

FILED
Court of Appeals
Division III
State of Washington
4/24/2018 8:00 AM

No. 32650-1-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

In re the Marriage of:

KERT A. CARLSON,
Appellant,

and

REBECCA M. CARLSON (n/k/a REBECCA M. EISMANN),
Respondent.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Maryann C. Moreno, Judge
Honorable Harold D. Clarke III, Judge

BRIEF OF RESPONDENT

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A. ISSUES RELATING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court properly exercised its discretion when calculating the parties' monthly net incomes in its June 2014 child support order when such calculations are supported by the parties' 2012 income tax returns and testimony by Ms. Eismann and CPA Todd Carlson?
2. Whether this Court lacks jurisdiction to review the trial court's judgment for back child support, back maintenance, attorney and expert fees because Mr. Carlson did not timely appeal the judgment?
3. Whether substantial evidence supports the trial court's maintenance, expert fees, and attorney fees awards?
4. Whether substantial evidence supports the trial court's finding of intransigence?
5. Whether the trial court properly exercised its discretion when calculating the parties' incomes in its April 7, 2017 child support order when such calculations are supported by the parties' testimonies and Ms. Eismann's paystubs, employment contract, and W-2 for her librarian's position?

B. STATEMENT OF THE CASE

On June 4, 2013, Kert Carlson petitioned to dissolve his 14-year marriage to Rebecca Carlson (n/k/a Rebecca Eismann). Clerk's Papers (CP) 3-7. When dissolution proceedings began, the parties' three minor children were ages 13, 10, and 4. CP 3, 80. Both parties asked the trial court to determine child support pursuant to Washington State child

support statutes. CP 6, 81. Ms. Eismann also requested spousal maintenance. CP 81.

Mr. Carlson owned and operated a silk-screening, embroidery business known as KC Enterprises. RP (5/19/2014) 188-90. He was the breadwinner. RP 607. Ms. Eismann was a stay-at-home mom with the agreement of the parties for the majority of the parties' marriage. RP (5/19/2014) 153-54, 607. Mr. Carlson managed the parties' and his business's commingled finances. RP 153. He admitted, "All income I earn is used to service business debts and household expenses." CP 588. Mr. Carlson further testified, "Reasonable income for me is probably about \$90,000 to \$100,000 a year as a top tier salesman. Once this is taken out of the business as an expense there is no profit." CP 592.

The week after the dissolution proceedings began, Ms. Eismann moved for temporary orders. CP 266-67. In response, Mr. Carlson declared that his net income for 2012 was \$122,984. CP 276. By August 2013, Mr. Carlson claimed he was making a net income of only \$7,500 per month. CP 585.

After a hearing, the court commissioner entered a temporary order permitting both parties to continue occupying the family home and requiring Mr. Carlson to pay \$2,500 per month in spousal maintenance if

Ms. Eismann moved out of the family home. CP 367-68. Because the parties remained in the same home, parenting plan and child support issues were reserved. CP 367. Both parties moved to revise the commissioner's ruling. CP 370-74.

On revision, the trial court judge ordered Mr. Carlson to move out of the family home by July 21, 2013. CP 397. The trial court further ordered that the parties would have equal time with the children, that they were prohibited from discussing the case with any of the children and from disparaging or defaming the other party in the children's presence. CP 398. The court reserved child support and maintenance issues and ordered the parties to engage in good faith mediation to resolve all remaining temporary orders issues. CP 399.

At mediation, the parties were able to resolve real property, personal property, and temporary parenting plan issues but no financial issues. The parties agreed that Mr. Carlson would remain in the family home and that Ms. Eismann would move out. CP 553. They also agreed that Ms. Eismann would be designated the primary parent of the children and that she would have custody of the children except for five days every other week. CP 554-55. Mr. Carlson refused to present a financial

analysis at mediation, so the parties failed to resolve any financial issues. RP 561.

After mediation, Ms. Eismann moved again for temporary orders to resolve financial issues. CP 574-75. Determining Mr. Carlson's income was made difficult by the fact that he is self-employed and commingled his personal and business incomes. Ms. Eismann had to hire a Certified Public Accountant to determine Mr. Carlson's income. RP (12/6/13) 38. She asked the Court to order Mr. Carlson to pay her \$6,000 for the CPA's fees. *Id.*; CP 564, 572. She also asked for \$2,300 per month in maintenance and \$8,000 in attorney fees as an equalization payment due to the volume of pleadings filed by Mr. Carlson for temporary orders hearings. RP (12/6/13) 43; CP 564, 572.

The trial court ordered temporary child support using the parties' 2012 incomes. RP (12/6/2013) 54. It also ordered Mr. Carlson to pay Ms. Eismann \$2,000 in spousal maintenance based upon her need and his ability to pay. *Id.* And it granted Ms. Eismann's requests for expert and attorney fees. *Id.*

Temporary orders were entered that required Mr. Carlson to pay Ms. Eismann child support and spousal maintenance. However, Mr.

Carlson refused to pay either from May 2013 through the dissolution trial, which began in May 2014. RP (12/6/2013) 8, 37.

Mr. Carlson involved the parties' children in the dissolution proceedings, including bringing them to court to testify and watch court hearings. RP (12/6/2013) 12; RP (05/09/2014) 27-30. He interfered with and undermined Ms. Eismann's efforts to parent the children. RP (12/6/2013) 17, 21, 34; CP 1133. He telephoned Ms. Eismann's workplace multiple times, causing Ms. Eismann's employer to place her on probation. CP 1145, 1149, 1186. He cancelled Ms. Eismann's health insurance and stopped paying the loan on the vehicle driven by Ms. Eismann despite automatic temporary order requiring the parties to maintain the status quo. CP 1146, 1188.

At a hearing on April 4, 2014, the trial court noted its concern with Mr. Carlson's behavior:

I'll tell you now, this case is spiraling out of control, and it has been, frankly, Mr. Carlson, ever since your lawyer stepped down. Things have been going sideways and they've been going sideways fast. I've not been privy to the communications that your mother has had with my staff, but it appears to be frequent, ongoing, and it's quite concerning.

RP (4/4/2014) 31.

At trial, Todd Carlson, CPA, testified. He had analyzed Mr. Carlson's gross annual and monthly income for 2012, relying upon Mr. Carlson's QuickBooks Profit & Loss Statements and his federal income tax returns for 2010, 2011, and 2012. CP 1157, 1159. CPA Todd Carlson's report noted issues he had with the business expenses reported on Mr. Carlson's tax returns:

Detailed depreciation records have not been provided for analysis and substantiation of the significant expenses reported on the tax returns. The 2010 tax return reports that a computer, table and chairs were purchase totaling \$3,110 that has been considered an appropriate expense for this analysis. All other depreciation appears to be a result of past business activities not associated with the current operations.

CP 1159. CPA Todd Carlson removed Mr. Carlson's auto expense and depreciation deductions for child support calculation purposes. CP 1159. He concluded that Mr. Carlson's gross monthly income for 2012 was \$19,692. RP (5/20/2014) 350.

CPA Todd Carlson also analyzed Ms. Eismann's income and concluded that her gross monthly income was \$4,717 per month for 2012 and \$4,305 per month through September 15, 2013. CP 1174.

Mr. Carlson admitted at trial that he had not paid Ms. Eismann child support or maintenance as ordered. RP (5/9/2014) 154. He was adamant that he would make no transfer payment of cash dollars to Ms.

Eismann for child support or maintenance “until the Court seeks the true and real numbers[.]” RP 163-64. He refused to pay Ms. Eismann “[b]ecause I believe it would go to her new vehicle, the dog grooming, the housecleaning, the health club membership, the nails being done and the toes being painted, and the \$1250 would not go to my children.” RP 166.

Relying primarily upon the parties’ 2012 income tax return and CPA Todd Carlson’s testimony, the trial court ruled that Mr. Carlson’s net income was \$15,592 and Ms. Eismann’s net income was \$4,452:

THE COURT: Okay. All right.

So Mrs. Carlson claimed a net income of \$4,452, and she designates Mr. Carlson's income at -- his net as \$16,467. Mr. Carlson claims his wife actually nets -- that his own net is \$8,442 with his wife's at \$5,390. I basically used the last tax return in 2012. And I relied very heavily on the testimony of Todd Carlson, who based upon his calculations and his averaging came up with a gross monthly income of \$17,242. And I know he disallowed depreciation, the use of the home office. And I found that that was reasonable for him to do that. I also found that he did not allow the automobile expense. And that was based upon the fact that he didn't have the information, nobody provided him that information. So I went back and I pulled Mr. Carlson's financial declaration, which I believe the last one he filed was June of 2013. I could be wrong on that, and I'd have to look and see if there's a more updated one. But he indicated that his -- his automobile expense at that time was \$400 for gas, \$50 for oil, and \$100 for maintenance. So I'm allowing that for him for every month, so that was \$550. So his gross would be \$16,692. With regard to the taxes, I know he doesn't pay any withholding, but the rest of it I simply pulled that out of the 2012 tax return. And that figure was -- I don't know what that figure

was, but the monthly was \$1100. So I set his net monthly income at \$15,592.

RP (5/23/2014) 620-21.

The trial court also ordered Mr. Carlson to pay spousal maintenance in the amount of \$2,000 per month through December 31, 2014. CP 1897; Cf. RP (5/23/2014) 630-31 (ordering two years). The court also found that much of Ms. Eismann's attorney fees were incurred in response to Mr. Carlson's intransigent actions. RP (5/23/2013) 631. Because he caused her to incur additional fees, she had need, and he had an ability to pay, the court ordered him to pay \$20,000 of Ms. Eismann's attorney fees. RP (5/23/2013) 631.

Mr. Carlson appealed the final dissolution orders. CP 1900.

On January 20, 2015, Mr. Carlson petitioned to modify child support based on an alleged decrease in his income, an alleged increase in Ms. Eismann's income, and a change in custody of two of the parties' three children; he filed an amended modification petition in September 2015. CP 2024-2027. The matter went to trial beginning in March 2017. RP (3/27/2017) 95.

At the time of the modification trial, Ms. Eismann was living in Montana and working at an elementary school as a librarian. RP (3/27/2017) 154, 164. She earned a gross income of \$2,798.33 per month

on a 12-month teaching contract. RP (3/28/2017) 234-36; Ex. 107; CP 2878, 2907. Ms. Eismann intended to return to the Spokane area after the school year ended and to continue to have one job in teaching. RP (3/28/2017) 240.

Mr. Carlson claimed that his monthly net income was \$2,070 and that his total monthly expenses were \$8,489.58. RP (3/28/2017) 249, 365-66. However, he admitted that he paid everything using business income: he pays his home mortgage, household expenses, and food expenses using the income of KC Enterprises. RP (3/28/2017) 382-83, 387, 480, 499, 503, 506. He later conceded that the \$2,070 was his **net profit**:

Q. Okay. Isn't that what we're showing here, that you spend \$8,500 a month per your own financial declaration, yet you claim you only make \$2,070 a month?

A. No. The 2,000 is the net profit, which is based off personal financial sales[.]

RP (3/29/2017) 507.

Mr. Carlson also called as a witness a fellow businessman, Rusty Namie, who owned and was the chief financial officer of a company similar to KC Enterprises. RP (3/28/2017) 404-17. Mr. Namie testified that, based on his review of KC Enterprises' profit and loss statement and after subtracting cost of goods from total sales, he believed KC Enterprises

would have \$90,000 or roughly \$7,500 per month to pay Mr. Carlson an income and any other business expenses. RP (3/28/2017) 426.

Considering Mr. Carlson's 2015 bank statements, Ms. Eismann believed Mr. Carlson's income exceeded \$2,000 per month. RP (3/28/2017) 249. Mr. Carlson had not produced updated bank statements since early 2016. RP (3/28/2017) 251. So she relied upon his Financial Declaration and his most recent bank statements, and testified that his monthly net income equaled his household expenses of \$8,489.54. RP (3/28/2017) 252.

Using a net income of \$2,277 for her and \$8,489.54 for Mr. Carlson, Ms. Eismann calculated Mr. Carlson's child support obligation transfer payment for the parties' youngest daughter at \$203.82 per month. RP (3/28/2017) 251-52, 262; *see* CP 3027, 3152-163, 3169. The trial court adopted Ms. Eismann's proposed child support figures and entered orders requiring Mr. Carlson to pay child support to Ms. Eismann in the amount of \$203 per month beginning April 1, 2017. CP 3152-163, 3169. Mr. Carlson appeals this order as well.

C. ARGUMENT

1. The Trial Court Properly Exercised Its Discretion when Calculating the Parties' Monthly Net Incomes in Its June 2014 Child Support Order.

Mr. Carlson contends the trial court's June 2014 child support order overstated his net income and understated Ms. Eismann's net income.

An appellate court will uphold a child support order unless the party challenging the order demonstrates that the trial court's order is manifestly unreasonable, based on untenable grounds, or granted for untenable reasons. *In re Marriage of Peterson*, 80 Wn. App. 148, 152, 906 P.2d 1009 (1995). Mr. Carlson has failed to show the trial court abused its discretion.

Challenged findings of fact are reviewed to determine whether they are supported by substantial evidence. *In re Marriage of Stachofsky*, 90 Wn. App. 135, 144, 951 P.2d 346 (1998). "That means [the court] look[s] at the evidence and reasonable inferences therefrom in the light most favorable to the respondent," Ms. Eismann. *In re Marriage of Zigler and Sidwell*, 154 Wn. App. 803, 812, 226 P.3d 202 (2010). Substantial evidence is evidence of sufficient quantity to persuade a reasonable fact finder of the truth of the declared premise. *Holland v. Boeing Co.*, 90

Wn.2d 384, 390–91, 583 P.2d 621 (1978). “Unchallenged findings of fact are verities on appeal.” *Bartel v. Zuckriegel*, 112 Wn. App. 55, 62, 47 P.3d 581 (2002).

Here, the trial court’s calculation of the parties’ monthly net incomes was based primarily upon the parties’ 2012 tax return¹ and the testimony of CPA Todd Carlson. RP (5/23/2014) 620. It found Mr. Carlson’s monthly net income to be \$15,592 and Ms. Eismann’s monthly net income to be \$4,452. RP (5/23/2014) 621. The trial court’s net monthly income findings fell within the range of evidence of income produced at trial.

Mr. Carlson claimed his monthly net income was \$8,442. RP (5/19/2014) 165.

KC Enterprises’ 2012 Profit and Loss statement showed he had a monthly net income of \$232,746 (or \$19,395 per month). RP (5/19/2014) 204.

Ms. Carlson testified that her monthly net income was \$4,452 per month if she had to pay federal income tax and \$5,678 if she did not have to pay federal income tax. RP (5/20/2014) 419.

¹ R-153

The parties' 2012 tax return indicated that Mr. Carlson's business had a gross income of \$567,974 (or \$47,331 per month) and a net profit of \$122,984 (or \$10,248 per month). CP 116. The tax return indicated that Ms. Eismann's gross income was \$33,347 (or \$2,778 per month) and net profit was \$23,055 (or \$1,921 per month). CP 119.

CPA Todd Carlson analyzed the parties' earnings based upon his review of their 2010, 2011, and 2012 income tax returns, and financial and profit and loss statements for KC Enterprises and Ms. Eismann's independent contractor businesses. RP (5/20/2014) 346-47. He initially concluded that Mr. Carlson's monthly gross income was \$19,692. RP (5/20/2014) 350. But, after reviewing KC Enterprises' profit and loss statements through October 18, 2013, and giving 50 percent weight to Mr. Carlson's rough, unverified 2013 income figures², CPA Todd Carlson reduced Mr. Carlson's monthly gross income to \$17,242. RP (5/20/2014) 350-51. He did not subtract any of the "normal business expenses" claimed by Mr. Carlson for auto and home office expenses or net operating losses. RP (5/20/2014) 353-55. But he did deduct approximately \$775

² Mr. Carlson incorrectly claims CPA Todd Carlson gave no reason for giving only 50% weight to Mr. Carlson's 2013 income; however, CPA Todd Carlson testified that he weighted the 2013 financial information at 50% because he derived the information from "internal financial statements, because it's a partial year, the year's not completed yet and it's not on a federal income tax return in which case adjustments are sometimes made." RP 351.

per month for social security and Medicare and concluded that Mr. Carlson's monthly net income was \$16,467. RP (5/20/2014) 363.

In summary, the evidence shows that Mr. Carlson's monthly net income was between \$8,442 and \$19,395 per month. And Ms. Eismann's monthly net income ranged between \$1,927 per month and \$5,678 per month. The trial court's findings that Mr. Carlson's monthly net income was \$15,592 (after allowing a deduction for vehicle expenses) and that Ms. Eismann's was \$4,452 was well within the range of evidence and therefore does not constitute an abuse of discretion. *See Matter of Marriage of Sedlock*, 69 Wn. App. 484, 491–92, 849 P.2d 1243 (1993) (affirming the trial court's findings as to valuation of business assets where the finding is within the range of the credible evidence).

a. Whether Mr. Carlson's 2013 Income Was Weighted Properly is Moot Because the Trial Court Used 2012 Income to Determine His Child Support Obligation.

Mr. Carlson complains that CPA Todd Carlson should have weighted his 2013 income differently than he did. Had CPA Todd Carlson used a straight average of Mr. Carlson's 2013 income rather than a 50% weighted average, the difference would have been a mere \$200 per month. RP (5/20/2014) 365. Regardless, whether CPA Todd Carlson properly weighted Mr. Carlson's 2013 income is a moot issue because the trial

court did not rely upon Mr. Carlson's 2013 income when calculating child support.³ It relied upon his 2012 income tax return, which was proper because the law allows it and Mr. Carlson had no reliable verification of his post-2012 income. *See* RCW 26.19.071(2) (Tax returns for the preceding two years and current paystubs shall be provided to verify income and deductions).

b. The Trial Court Properly Refused to Subtract Business Loss and Home Office Deductions from Mr. Carlson's Monthly Gross Income.

Mr. Carlson argues that the trial court should have subtracted depreciation and home office deductions when calculating his net income for child support purposes.

On the parties' 2012 tax return, Mr. Carlson deducted \$70,380 for depreciation and \$24,330 as a home office deduction. CP 118.

The federal tax code permits a taxpayer to deduct net operating business losses from his tax obligation and to carry forward those losses until they are exhausted. 26 U.S.C. sec. 165. The code also allows a taxpayer to deduct those home office expenses allocable to a portion of the dwelling unit which is exclusively used on a regular basis as the principal place of the taxpayer's business. 26 U.S.C. sec. 280A(c)(1)(A). However,

³ Mr. Carlson had yet to file a 2013 federal income tax return. RP 351. So the trial court could not have considered it.

the determination as to whether the federal tax code allows a taxpayer to deduct certain business losses and expenses does not control whether those expenses are deductible for purposes of calculating child support. *In re Marriage of Mull*, 61 Wn. App. 715, 722, 812 P.2d 125 (1991).

The Washington Child Support Schedule states that “normal business expenses” for self-employed people shall be deducted from gross income, and, again, “[j]ustification shall be required for any business expense deduction about which there is disagreement.” RCW 26.19.071(5)(h).

Ms. Eismann opposed Mr. Carlson’s request that the trial court deduct nearly \$100,000 worth of “normal business expenses” from his income when calculating his child support obligation. Mr. Carlson failed to justify deducting the business loss and home office expenses. And the trial court correctly rejected the deductions.

Depreciation expenses may be deducted from gross income if the expenses reflect an actual reduction in the party’s personal income, such as where a party spends money to replace worn equipment or purchase new reserves. *In re Marriage of Stenshoel*, 72 Wn. App. 800, 807, 866 P.2d 635 (1993).

Mr. Carlson was not spending money to replace equipment or to purchase reserves. He failed to show that the loss suffered from a past failed business (not KC Enterprises) actually reduced his current personal income or caused him to spend money. Instead, the record shows the Carlsons' business loss had been carried forward for several years and had operated to eliminate their federal income tax obligations. RP 357-360. In other words, the business loss deduction saved Mr. Carlson money; it did not require him to spend money. Consequently, CPA Todd Carlson and the trial court properly declined to subtract the depreciation expense from Mr. Carlson's gross income.

Similarly, Mr. Carlson failed to show that a deduction for expenses for his entire home property was appropriate as a home office deduction. According to CPA Todd Carlson's testimony and federal law, a home office deduction is typically limited to the direct expenses associated with only that proportional share of the square footage of the home property used for the business. RP 355; 26 U.S.C. sec. 280A(c)(1)(A).

It is undisputed that KC Enterprises operated out of a shop on the home property. RP 367. However, Mr. Carlson failed to point to any evidence that accurately estimated a proper home office deduction and instead attempted to subtract all of the home property's direct expenses as

a home office deduction. RP 355. Mortgage payments, property taxes, and other household expenses are not among the limited list of mandatory deductions from gross monthly income when calculating child support obligations. RCW 26.19.071(5). The trial court, therefore, properly refused to deduct such expenses from Mr. Carlson's gross monthly income under the guise of a "normal business expense."

c. The Trial Court's Finding on Ms. Eismann's Monthly Net Income was Within the Range of Evidence.

Mr. Carlson also contends the trial court erred by finding that Ms. Eismann's monthly net income was \$4,452, because the court's oral ruling "found her monthly net income was \$5,300 from 2015 on." Appellant's Br. at 13.

The trial in this matter was held in May 2014, so it is unclear how the trial court could have known what Ms. Eismann's income would be from 2015 on. Regardless, to the extent Mr. Carlson relies on any oral ruling of the trial court to argue that Ms. Eismann's monthly net income should have been set at \$5,300, such a verbal expression of the trial court's informal opinion at the time is not binding because it was not incorporated into the written findings. *DGHI Enters. v. Pacific Cities, Inc.*, 137 Wn.2d 933, 944, 977 P.2d 1231 (1999).

Moreover, substantial evidence supports finding that Ms. Eismann's monthly net income was \$4,452. Ms. Eismann testified that her monthly net income was \$4,452 if she had to pay federal income taxes and could not offset those taxes by depreciating half of the remaining net operating loss. RP (5/20/2014) 419. Mr. Carlson's testimony suggested that the parties would no longer be able to use the depreciation expense because it had run out:

Q. So what is this depreciation expense that you use every year to reduce your profit?

A. It's a seven-year net operating loss that started in 2006[.]

RP (5/20/2014) 289. If the parties' net operating loss was to be depreciated over seven years, and they began depreciating the loss in 2006, then it is reasonable to infer that 2013 would have been the last year the parties could depreciate the loss. Moving forward, Ms. Eismann would not have the benefit of claiming a net operating loss to offset her federal income tax obligation. She would have had to pay federal income taxes, reducing her monthly net income to \$4,452. The trial court, then, did not err by finding that Ms. Eismann's monthly net income was \$4,452.

2. This Court Lacks Jurisdiction to Review the Trial Court's Judgment for Back Child Support, Back Maintenance, and Expert Fees Because Mr. Carlson Did Not Timely Appeal the Judgment.

Mr. Carlson challenges a \$43,862.07 money judgment the trial court entered against him for back child support, back maintenance, and business valuation fees on February 14, 2014. The Order re Judgment and Judgment Summary, both of which were entered on February 14, 2014, were final judgments. RAP 2.2(a)(1). Mr. Carlson had 30 days from February 14, 2014 to appeal the order and judgment. RAP 5.2(a). If a party fails to file a notice of appeal within 30 days of entry of an appealable order, the Court of Appeals is without jurisdiction to review the order. *Kelly v. Schorzman*, 3 Wn. App. 908, 911, 478 P.2d 769 (1970). The time has long since passed for Mr. Carlson to challenge the merits of the trial court's entry of judgment against him for back child support, back maintenance, and business valuation fees. Because Mr. Carlson's appeal of these orders is untimely, this Court lacks jurisdiction to review the Order re Judgment and Judgment Summary.

The trial court did not err by entering the judgment in any event. The trial court awarded Ms. Eismann attorney and expert fees and ordered Mr. Carlson to pay them within 30 days. RP (12/6/2013) 60. It is undisputed that he failed to pay. Valid temporary orders, requiring Mr. Carlson to pay temporary child support and maintenance, had also been entered. At trial, Mr. Carlson admitted he paid for the children's direct

expenses but refused to pay Ms. Eismann child support or maintenance until the trial court “sees the true and real numbers” because he “believe[d] it would go to her new vehicle, the dog grooming, the housecleaning, the health club membership, the nails being done and the toes being painted, and the \$1250 would not go to my children.” RP (5/19/2014) 163-64, 166.

Mr. Carlson asserts the trial court erred when it required him to pay the fees for Ms. Eismann’s attorney and her expert, CPA Todd Carlson. The decision to award fees under RCW 26.09.140 is discretionary and based on the needs of the spouse seeking fees and the ability of the other spouse to pay. *In re Marriage of Moody*, 137 Wn.2d 979, 994, 976 P.2d 1240 (1999).

Mr. Carlson also challenges the trial court’s spousal maintenance award. A trial court may grant a maintenance order for either spouse in a dissolution proceeding “in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors....” RCW 26.09.090. These factors include:

- (a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;
- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find

employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;
(c) The standard of living established during the marriage ...;
(d) The duration of the marriage ...;
(e) The age, physical and emotional condition, and financial obligations of the spouse ... seeking maintenance; and
(f) The ability of the spouse ... from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse ... seeking maintenance.

RCW 26.09.090(1)(a)-(f). “Nothing in RCW 26.09.090 requires the trial court to make specific factual findings on each of the factors listed in RCW 26.09.090(1).” *Mansour v. Mansour*, 126 Wn. App. 1, 16, 106 P.3d 768 (2004). And given an appellate court’s reluctance to encourage appeals by “tinkering” with the difficult decisions made by trial courts in dissolution actions, it will affirm such a decision absent abuse of discretion. *In re Marriage of Landry*, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985).

Here, the trial court found that Mr. Carlson’s tax returns and \$23,000 in payments to his mother over the preceding few months showed his ability to pay. RP (12/6/2013) 60. And, as set forth above, the evidence at trial (which is the same evidence the trial court relied upon to order temporary child support and maintenance) supported the trial court’s finding that Mr. Carlson earned in excess of \$15,000 per month in 2012. By contrast, Ms. Eismann earned only \$4,452 per month. In addition, it is

undisputed that Mr. Carlson had greater earning capacity than Ms. Eismann and was the primary breadwinner during the parties' marriage, while Ms. Eismann was a stay-at-home mother. They enjoyed a comfortable lifestyle throughout their 14-year marriage. And, while Ms. Eismann suffers from health issues, Mr. Carlson does not.

Substantial evidence supports the findings that, in light of the circumstances of the parties, Ms. Eismann needed financial assistance and that Mr. Carlson had the ability to pay expert fees, attorney fees, and maintenance. The trial court's orders and judgment on these matters should be affirmed.

3. The Trial Court Properly Ordered Mr. Carlson to Pay Ms. Eismann \$20,000 for Attorney Fees and Costs.

Mr. Carlson also contends that the trial court abused its discretion by ordering him to pay \$20,000 of Ms. Eismann's attorney fees for intransigence.

The decision to award attorney fees is within the trial court's discretion. *In re Marriage of Knight*, 75 Wn. App. 721, 729, 880 P.2d 71 (1994). The party challenging the trial court's decision bears the burden of proving the trial court exercised its discretion in a way that was "clearly untenable or manifestly unreasonable." *Id.*

RCW 26.09.140 grants the trial court discretion to grant an award of attorney fees after considering the parties' financial resources:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

In other words, when determining an award of attorney fees, the trial court first balances the needs of the spouse requesting fees against the ability of the other spouse to pay. *Knight*, 75 Wn. App. at 729, 880 P.2d 71. The court may also consider the extent to which one spouse's intransigence caused the spouse seeking a fee award to require additional legal services. *In re Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197 (1989). If intransigence is established, the financial resources of the spouse seeking the fees are irrelevant. *Id.* at 590.

Awards of attorney fees based upon the intransigence of one party have been granted when the party engaged in "foot-dragging" and "obstruction", as in *Eide v. Eide*, 1 Wn. App. 440, 445, 462 P.2d 562 (1969); when a party filed repeated, unnecessary motions, as in *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224, *review denied*, 104

Wn.2d 1020 (1985); when one spouse produced conflicting information about his income, forcing the wife to conduct additional investigations, as in *Mattson v. Mattson*, 95 Wn. App. 592, 976 P.2d 157 (1999); or when one spouse harassed, embarrassed, threatened and intimidated the guardian ad litem, judicial officers, or the former spouse, as in *Wixom v. Wixom*, 190 Wn. App. 719, 360 P.3d 960, *review denied*, 185 Wn.2d 1028, 377 P.3d 717 (2015); or simply when one party made the trial unduly difficult and increased legal costs by his or her actions, as in *Morrow*, 53 Wn. App. at 591.

Here, the trial court found that Mr. Carlson's activities during the dissolution proceedings caused Ms. Eismann to incur additional fees and costs. RP (5/23/2014) 631; CP 1889. It also found that Ms. Eismann had financial need and Mr. Carlson had the ability to pay. RP (5/23/2014) 631. Although the trial court did not list the specific activities underlying its finding of intransigence, the record is replete with evidence supporting the trial court's finding.

Mr. Carlson engaged in foot-dragging and obstruction concerning financial issues. He filed a flurry of pre-trial motions that required Ms. Eismann's quick response even though the motions were largely premature and unnecessary. He aligned the parties' eldest daughters against Ms.

Eismann, repeatedly attempted to bring them to court, and undermined Ms. Eismann's authority as a parent, which required additional court time. He repeatedly called Ms. Eismann's employer, compromising her employment. And he refused to obey court orders. This is only a small sampling of the overwhelming evidence of Mr. Carlson's intransigent behavior, and it sufficiently supports the trial court's finding of intransigence and resulting \$20,000 attorney fees award.

4. The Trial Court Properly Exercised Its Discretion when Calculating the Parties' Monthly Net Incomes in Its June 2017 Child Support Order.

Mr. Carlson again contends that the trial court erred by overstating his income and understating Ms. Eismann's income in its 2017 child support order entered after a child support modification trial.

"A party moving to modify child support bears the burden of showing a substantial change in circumstances." *McCausland v. McCausland*, 159 Wn.2d 607, 615, 152 P.3d 1013 (2007), *as amended* (Mar. 2, 2007). A reviewing court must not reverse the trial court's decision absent a manifest abuse of discretion. *Id.* at 616. In other words, "the reviewing court cannot substitute its 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). Further, appellate courts will 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). Instead, appellate courts will defer to the trial court's credibility determinations because the trial court has the unique opportunity to observe the parties to determine their credibility and to sort out conflicting evidence. *In re Marriage of Woffinden*, 33 Wn. App. 326, 330, 654 P.2d 1219 (1982).

Substantial evidence supports the trial court's findings that Mr. Carlson's monthly net income equaled his monthly household expenses of approximately \$8,489 and that Ms. Eismann's monthly net income was \$2,277.

At the child support modification trial, Ms. Eismann testified to her current income and produced her employment contract, paystubs, and a 2016 Form W-2 reporting her 2016 wages from her sole employer at the time. RP (3/28/2017) 234-36; Exhibits 106, 107; CP 2878, 2907, 3104. The testimony and exhibits offered by Ms. Eismann verified her current income and support the trial court's finding that Ms. Eismann's monthly net income was \$2,277.

Ms. Eismann also testified at the child support modification trial that Mr. Carlson's net monthly income equaled his monthly household

expenses of \$8,498. Mr. Carlson even conceded that he paid all of his household expenses from his business income. RP (3/28/2017) 249, 365-66, 382-83, 387, 480, 499, 503, 506. He also conceded that his monthly income was \$7,500 per month and that \$2,070 was KC Enterprises' monthly net profit. RP (3/29/2017) 483, 507. The trial court could reasonably infer from this testimony that Mr. Carlson's monthly net income was at least \$8,498 and up to \$9,570 per month. Moreover, the trial court had the discretion to believe Ms. Eismann's testimony and to disbelieve Mr. Carlson's initial assertion that his income was only \$2,070 per month. *Woffinden*, 33 Wn. App. at 330. This Court will not disturb the trial court's credibility determinations. *Lutz*, 74 Wn. App. at 372.

Like in the dissolution proceedings, the trial court's determination of the parties' incomes was well within the range of evidence produced at the child support modification trial and therefore does not constitute an abuse of discretion. *See Sedlock*, 69 Wn. App. at 491-92, 849 P.2d 1243 (1993) (affirming the trial court's findings as to valuation of business assets where the finding is within the range of the credible evidence).

Mr. Carlson also attempts to rely upon a late-filed declaration to attack the trial court's April 7, 2017 child support worksheets. He filed a declaration on June 8, 2017 - two months after the final child support

modification orders were entered, claiming that the Line 5 of the child support worksheet is incorrect and that Ms. Eismann should be paying him child support.

To preserve error for consideration on appeal, the alleged error first must be brought to the trial court's attention at a time that will afford that court an opportunity to correct it. *In re Welfare of Young*, 24 Wn. App. 392, 395, 600 P.2d 1312 (1979). Mr. Carlson failed to properly or timely object to Ms. Eismann's proposed child support worksheets, which were ultimately adopted by the trial court.

At trial, Ms. Eismann offered her proposed child support worksheets (Exhibit R-108), which set forth the parties' incomes as ultimately found by the trial court, correctly set forth the presumptive basic child support obligations for all three girls according to their ages based on the parties' incomes, and included an Attachment for Residential Split Adjustment that calculated a net child support transfer payment of \$203.82 from Mr. Carlson to Ms. Eismann. RP (3/28/2017) 251-53. When Ms. Eismann offered Exhibit R-108 into evidence, Mr. Carlson made a general objection: "I object. But . . . missing some factors." RP (3/28/2017) 253. He did not object on the ground that the individual child support obligations on Line 5 were misstated; they were not. And he did not

object on the ground that the Residential Split Adjustment was miscalculated; it was not.

Mr. Carlson's belated declaration was not an exhibit produced at trial. *See* CP 3102-104. And it is not proper or timely to the extent it sought relief by way of reconsideration or a new trial. CR 59(b) (limiting motions for new trial and reconsideration to 10 days after entry of judgment, order, or decision).

The April 7, 2017 child support worksheets do list \$904 on line 5 for all three girls; this appears to be a scrivener's error. However, it did not affect the final child support order, which properly requires Mr. Carlson to pay child support of \$204 per month as calculated in Exhibit R-108.

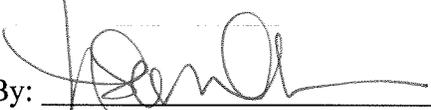
Mr. Carlson did not properly preserve his objections to Ms. Eismann's proposed child support worksheets. He has also failed to offer any legal analysis in support of his belated objections. Error raised for the first time on appeal need not be considered. *Young*, 24 Wn. App. at 397. This Court should decline to consider Mr. Carlson's objections to the trial court's April 7, 2017, child support worksheets and affirm the trial court's child support modification orders.

D. CONCLUSION

For the reasons stated above, Ms. Eismann asks this Court to affirm the trial court's orders.

Respectfully submitted on April 23, 2018.

STAMPER RUBENS, P.S.

By: 

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PROOF OF SERVICE (RAP 18.5(b))

I, Hailey L. Landrus, do hereby certify under penalty of perjury under the laws of the State of Washington that on April 16, 2018, I caused to be delivered a true and correct copy of the Brief of Respondent by email to Appellant's counsel, Kenneth H. Kato, at khkato@comcast.net, via the Washington Appellate Court online portal.



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April 23, 2018 - 6:36 PM

Transmittal Information

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Appellate Court Case Title: In re the Marriage of: Kert A. Carlson and Rebecca M. Carlson
Superior Court Case Number: 13-3-01337-0

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