

69108-2

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NO. 69108-2

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

ROBERT GUSTAVESON

Appellant,

v.

Amina Babyev,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE TIMOTHY A. BRADSHAW, JUDGE

BRIEF OF RESPONDENT STATE

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A. **INTRODUCTION**

This is an appeal from a modification of child support action filed by the appellant father, Robert Gustaveson. CP 253-297. Appellant has alleged error regarding a number of the superior court's rulings on his motion for reconsideration of the superior court's order on revision. Appellant's Brief at 1.

The State does not represent Appellant or respondent Ms. Babayev. The State entered a notice of appearance in this case pursuant to RCW 74.20, RCW 74.20A, and RCW 26.23.130 because the child has received public assistance in the form of Temporary Aid for Needy Families (TANF) in the past. CP 140-142. As a result, there is already accrued back support owing to the State as reimbursement for past public assistance paid. CP 371-379.

The State does not have any direct financial interest in the amount of current support ordered by the court except for those months the child received TANF (June 16, 2010 through September 30, 2011. CP 371-379). Because of the State's limited interest, the State is only addressing

Appellant's second claim of error regarding retroactive modification of child support. See Appellant's Brief at 1.

B. ASSIGNMENT OF ERROR

The State does not allege any assignments of error. Nor does the State agree with any of Appellant's assignments of error.

C. ISSUE PRESENTED

WAS THE SUPERIOR COURT'S RULING THAT CHILD SUPPORT SHOULD NOT BE MODIFIED RETROACTIVELY AN ABUSE OF DISCRETION?

D. STATEMENT OF THE CASE

Appellant filed a notice of appeal on July 26, 2012. CP 253-397. Appellant is appealing the honorable Judge Timothy Bradshaw's July 3, 2012 order denying his motion for reconsideration of the court's order on revision. CP 253-297.

Appellant filed a petition to modify his child support order August 22, 2011. CP 1-4. The State filed a notice of appearance and response to the petition indicating the State had an interest in the case because public assistance was being or had been provided for the child. CP 140-142. The

child received TANF from June 16, 2010 through September 30, 2011. CP 371-379.

The State filed a trial memorandum requesting that any modified order of child support not affect back support owing to the State. CP 157-159. A trial by affidavit was held December 8, 2011 before a family law commissioner. CP 191. The commissioner found there was a basis to modify support. CP 197-190. The commissioner imputed Appellant's income at full time minimum wage, resulting in a transfer payment of \$166 per month. CP 160-180. The commissioner ordered a June 1, 2011 start date for the modified order. CP 160-180. The State signed the order for purposes of back child support owing to the State and state medical assistance. CP 160-180.

Appellant filed a motion for revision of the commissioner's December 8, 2011 orders. CP 199-200. Appellant's motion requested the superior court revise the commissioner's ruling regarding the start date of the modified order and that the court evaluate his request for a downward deviation. CP 199-200. The State did not take a position on either issue. CP 207-208. The State's response

to the motion for revision requested that back support owing to the State not be affected. CP 207-208. The State was not present at the revision hearing. CP 211.

On April 26, 2012 the superior court affirmed the commissioner's ruling, finding there was a basis for modification. CP 214-215. However, the superior court ordered child support be recalculated and the start date not be retroactive beyond the date the petition for modification was filed. CP 214-215.

The court ordered Appellant's income based on his historical rate of pay. CP 214-215. The court entered a new order of child support with a child support obligation of \$421.08 beginning May 1, 2011. CP 216-228.

Appellant filed a motion for reconsideration of Judge Bradshaw's ruling on his motion for revision. CP 229-235. The State did not receive notice of this motion. CP 236-237. Judge Bradshaw issued an order denying the motion for reconsideration July 3, 2012. CP 245-247.

Appellant is appealing the July 3, 2012 order. CP 253-297.

E. **ARGUMENT**

THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S REQUEST TO RETROACTIVELY MODIFY CHILD SUPPORT.

Superior Court Standard of Review

The superior court's *de novo* review on revision and reconsideration was proper. CP 214-215, 245-247. The superior court is not bound by the commissioner's decision.

RCW 2.24.050 provides: "All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court." "The actions of a superior court commissioner are subject to revision by a superior court judge." *In re Marriage of Dodd*, 120 Wash. App. 638, 643, 122 P.3d 929 (2005) (citing *State v. Lown*, 116 Wash.App. 402, 407, 66 P.3d 121 (2003)).

When the evidence before the commissioner does not include live testimony the superior court reviews the record *de novo*. *In re Marriage of Dodd*, 120 Wash. App. 638, 643, 122 P.3d 929 (2005) (citing *In re Marriage of Moody*, 137 Wash.2d 979, 993, 976 P.2d 1240 (1999)). "But the revision court's scope of review is not limited merely to whether substantial evidence supports commissioner's

findings.” *In re Marriage of Dodd*, 120 Wash. App. 638, 644, 122 P.3d 929 (2005) (citing *In re Smith*, 8 Wash.App.285, 288, 505 P.2d 1295 (1973)). “The revision court has full jurisdiction over the case and is authorized to determine its own facts based on the record before the commissioner.” *In re Marriage of Dodd*, 120 Wash. App. 638, 644, 122 P.3d 929 (2005) (citing *In re Dependency of B.S.S.*, 56 Wash. App. 169, 171, 782 P.2d 1100 (1989); *In re Welfare of McGee*, 36 Wash. App. 660, 679 P.2d 933 (1984); *Smith*, 8 Wash.App. at 288-89, 505 P.2d 1295)). “[T]he superior court judge is not required to defer to the fact finding discretion of the commissioner” *In re Marriage of Dodd*, 120 Wash. App. 638, 645, 122 P.3d 929 (2005) (citing *B.S.S.*, 56 Wash. App. At 171, 782 P.2d 1100; *Smith*, 8 Wash.App. at 288-89, 505 P.2d 1295)). “A revision court may, based upon an independent review of the record, re-determine both the facts and legal conclusions drawn from the facts.” *In re Marriage of Dodd*, 120 Wash. App. 638, 645, 122 P.3d 929 (2005) (citing *B.S.S.*, 56 Wash. App. At 171, 782 P.2d 1100)). “[T]he superior court has full jurisdiction over the

case.” *In re Marriage of Dodd*, 120 Wash. App. 638, 645, 122 P.3d 929 (2005).

The modification trial before the commissioner was a trial by affidavit. Neither party was sworn in to give testimony. RP 1-34. The superior court was not required to defer to the commissioner’s findings and order. Therefore the superior court’s *de novo* review on revision and reconsideration was proper.

Standard of Review on Appeal

The standard of review for a superior court order on reconsideration is whether the ruling constitutes an abuse of discretion. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wash.App. 73, 88, 60 P.3d 1245 (2003) (citing *Weems v. North Franklin Sch. Dist.*, 109 Wash.App. 767, 777, 37 P.3d 354 (2002)). The standard of review for a superior court’s ruling on revision is also whether the ruling constitutes an abuse of discretion. *In re Marriage of Dodd*, 120 Wash. App., 638, 644, 122 P.3d 929 (2005).

“A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds

or untenable reasons.” *Go2Net, Inc. v. C I Host, Inc.*, 115 Wash.App. 73, 88, 60 P.3d 1245 (2003) (citing *Weems v. North Franklin Sch. Dist.*, 109 Wash.App. 767, 777, 37 P.3d 354 (2002)).

A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

In re Marriage of Fiorito, 112 Wash.App. 657, 664, 50 P.3d 298 (2002) (citing *In re Marriage of Littlefield*, 133 Wash.2d 39, 47, 940 P.2d 1362 (1997)).

Retroactive Modification

It was reasonable under the facts and the law for the superior court to conclude that child support should not be modified retroactively.

RCW 26.09.170(1) states: “[e]xcept as otherwise provided in RCW 26.09.070(7), the provisions of any decree respecting maintenance or support may be modified: (a) Only as to installments accruing subsequent to the petition for modification or motion for adjustment except motions to compel court-ordered adjustments. . .” RCW 26.09.070(7) is

not applicable as it refers to separation contracts. The 2008 support order did not contain any provision for court-ordered adjustment. CP 49-60.

“Under RCW 26.09.170, a retroactive child support modification is highly disfavored except in certain unusual circumstances . . .” *In re Marriage of Cummings*, 101 Wash.App. 230, 234, 6 P.3d 19 (2000). “It is well settled that a court may not modify maintenance and support payments retroactively.” *In re Marriage of Drlik*, 121 Wash.App. 269, 279, 87 P.3d 1192 (2004) (citing *In re Marriage of Olsen*, 24 Wash.App. 292, 295, 600 P.2d 690 (1979)). “Delinquent support payments become vested judgments as they fall due, and generally, they may not be retrospectively modified. *In re Marriage of Barone*, 100 Wash.App. 241, 244, 996 P.2d 654 (2000).

The *Barone* court indicates traditional equitable remedies may be available to the paying parent “when their application does not work an injustice to the custodial parent or to the child.” *Id* at 245 (citing *Hartman v. Smith*, 100 Wash.2d 766, 768, 674 P.2d 176 (1984)). The record must also support the paying parent’s “. . . claim that enforcement

would create a severe hardship . . .” *In re Marriage of Barone*, 100 Wash.App. 241, 246, 996 P.2d 654 (2000) (quoting *In re Marriage of Capetillo*, 85 Wash.App. 311, 319, 932 P.2d 691 (1997)).

Appellant filed the petition for modification of child support on August 22, 2011. CP 1-4. The commissioner’s modified child support order began June 1, 2011, which was actually more than two months prior to the date the petition was filed. CP 160-180. However, the commissioner stated that she did not believe she had the authority to grant a modification retroactive to the date of filing. RP 32. (The commissioner thought the petition was filed in May 2011, hence the June 1, 2011 start date. RP 32).

The superior court’s modified order of child support began May 1, 2011, more than three months prior to the date the petition was filed. CP 216-228. The State believes this was a clerical error and the superior court intended a May 1, 2012 start date, as the order of child support on revision was entered at the end of April 2012. CP 216-228.

Further, the superior court’s July 3, 2012 Order Re Revision states: “. . . the modified Order of Child Support

may not be applied retroactively beyond the date of filing. It is clear that under RCW 26.09.170(1) a court may not backdate child support prior to the petition absent a motion to compel a court ordered automatic adjustment; here, there is/was no such provision." CP 214-215.

It appears Appellant was inadvertently granted a modification of child support retroactive beyond the August 22, 2011 filing date. Clearly this was not the court's intent. The language in the superior court's order is clear the court did not intend to make the modified order retroactive beyond the filing date. This was a clerical error, not an abuse of discretion.

Based on the evidence before the court, it was also not an abuse of discretion to deny Appellant's request for a retroactive modification. Appellant claims support should be retroactively modified to April 2009. Appellant's Brief at 8. Appellant does not cite any law or statute to support his claim. Appellant's Brief does not specifically argue for equitable relief either. Instead, he claims the superior court did not cite adequate findings to support its denial of the request for retroactive modification. Appellant's Brief 8-10.

Even if equitable relief were claimed, the facts do not support it. Appellant's financial declaration indicates he has a college degree and has \$9,000 in stocks, bonds, and life insurance. CP 117-122. Although Appellant is currently not employed, he indicates he has real estate worth \$100,000 and investments of \$12,000. CP 13-22. Employment Security records show significant employment in the past. CP 371-379. The record also shows Ms. Babyev has received public assistance in the past CP 371-379. At the time of trial she had recently terminated public assistance (TANF). CP 371-379. Employment Security records show she has a history of low earnings. CP 371-379. The record before the superior court does not support a claim of equitable relief. The evidence does not support a claim that enforcement would cause a severe economic hardship on the paying parent *and* such relief would not harm the custodial parent or child.

Neither the evidence nor the law support retroactive modification of child support beyond the date of filing. The superior court did not abuse its discretion when it denied Appellant's request for retroactive modification.

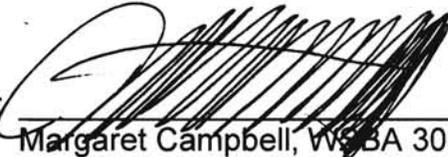
F. **CONCLUSION**

The superior court did not err by denying Appellant's request for a retroactive modification. Appellant's request on appeal for retroactive modification of child support should be denied.

DATED this 11th day of January, 2013.

RESPECTFULLY submitted,

By:

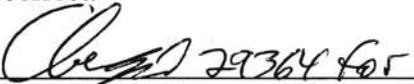


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Certificate of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Appellant, Robert Gustaveson , at the following address: 412 Wells AVE N., Renton, WA 98057 and to Respondent, Amina Babayev, at the following address: 436 102nd AVE SE, #B-303, Renton, WA 98004, containing a copy of Brief of Respondent State to be sent to Court of Appeals, in Robert Gustaveson v. Amina Babyev, No. 69108-2, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Margaret Campbell
Done in Kent, Washington

1/14/13
Date

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