's testimony that she did not agree to joint custody and never intended to sign the settlement draft of the proposed parenting plan was properly disregarded by the trial court because she had admittedly agreed to endorse the agreement as written. Any evidence that she subjectively disagreed and intended terms that contradict the clear language of the agreement could not be considered. *Id.*

If Ms. Burns's agreement to the terms was coerced by undue influence, however, the proposed parenting plan might be unenforceable. *In the Matter of Infant Child Perry*, 31 Wn. App. 268, 272, 641 P.2d 178 (1982) (undue influence is a species of fraud and will vitiate a transaction). Undue influence is unfair persuasion that seriously impairs the free and competent exercise of judgment. *Id*. at 272-73 (quoting Restatement (Second) of Contracts § 177, comment b at 491 (1981)). To decide whether undue influence has vitiated a particular agreement, the court considers such factors as the unfairness of the bargain, the unavailability of independent advice, and the susceptibility of the party who was persuaded. *Id.* Here, the court found that the parties "were at least on an equal

footing." RP at 45. They had agreed to mediation without the benefit of counsel, yet Ms. Burns consulted with counsel—her sister—during the negotiations. Even with the benefit of counseling, the trial court noted, Ms. Burns agreed at the end of the day to joint custody. Finally, the court considered evidence that Ms. Burns was overborne by Mr. Hodge's assertive personality. Under the "totality of the circumstances," the court concluded, the proposed parenting plan was approved by equal parties and was not the product of undue influence. RP at 45.

Considering the evidence in the light most favorable to Ms. Burns, this court concludes that she fails to show that she genuinely disputed the material terms of the mediated agreement. CR 2A; *Lavigne*, 106 Wn. App. at 19; *Ferree*, 71 Wn. App. at 40-41. Reasonable minds could reach but one conclusion: that a settlement was reached without undue influence and its terms were set forth in Mr. Harkins's draft of the proposed parenting plan. *See Ferree*, 71 Wn. App. at 45. Although Ms. Burns would prefer not to comply with the plan, its "purport" was not disputed under the meaning of CR 2A, and the trial court did not err by enforcing it. *Id.* The proposed parenting plan was a valid, enforceable agreement.

Ms. Burns next contends several of the trial court's findings to support the parenting plan are unsupported by the record. We review the trial court's findings of fact

for an abuse of discretion. *Fernando v. Nieswandt*, 87 Wn. App. 103, 108, 940 P.2d 1380 (1997). Because the court was in a position to observe the parties at trial, the court's findings are given great weight and will not be disturbed if supported by ample evidence. *Id.* Each of the trial court's findings here is adequately supported by the record.

Some of the findings disputed by Ms. Burns come from the mediated parenting plan, which was properly adopted by the trial court as an enforceable agreement. Included in these findings are the residential schedule and the $300 monthly child support payment. The trial court's conclusion that Ms. Burns agreed to those terms is supported by the record, as discussed above. The record also shows that the support obligation deviates from the standard calculation (which is over $500 in this case) because the children spend a significant amount of time with Mr. Hodge. A trial court has discretion to deviate from the standard calculation if the child spends a significant amount of time with the parent who is obligated to pay support. RCW 26.19.075(1)(d); *Fernando*, 87 Wn. App. at 110-11. Because the evidence amply supports the findings regarding the residential schedule and child support, the trial court here did not abuse its discretion.

Ms. Burns also assigns error to the trial court's failure to make findings providing for health insurance, requiring transmittal of the restraining orders to the police, and

providing back child support. These issues were not addressed at trial and they are not properly raised for the first time on appeal. RAP 2.5(a); *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008); *see also Burch v. Burch*, 81 Wn. App. 756, 761, 916 P.2d 443 (1996) (it is each party's obligation to raise issues that must be addressed by the trial court; failure to do so waives the issues). Moreover, the issues are without merit. The child support order states that each parent is responsible for health insurance coverage and that "[b]ack child support that may be owed is not affected by this order." Clerk's Papers at 20. The judgment and order on the parenting plan continues the mutual restraining orders already in place against each party. Ms. Burns provides no evidence that these provisions are inadequate as adopted.

Finally, Ms. Burns contends the trial court erred by failing to designate a primary custodial parent. RCW 26.09.285 states that the parenting plan must designate the parent with whom the child resides the majority of the time as the custodian of the child. This custodial parent designation, however, is "[s]olely for the purposes of all other state and federal statutes which require a designation or determination of custody." RCW 26.09.285; *accord In re Marriage of Kimpel*, 122 Wn. App. 729, 731, 94 P.3d 1022 (2004). Because here, as in *Kimpel*, the residential schedule roughly divides residential time equally between the parties, the record supports the trial court's refusal to

designate either party as the custodial parent. *Kimpel*, 122 Wn. App. at 731.

The findings are supported by the record.

Lastly, according to Ms. Burns, the trial court excluded evidence that Mr. Hodge had a history of domestic violence. She contends the court prevented her from presenting testimony by the GAL about the dynamics of the couple's relationship and Mr. Hodge's violent actions. Her contentions are not supported by the record. The GAL testified telephonically and freely responded to questions from Ms. Burns's counsel regarding the parties' personalities and relationship. Ms. Burns's counsel never asked the GAL about violence in the relationship.

The person prevented from testifying about domestic violence was Ms. Burns herself. We review the court's decisions on the admissibility of evidence for an abuse of discretion. *McGreevy v. Oregon Mut. Ins. Co.*, 74 Wn. App. 858, 871, 876 P.2d 463 (1994), *aff'd*, 128 Wn.2d 26, 904 P.2d 731 (1995). The trial court sustained Mr. Hodge's objection to Ms. Burns testifying on rebuttal about alleged domestic violence. As the court noted, the issue of domestic violence had not been raised until the trial rebuttal, after a prolonged period of negotiations and settlement of the parenting plan issues. Although RCW 26.09.191(2)(a) states that a parent's residential time with the child shall be limited if the parent has a history of domestic violence, Ms. Burns has never argued

for increased residential time on this basis.

Rebuttal evidence is admissible to answer new material presented by the opposing party, not to reiterate evidence offered in the case in chief. *McGreevy*, 74 Wn. App. at 871. The rebuttal offered by Ms. Burns did not refute new evidence presented by Mr. Hodge. He admitted that he had called Ms. Burns multiple times the night after the mediation negotiations and that he threatened to reveal unfavorable information about Ms. Burns if they did not reach a settlement. The court also heard the GAL's testimony that Ms. Burns tended to submit to Mr. Hodge's more assertive personality during stressful situations. Ms. Burns's rebuttal testimony regarding domestic violence would have been redundant and would not have refuted Mr. Hodge's testimony. Accordingly, the trial court did not abuse its discretion by excluding her rebuttal testimony.

In a separate section of her appellate brief, Ms. Burns requests attorney fees on appeal, citing Mr. Hodge's alleged intransigence. Attorney fees may be awarded on appeal without consideration of the parties' financial resources when the intransigence of one party causes the other party to incur additional fees. *In re Marriage of Mattson*, 95 Wn. App. 592, 605-06, 976 P.2d 157 (1999); *In re Marriage of Crosetto*, 82 Wn. App. 545, 563-64, 918 P.2d 954 (1996). Intransigence includes "foot-dragging" and obstructionist behavior that makes a trial unduly difficult. *In re Marriage of Greenlee*, 65

Wn. App. 703, 708, 829 P.2d 1120 (1992).

Ms. Burns claims that Mr. Hodge's conduct "was the epitome of intransigence" because he did not propose a fair settlement at the outset, forced her to react to his "every move," and confused the issues, leaving Ms. Burns "no choice but to appeal the trial court's insupportable rulings." Appellant's Br. at 19. In other words, by opposing Ms. Burns, Mr. Hodge caused her to incur trial and appellate fees. But Ms. Burns fails to show that Mr. Hodge's pretrial, trial, and appellate conduct was anything other than is typical in litigation. She provides no evidence of obstructionist behavior that made the trial and appellate procedures unusually difficult. Thus, she is not entitled to attorney fees on appeal based on intransigence.

We affirm the trial court in all respects.

A majority of the panel has determined 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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Kulik, C.J.

WE CONCUR:

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Brown, J.

Korsmo, J.