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WASHINGTON STATE  
SUPREME COURT

No. 92296-9

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In re the Matter of the Marriage of:

VICTOR M. ZANDI,

Petitioner,

vs.

DEANNA M. ZANDI,

Respondent.

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Court of Appeals Cause No. 46313-0-II  
Appeal from the Superior Court of the  
State of Washington for Cowlitz County

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RESPONDENT'S SUPPLEMENTAL BRIEF

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 ORIGINAL

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**A. IDENTITY OF RESPONDENT**

Deanna Zandi is the Respondent.

**B. DECISION**

The Court of Appeals decision, *Zandi v. Zandi*, 190 Wash.App.51, 357 p.3d 65 (2015), reversed the trial court, Cowlitz County cause #05-3-00007-9. The decision held that the trial court was bound by the child support order in apportioning uninsured medical expenses.

**C. ISSUE PRESENTED FOR REVIEW.**

In the event of a medical emergency, where a child receives medical treatment and later the medical insurer determines that the medical services are not covered, are the non-covered medical expenses "uninsured medical expenses" referenced in the order of child support?

**D. STATEMENT OF THE CASE**

The order of child support between the parties required the father to pay all uninsured medical expenses. The father agreed to pay 100%. CP at 7. The child was insured under the father's Kaiser Permanente (Kaiser) policy. CP at 39.

In July 2011, while visiting her aunt in Ohio, the child developed kidney stones. Her aunt took her to a non-Kaiser emergency room, which treated and released her. Kaiser paid for this emergency room visit. She needed follow-up surgery to remove a large kidney stone. The nearest Kaiser medical facility was 4 to 8 hours away. Kaiser provided a Kaiser patient number for the emergency medical services. CP at 44. The aunt took the child to a non-Kaiser facility for the follow up surgery. Although a doctor at this facility stated that Kaiser would cover the costs of the surgery, Kaiser refused to pay the medical expenses. CP at 44. The father appealed through the Kaiser appeal process, and Kaiser denied the appeal. The mother paid some of the uninsured medical expenses due to collection agencies. CP at 192.

On March 30, 2012, the mother filed a petition to modify child support and in it also requested the father to pay medical expenses incurred in July 2011 as "uninsured medical expenses." CP at 12. Following argument, the trial court ordered the mother to pay 25 percent and the father to pay 75 percent of the outstanding medical bills. In a written order, the court determined that because the mother was in a better position, as the primary residential parent, to secure coverage for the treatment through Kaiser, "the-

uninsured medical expenses for this incident should be" divided. CP at 247. The mother appealed. She argues that the trial court lacked the authority to ignore the terms of the child support order and apportion payment of uninsured medical expenses. The Court of Appeals reversed the trial court holding that the father is required to pay 100% of the uninsured medical expenses according to the Order of Child Support. *Zandi v. Zandi*, 190 Wash.App.51, 357 p.3d 65 (2015).

**E. EXCEPT UNDER VERY LIMITED CIRCUMSTANCES, THE LEGISLATURE HAS REMOVED FAULT FROM THE COURT'S CONSIDERATION REGARDING THE ECONOMIC ASPECTS OF DISSOLUTION OF MARRIAGE.**

In 1973, the Washington legislature passed sweeping legislation that removed fault from a court's consideration in issues relating to marriage dissolutions. Uniform Marriage and Divorce Act, Laws of 1973, 1stEx. Sess., ch. 157 (codified at RCW 26.09).

Consistent with the elimination of fault and misconduct from the court's consideration regarding economic issues, the legislature enacted several statutes that eliminate fault and misconduct from the court's determinations. Three examples of the statutes are as follows:

RCW 26.09.160 prohibits a parent from using the fault of the other parent in performing parenting plan obligations as a basis for denial of payment under an order of child support. RCW 26.09.160 states in relevant part as follows:

**RCW 26.09.160. Failure to comply with decree or temporary injunction—Obligation to make support or maintenance payments or permit contact with children not suspended—Penalties.**

(1) The performance of parental functions and the duty to provide child support are distinct responsibilities in the care of a child. If a party fails to comply with a provision of a decree or temporary order of injunction, the obligation of the other party to make payments for support or maintenance or to permit contact with children is not suspended. An attempt by a parent, in either the negotiation or the performance of a parenting plan, to condition one aspect of the parenting plan upon another, to condition payment of child support upon an aspect of the parenting plan, to refuse to pay ordered child support, to refuse to perform the duties provided in the parenting plan, or to hinder the performance by the other parent of duties provided in the parenting plan, shall be deemed bad faith and shall be punished by the court by holding the party in contempt of court and by awarding to the aggrieved party reasonable attorneys' fees and costs incidental in bringing a motion for contempt of court.

RCW 26.09.080 prohibits a court from considering misconduct/fault in dividing property. RCW 26.09.080 states in relevant part as follows:

**RCW 26.09.080. Disposition of property and liabilities—Factors.**

In a proceeding for dissolution of the marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage or the domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner or lacked jurisdiction to dispose of the property, the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

• • •

- (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

RCW 26.09.090 prohibits the court from considering misconduct/fault in determining spousal maintenance. RCW 26.09.090 states in relevant part as follows:

**RCW 26.09.090. Maintenance orders for either spouse or either domestic partner—Factors.**

(1) In a proceeding for dissolution of marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for maintenance following dissolution of the marriage or domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner, the court may grant a maintenance order for either spouse or either domestic partner. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors including but not limited to:

In, *In re Marriage of Steadman*, 63 Wash.App. 523, (1991), 821 P.2d.59 at 527, the court examined the consideration of marital misconduct in dividing property. The court stated in relevant part as follows:

We agree with the Clark court's interpretation of "marital misconduct". The historical background supports the conclusion that the facts here do not involve "marital misconduct" as contemplated by the statute. Under the prior statute the court could consider the "merits of the parties" in apportioning property. Laws of 1949, ch. 215, § 11, p. 701. Trial courts did so, considering cruelty or infidelity, for instance. Indeed, the appellate courts had to limit abuse of this factor. The "merits", as used in those cases, clearly refers to immoral conduct within the marital relation. The legislature wished to eliminate such considerations and did so by providing that the court may not consider "marital misconduct" in dividing property. Thus, marital misconduct refers to

substantially the same conduct previously considered in evaluating the "merits" of the parties.

Based upon this history we find that the "marital misconduct" which a court may not consider under RCW 26.09.080 refers to immoral or physically abusive conduct within the marital relationship and does not encompass gross fiscal improvidence, the squandering of marital assets or, as here, the deliberate and unnecessary incurring of tax liabilities. In shaping a fair and equitable apportionment of the parties' liabilities the trial court was entitled to consider whose "negatively productive conduct" resulted in the tax liabilities at issue. Clark, at 809, 538 P.2d 145. [Emphasis added.]

The legislature has determined that the designation of a parent as the "custodian" may be used "solely" for the purpose of designations under State and Federal statutes which require designation or determination of custody. RCW 26.09.285 states as follows:

**RCW 26.09.285. Designation of custody for the purpose of other state and federal statutes.**

Solely for the purposes of all other state and federal statutes which require a designation or determination of custody, a parenting plan shall designate the parent with whom the child is scheduled to reside a majority of the time as the custodian of the child. However, this designation shall not affect either parent's rights and responsibilities under the parenting plan. In the absence of such a designation, the parent with whom the child is scheduled to reside the majority of the time shall be deemed to be the custodian of the child for the purposes of such federal and state statutes.

Therefore, the label “custodian” or “primary residential parent” should not be used as a basis to allocate uninsured medical expenses contrary to the allocation set forth in an order of child support.

In the present case, the order of child support states in relevant part as follows:

**3.19 UNINSURED MEDICAL EXPENSES.**

Both parents have an obligation to pay their share of uninsured medical expenses. The father shall pay 100% of uninsured medical expenses and the mother shall pay 0% of uninsured medical expense per agreement of the parties pending a child support review hearing scheduled for February 17, 2010.

CP at 7.

The order regarding medical expenses entered by the trial court on May 6, 2014, states in relevant part as follows:

5. Because the mother was primary residential parent of the child, and therefore in a better position to secure coverage for the kidney stone treatment by Kaiser Permanente, the court determines that the uninsured medical expenses for this incident should be divided 75% to the father and 25% to the mother.

CP at 247.

In the present case, the trial court made no findings that either of the parents engaged in conduct that resulted in Kaiser's

non-coverage of the relevant emergency medical expenses. The court appeared to assign some fault to the mother purely because of her status as the “primary residential parent.” The designation as primary custodial parent in a parenting plan, in itself, is insufficient to assign fault or misconduct on the part of the mother that would allow the court to disregard the order of child support.

In 1973, with few exceptions, the Washington legislature repealed the notion that fault could be considered in determining economic issues with respect to dissolution of marriage proceedings. The *Steadman* decision discusses the types of misconduct that the court may consider. Clearly, *Steadman* discusses only egregious and intentional acts on the part of a parent. Mere negligence should not be a basis for the assignment of fault in a child support dissolution of marriage proceeding.

In the present case, no fault was assigned to either of the parents resulting in the non-coverage of medical expenses. The trial court found no fault on the part of either parent. The child, age 17 at the time, went to visit her aunt in Cincinnati, Ohio. While there, the child developed an emergency kidney stone condition. There was an attempt to secure Kaiser coverage. A Kaiser case number was assigned in Ohio. Further, a doctor made assurances

that the emergency treatment, including the surgery, would be covered by Kaiser.

After coverage was denied, the mother made payments towards the uninsured medical bills because of collection efforts. The mother fully cooperated with the appeal of Kaiser's denial of coverage. CP at 39, 40.

This is not a case where the mother's conduct resulted in the denial of insurance coverage. In fact, no fault was found on the part of the mother by the trial court. The only basis for disregarding the order of child support's uninsured medical expense allocation was that the mother was the "primary residential parent."

**F. THE DEFINITION OF UNINSURED MEDICAL EXPENSES INCLUDES ALL MEDICAL EXPENSES THAT ARE NOT PAID BY INSURANCE.**

In the Order Regarding Medical Expenses, paragraph 5, the trial court refers to the medical expenses at issue as "uninsured medical expenses." CP at 247.

In discussing the application of RCW Chapter 26.18, the legislature, in RCW 26.18.030, states in relevant part as follows:

(3) This chapter shall be liberally construed to assure that all dependent children are adequately supported.

RCW 26.18.170 (18) defines uninsured medical expenses as follows:

(d) "Uninsured medical expenses" includes premiums, copays, deductibles, along with other health care costs not covered by insurance.

RCW 26.18.170 (19) enabled the Department of Social and Health Services with rule making authority as follows:

(19) The department has rule-making authority to enact rules consistent with 42 U.S.C. Sec. 652(f) and 42 U.S.C. Sec. 666(a)(19) as amended by section 7307 of the deficit reduction act of 2005. Additionally, the department has rule-making authority to implement regulations required under 45 C.F.R. Parts 302, 303, 304, 305, and 308.

With respect to the presumed validity of administrative rules, the Court of Appeals states as follows:

When an agency acts within its authority, a rule is presumed to be valid and, therefore, the "burden of demonstrating the invalidity of agency action is on the party asserting the invalidity." RCW 34.05.570(1)(a). The party asserting the invalidity must show compelling reasons why the rule conflicts with the intent and purpose of the legislation. *Weyerhaeuser Co. v. Dep't \*\*1067 of Ecology*, 86 Wash.2d 310, 317, 545 P.2d 5 (1976). Any rule that is "reasonably consistent" with the underlying statute should be upheld. *Green River Comty. Coll.*, 95 Wash.2d at 112, 622 P.2d 826.

*Washington Federation of State Employees v. State of General Admin.*, 152 Wash.App. 368, at 378, 216 P.3d 1061; see also *American Network, Inc. v. Washington Utilities and Transp. Com'n*, 113 Wash.2d 59, 776 P.2d 950 (1989).

WAC 388-14A-1020, defines "Uninsured medical expenses" as follows:

**"Uninsured medical expenses"**: For the purpose of establishing or enforcing support obligations means:

- (1) Medical expenses not paid by insurance for medical, dental, prescription and optometrical costs incurred on behalf of a child; and
- (2) Premiums, copayments, or deductibles incurred on behalf of a child.

As set forth in the Court of Appeals majority opinion, the trial court concluded in paragraph 5 of its findings that the subject medical expenses were "uninsured." The majority Court of Appeals opinion further found that the definition of uninsured medical expenses in RCW 26.18.070 (18) (d) is unambiguous because the definition is discernable from the plain language from the statute without considering outside sources. See *Durland v. San Juan County*, 174 Wn. App. 1, 23-23, 298 P.3d 757 (2012). Clearly the subject medical expenses are uninsured because they are not

covered by insurance. Kaiser has refused to cover the subject medical expenses.

WAC 388-14A-1020 adds further clarification to the definition of "uninsured medical expenses". Medical expenses not paid by insurance for medical, dental, prescription and optometrical costs incurred on behalf of a child are "uninsured medical expenses." Therefore, all medical expenses unpaid by insurance should be determined to be uninsured medical expenses for the purpose of RCW Chapter 26.18, child support enforcement. Pursuant to RCW 26.18.030 (3) the definition of uninsured medical expenses should be given a liberal interpretation. It should not be left up to the parties to decipher complicated insurance policy provisions in order to determine whether or not a medical expense is an "uninsured medical expense." This would create a black hole not intended by the legislature.

Adopting the Court of Appeals dissenting opinion would be incorrect in this case. The dissent fails to recognize that the mother in this case did not take any action to sabotage insurance coverage. In fact, a Kaiser number was obtained and assurances were made by a physician that Kaiser would pay for the services. A lay person, not trained in the intricacies of insurance, would have

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IN THE SUPREME COURT FOR  
THE STATE OF WASHINGTON

In re the Matter of the Marriage  
of:

VICTOR M. ZANDI,

Petitioner,

vs.

DEANNA M. ZANDI,

Respondent.

DECLARATION OF SERVICE

I, Terri L. Specht, declare as follows:

On April 1, 2016, I personally served a true and correct copy  
of RESPONDENT'S SUPPLEMENTAL BRIEF, to the address listed  
below:

John Hays  
Attorney at Law  
1402 Broadway, Ste 103  
Longview, WA 98632

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

DATED April 1, 2016, at Longview, Washington.

  
Terri L. Specht

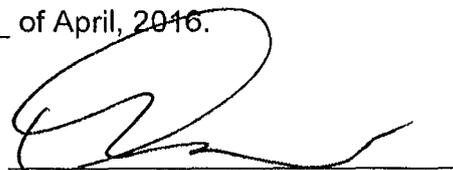
believed that the emergency medical expenses services would be covered. The trial court made no findings that the mother did anything wrong; only that the mother was the "primary residential parent" and therefore, in a better position to secure coverage.

It should be noted that the Petitioner never requested a modification of the child support order. In any event, RCW 26.09.170 restricts a court from modifying a child support order retroactively. An order modifying a child support obligation applies to obligations accruing subsequent to a petition for modification. *Marriage of Schumaker*, 128 Wash.2d 116, 121, 904 P.2d 1150 (1995).

**G. CONCLUSION**

Based upon the foregoing, the Respondent respectfully requests that the Court of Appeals decision be affirmed.

Respectfully Submitted this 1 of April, 2016.



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Attorney for Respondent

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Dear Clerk:  
Attached for filing, please find Respondent's Supplemental Brief regarding the above-referenced case.

Should you have any questions, please let me know.

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