

No. 33430-9-III

WASHINGTON STATE COURT OF APPEALS – DIVISION III

In re the Marriage of:

JEFFREY K. NEWGARD,

Respondent,

v.

PENNELOPY ANN NEWGARD,

Appellant.

ON APPEAL FROM YAKIMA COUNTY SUPERIOR COURT
Hon. Gayle M. Harthcock

**SUPPLEMENTAL BRIEF OF FATHER RE APPLICATION OF
*IN RE MARRIAGE OF ZANDI***

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I. INTRODUCTION

The Court stayed consideration of this appeal pending determination of *In re Marriage of Zandi*, 187 Wn.2d 921, 391 P.3d 429 (2017). *Zandi* has different issues and does not control. *Zandi* did not involve either parent's repeated failure to follow the applicable parenting plan's joint decision-making provision which must be construed with the support order; this case involves precisely that. *Zandi* did not involve unreasonable and unexcused actions by either parent; this case involves precisely that.

Zandi's dicta gives guidance: Mother's repeated refusal to follow the parenting plan's joint decision-making provision without reason is unreasonable conduct which provides a proper basis to modify the support order, to the extent that is necessary to affirm.

II. STATEMENT OF ISSUE

In re Marriage of Zandi teaches in *dicta* that a trial court has authority to impose costs on a parent who acts unreasonably or in bad faith in complying with court orders related to support. Where the mother herein made a series of 12 unilateral decisions over a full year as to non-emergent health care for which the parenting plan required joint decision-making without attempting to comply with that requirement, does *Zandi* support the trial court's conclusion that the mother (who thus acted unreasonably) may be required to bear the cost of her unilateral decisions?

III. SUPPLEMENTAL ARGUMENT

Zandi addressed a question of statutory interpretation: Whether "out-of-network health care costs qualify as '[u]ninsured

medical expenses’ under RCW 26.18.170(18)(d)” where the father conceded he was responsible for all of such uninsured expenses. 187 Wn.2d at 923. *Zandi* thus “turn[ed] on whether the medical bills [the daughter] incurred while in Ohio qualif[ied] as ‘uninsured medical expenses’ under RCW 26.18.170” and “present[ed] a straightforward question of statutory interpretation.” *Id.* at 926, 927.

The Zandis’ daughter was visiting the mother’s sister near Cincinnati, Ohio, and needed a kidney stone removed after emergency treatment. *Id.* 923-25. There was no dispute between the parents that the care was needed, only where it should be provided since that affected the amount of insurance coverage. *Id.* at 924. Because the Cincinnati area was “out of network” for the Kaiser health insurance provided by her father, he wanted the care to be in a Kaiser facility or by a Kaiser-authorized out-of-network provider. *Id.* The aunt took the daughter “to a non-Kaiser facility for the follow up surgery [and] the doctor at this facility stated that Kaiser would cover the costs of the surgery, [but] Kaiser refused to pay the approximately \$13,000 in medical bills,” *In re Marriage of Zandi*, 190 Wn.App. 51, 53, 357 P.3d 65 (2015), *aff’d*, 187 Wn.2d 921, because Kaiser ultimately decided the “treatment was both nonemergent and out of network.” *Zandi*, 187 Wn.2d at 924.

The trial court apportioned the unpaid charges on the basis the mother was in a better position to secure insurance coverage for such care since the daughter resided with her. The Court of Appeals

reversed on the basis the support order controlled and the “out-of-network” bills were covered as statutory uninsured medical expenses. *Id.* at 925. The Supreme Court rejected the father’s statutory analysis that would distinguish “not covered” health care costs from “unpaid” costs and affirmed Division II. *Id.* at 926-929.

In *dicta*, the Court addressed the kind of circumstances which would justify relief from a support order. It specified that bad faith or “unreasonable conduct” or “findings as to fault” could amount to “changed circumstances” that would justify modifying the support order. *See id.* 929-930 & fn. 2. The Court pointedly noted that the father’s analysis, if followed, would mean he could interfere with the mother’s “authorized decision-making” but that the trial court’s assignment to the father of total financial responsibility for their daughter’s health care did not allow him to “limit [the mother’s] right to make parenting decisions.” *Id.* at 930.

There is no discussion in either *Zandi* decision of a parenting plan provision. Nor is there an issue of the mother disregarding the parenting plan, or trenching on the decision-making rights of the father, as are central to this case. Indeed, even assuming joint decision-making in *Zandi*, the facts of both appellate decisions make clear that, in stark contrast to this case, Mr. Zandi was consulted immediately and agreed the care should be provided.

In this case the requirement Mother failed to meet was not a health insurer’s protocol for getting in-plan coverage that would

reduce the total amount owing. It was the court-ordered parenting plan that requires joint decision-making for non-emergent health care, an obligation Mother had a legal obligation to honor. The trial court made a finding that Mother was at fault – she violated the parenting plan (CP 49) – satisfying the *dicta* in *Zandi* for imposing costs on Mother. Further, the only reasonable reading of the support order is to read it together with the parenting plan provision on joint decision-making and that Father is not required to provide the specified level of financial support for non-emergent care obtained unilaterally without his involvement. *See* CP 113:4-5 (Mother’s attorney arguing that joint decision-making requires, at minimum, “involvement of the other parent”). Otherwise, the joint decision-making provision of the parenting plan is made a nullity.

Moreover, unlike in *Zandi* where the mother and her sister thought they met the requirements of the health insurance company (the aunt was told by a treating physician it would be covered by Kaiser), here Mother made no effort to comply with the court-required joint decision-making provision for a full year, for all 12 appointments beginning in January, 2013, before she finally wrote to Father on December 17, 2013, asking for money to pay for those visits. *See* CP 65 (Father’s letter); 38-45 (bills). *Cf* CP 49 (Mother’s declaration stating only that Mother and daughters saw an ARNP for mental health issues and giving no reason for not contacting Father about it for an entire year).

There was no good faith effort by Mother to address the health care treatment with Father before it occurred, as there was in *Zandi*. Rather, Mother repeatedly violated the parenting plan and did not offer a reason. That failure to make a good faith effort at joint decision-making is unreasonable by definition, since no reason was given. It also is patently unreasonable for a parent to make a unilateral decision she was not legally entitled to make without at least involving the father, and do it repeatedly for an entire year.

The proper course is to seek the agreement of the other parent for proposed care before obtaining it, as in *Zandi*. A parent who repeatedly refuses to involve the other parent in joint decision-making without reason waives their right to require the other parent pay the proportionate share. Failing to take that step here – twelve times in 2013 – meant Mother repeatedly arrogated to herself a unilateral right to modify the parenting plan, which she had no right to do. That unreasonable conduct justifies the trial court’s decision below. The *dicta* in *Zandi* confirms this.

IV. CONCLUSION

Zandi supports affirming the trial court.

Respectfully submitted this 17th day of May, 2017.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing **Supplemental Brief of Father re Application of *In re Marriage of Zandi*** on the below-listed attorneys of record by the method(s) noted:

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DATED this 17th day of May, 2017.



Christine Williams, Legal Assistant

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