IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In Re The Marriage of: PATRICIA McCARTHY, Respondent, v. FEARGHAL McCARTHY, Appellant.	No. 45956-6-II UNPUBLISHED OPINION

SUTTON, J. — Fearghal McCarthy appeals the trial court's order modifying the 2009 order of child support that he and Patricia McCarthy agreed to in their dissolution action.[1] Fearghal argues that the trial court erred by (1) modifying the original child support order when he petitioned for an adjustment, (2) miscalculating the child support, and (3) using an incorrect retroactive commencement date for the new child support amount. We hold that the trial court did not abuse its discretion. Therefore, we affirm the trial court's modification of the child support order.

FACTS

Fearghal and Patricia have two children. In June 2009, as part of their dissolution action, they agreed to a child support order requiring Patricia to transfer $780 to Fearghal in child support each month until the older child changed age brackets in 2011, when the amount would increase to $857. The trial court entered the order and approved the child support worksheet.

[1] We refer to the parties by their first names for clarity. We intend no disrespect.

On May 29, 2013, Fearghal filed a motion to adjust child support due to a change in the parties' incomes. The court commissioner entered an order of adjustment of child support and order of child support on December 11, which increased the transfer payment from Patricia to Fearghal to $1003 per month and modified several other provisions. Fearghal then moved to revise the order, arguing that the court commissioner had erred in a number of ways, including imputing income to him greater than his actual earnings and erroneously modifying the 2009 child support order. On January 31, 2014, the trial court granted Fearghal's motion in part to reflect his "actual income." Clerk's Papers (CP) at 209. The final child support order increased Patricia's required transfer payment to $1,107 per month and affirmed the modifications that Fearghal claimed were erroneous. The trial court ordered a retroactive start date of January 1, 2014.[2] Fearghal appeals.

ANALYSIS

We review claims of error on a child support order for abuse of discretion.[3] *In re Marriage of Choate*, 143 Wn. App. 235, 240, 177 P.3d 175 (2008). A trial court abuses its discretion when

[2] On January 31, 2014, the trial court entered two orders that Fearghal now appeals, (1) "Order RE Motion for Modif[ication]/Adjustment of Order of Child Support" and (2) "Final Order of Child Support (Revised)." CP at 209-10. To distinguish between the 2009 child support order and the 2014 orders, we refer to these two 2014 orders collectively as the "modification of child support order."

[3] Fearghal and Patricia dispute the proper standard of review. Fearghal argues that we should review his claims of error de novo because we have only documentary evidence to consider and the issues he raises are questions of law, which we review de novo. Because Fearghal and Patricia dispute issues of fact on appeal (and did so below as well), Fearghal is incorrect that this case presents pure questions of law. Thus, the proper standard of review is abuse of discretion. *See In re Marriage of Langham*, 153 Wn.2d 553, 559, 106 P.3d 212 (2005) (de novo review is appropriate only where the trial court relied solely on documentary evidence and credibility is not an issue because the parties do not dispute underlying facts).

the decision is manifestly unreasonable or rests on untenable grounds or reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). We give deference to a trial court's domestic relations decisions because "'the emotional and financial interests affected by such decisions are best served by finality'" and de novo review may encourage appeals. *In re Parentage of Jannot*, 149 Wn.2d 123, 127, 65 P.3d 664 (2003) (quoting *In re Parentage of Jannot*, 110 Wn. App. 16, 21, 37 P.3d 1265 (2002)). The party asserting error holds the burden of demonstrating that the trial court abused its discretion. *In re Marriage of Schumacher*, 100 Wn. App. 208, 211, 997 P.2d 399 (2000).

I. THE TRIAL COURT DID NOT ERR IN MODIFYING THE 2009 ORDER OF CHILD SUPPORT

Fearghal argues that the trial court erred in modifying multiple provisions of the 2009 child support order. He alleges the following errors: (1) the downward deviation from Patricia's standard child support payment for a child from another relationship, (2) the reallocation of the federal tax exemption from Fearghal to Patricia, and (3) the modification of several of the postsecondary educational provisions. He argues that the trial court incorrectly changed these provisions because he moved for a child support adjustment and not for a child support modification and the trial court did not make a finding of a "substantial change of circumstances" as required to modify a child support order in most cases.[4] RCW 26.09.170(1). On review, we hold that the trial court's modifications of the 2009 child support order were not erroneous.

[4] Fearghal also argues that these modifications prejudiced him by violating his due process rights, including his ability to conduct discovery. Fearghal does not explain what further discovery he could have done or what evidence he would have submitted but could not due to lack of discovery. Fearghal cannot demonstrate any prejudice simply because he was not served with a summons, the only procedural difference between modification and adjustment proceedings. RCW 26.09.170(7)(a)-(b); RCW 26.09.175.

A trial court's adjustment of a child support order and its modification of a child support order follow two different statutory processes. A party may initiate an adjustment proceeding based upon a change in income or change in the economic table in chapter 26.19 RCW by filing a motion and child support worksheets, without a showing of a substantially changed circumstances, if 24 months have passed from the entry of the previous child support order. RCW 26.09.170(7)(a)-(b). A modification proceeding, in contrast, generally requires the moving party to demonstrate a substantial change of circumstances before the trial court may modify the previous child support order, and to initiate the proceeding, the party must serve on the opposing party a summons and a petition along with its proposed child support worksheets. RCW 26.09.170(1); RCW 26.09.175.

When a trial court modifies a child support order without finding a substantial change in circumstances, we must reverse and remand for entry of findings. *In re Marriage of Scanlon*, 109 Wn. App. 167, 174, 34 P.3d 877 (2001). But this general rule requiring reversal is inapplicable when the first order of child support was not the product of a fully contested hearing where the trial court independently examined the evidence before entering its order. *Schumacher*, 100 Wn. App. at 213. Where the parties come to their own agreement, we presume that the trial court did not examine the evidence, and the party arguing against the modified order must overcome the presumption with clear evidence. *Schumacher*, 100 Wn. App. at 213. Fearghal has not presented evidence to overcome this presumption. Thus, the trial court need not have found a substantial

change of circumstances because the 2009 child support order was the product of uncontested proceedings.[5] *Schumacher*, 100 Wn. App. at 313.

Washington courts have general equitable power to modify "*any order* pertaining to child support payments when the child's needs and parents' financial ability so require." *Schumacher*, 100 Wn. App. at 213 (emphasis added). Under the modification statute, a trial court may modify a child support order without a showing of a substantial change of circumstances if the original order works a severe economic hardship on either party or the child. RCW 26.09.170(6)(a). This is precisely the theory Fearghal argued in his motion to adjust. Because he faced financial hardship that impacted the children, he argued that he needed an increase in Patricia's child support obligation. Additionally, Fearghal's proposed order of child support modified the 2009 support order in several respects. The trial court appropriately modified the 2009 child support order pursuant to RCW 26.09.170(6)(a) based upon Fearghal's asserted financial hardship to him and the children.

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[5] Fearghal attempts to distinguish *Schumacher* and *Pippins v. Jankelson*, 110 Wn.2d 475, 754 P.2d 105 (1988), the case that *Schumacher* relies on. He attempts to distinguish *Pippins* from this case because there the lower court found that the original child support order was not based upon the reasonable needs of the child. *Pippins*, 110 Wn.2d at 477. Notably, this court did not characterize that finding as a substantial change in circumstances finding, which is the error Fearghal claims the trial court made here. Thus, that distinguishing characteristic does not assist Fearghal's argument. Further, contrary to Fearghal's suggestion, the holdings in *Schumacher* and *Pippins* were not based on a "statutorily non-compliant prior support order." Reply Br. of Appellant at 9. These cases were premised on the fact that the original child support order was not the product of an uncontested proceeding. *Pippins*, 110 Wn.2d at 481-82; *Schumacher*, 100 Wn. App. at 212-13. Lastly, Fearghal argues that we should not apply *Pippins* because that decision preceded the legislature's requirement of child support worksheets in 1989. He fails to mention that our court decided *Schumacher*, which relied on *Pippins*, in 2000.

For these reasons, the trial court did not abuse its discretion in modifying provisions of the 2009 child support order without first finding a substantial change in circumstances. We review Fearghal's claims of error on these modifications for manifest abuse of discretion. *In re Marriage of Sprute*, 186 Wn. App. 342, 357, 344 P.3d 730 (2015).

A. DEVIATION FOR PATRICIA'S THIRD CHILD

Fearghal argues that the trial court erred in granting a downward deviation for Patricia's third child because that child was one year old at the time of the 2009 child support order and the parties did not deviate in 2009 from the standard child support calculation. We disagree.

The trial court has discretion to deviate from a standard calculation of child support when one of the parents has a child from another relationship. *Choate*, 143 Wn. App. at 241-42. The trial court must base its deviation on the total circumstances of both households. *Choate*, 143 Wn. App. at 242. Here, the trial court found that a downward deviation was appropriate due to Patricia's third child from another relationship and decreased her child support obligation accordingly.

Fearghal argues that the trial court's decision to order a downward deviation was erroneous because it did so without full disclosure of Patricia's husband's and stepdaughter's incomes and without written findings on that income in the child support worksheet. The record contains evidence of Patricia's husband's income. The record also specifies that Patricia's stepdaughter is a college student. Without evidence to the contrary, we presume that the trial court considered all the evidence before it in setting the support obligation in the child support order. *In re Marriage of Kelly*, 85 Wn. App. 785, 793, 934 P.2d 1218 (1997). The trial court's deviation was not an abuse of discretion.

B. REALLOCATION OF TAX EXEMPTION

Fearghal argues that the trial court's reallocation of the child tax exemption from him to Patricia was erroneous because the reallocation has a detrimental effect on him and is not in the best interests of the children. The record demonstrates that the trial court had before it Fearghal's tax returns for the businesses in which he is a shareholder at the time, his pay stubs, Patricia's and her husband's paystubs, and the information relating to Patricia's bankruptcy proceeding. Again, we presume that the trial court considered this evidence in setting the child support obligation. *Kelly*, 85 Wn. App. at 793. Given this evidence, the trial court did not abuse its discretion in reallocating the child tax exemption from Fearghal to Patricia.

C. MODIFICATION OF TERMINATION AND POSTSECONDARY EDUCATIONAL PROVISIONS

Fearghal argues that the trial court erred in modifying three provisions in the 2009 child support order related to postsecondary education. The modification order (1) provides that Patricia will pay child support for each child until both children reach the age of 18 or are enrolled in high school, whereas the 2009 child support order provided that she would pay child support in addition to 50 percent of all costs related to postsecondary educational support for each child as long as the child is enrolled in high school or an accredited postsecondary school, (2) provides that if the parents cannot agree on the amount that each would contribute to postsecondary education either of them could bring the issue to the trial court rather than require a set percentage contribution for each parent, as in the 2009 child support order, and (3) changes several other provisions, such as due dates, for payment of postsecondary educational support from the 2009 child support order. None of these changes constitute an abuse of discretion.

The 2009 child support order required Patricia to double-pay child support by imposing both her transfer payment *and* 50 percent of all costs relating to postsecondary education expenses, which expenses include the "necessities of life." RCW 26.19.090. "Postsecondary educational support *is* child support." *In re Marriage of Daubert*, 124 Wn. App. 483, 502, 99 P.3d 401 (2004), *as amended on reconsideration* (Dec. 16, 2004) *abrogated on other grounds by In re Marriage of McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007) (emphasis added). Thus, the trial court's order that Patricia will pay child support for each child until the child reaches 18, or is no longer in high school, when she will then begin to pay postsecondary educational support, was not an abuse of discretion.

Fearghal next argues that the trial court erred in adding a provision allowing the parties to return to court if they cannot agree on the contribution amounts for postsecondary educational support because the parties did not consider it in the 2009 child support order and the provision opens the door to future litigation.

RCW 26.19.090(1)-(2) provides that postsecondary educational support schedules are advisory, not mandatory, and that the trial court shall consider if the child is actually dependent on the parents and shall exercise its discretion under the circumstances when deciding whether to order support for postsecondary education. The 2009 child support order also included a provision to allow a parent to recover the amount of an untimely payment for postsecondary educational support, plus interest, if the other parent failed to make that payment; this provision also allowed for future litigation. To achieve finality, the trial court's continued jurisdiction to resolve a potential future dispute over postsecondary educational support is not an abuse of discretion.

Jannot, 149 Wn.2d at 127 (we give deference to the trial court's decisions in domestic relations cases to achieve finality in emotional and financial issues).

Fearghal's remaining contentions about the postsecondary educational provisions relate to the trial court's reasonable changes that conformed the provisions to Washington law, such as requiring the parents to make payments directly to the educational institution. RCW 26.19.090(6). Lastly, as explained above, Fearghal's primary argument that these changes are prohibited because he moved only for an adjustment of child support is incorrect. The trial court did not abuse its discretion in modifying the postsecondary educational support provisions of the 2009 child support order.

II. TRIAL COURT'S CHILD SUPPORT WORKSHEET WAS NOT ERRONEOUS

Fearghal argues that the trial court miscalculated the transfer payment due to errors in the child support worksheet. He argues that the evidence does not support the worksheet's numbers for (1) Patricia's federal income tax withholding, (2) Patricia's Social Security and Medicare tax withholdings, (3) Patricia's health insurance costs, and (4) Fearghal's health insurance costs.[6] We disagree.

RCW 26.19.035 requires the trial court to file with its child support order a completed child support worksheet, which is a standard form developed by the administrative office of the courts

[6] Fearghal also argues that the trial court erred by (1) excluding special expenses in the child support worksheet and (2) limiting expenses not included in the transfer payment, but he did not object to these changes below. (Fearghal mentions the changes in the statement of facts, but does not explain why the error was unreasonable). Because these claims of error are not of constitutional magnitude, and we hold that the trial court did not err by modifying the 2009 child support order without finding a "substantial change in circumstances," we do not address them. RAP 2.5(a).

to calculate the proper amount of child support. The child support worksheet is signed by the parties and then reviewed and approved by the trial court at the time of entry of the child support order. RCW 26.19.035(3)-(4). The information contained in the approved child support worksheet constitutes findings of fact for the child support order. *Daubert*, 124 Wn. App. at 492. Substantial evidence must support the trial court's factual findings. *In re Parentage of Goude*, 152 Wn. App. 784, 790, 219 P.3d 717 (2009). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise. *Goude*, 152 Wn. App. at 790.

A. TAX, SOCIAL SECURITY, AND MEDICARE WITHHOLDINGS

Fearghal argues that the trial court's child support worksheet incorrectly lists Patricia's federal income tax withholding because it does not account for what he characterizes as Patricia's $116 per month in an income tax return. He is incorrect. The trial court's child support worksheet deducts $689 per month from Patricia's income for income taxes. To prove that the worksheet incorrectly states Patricia's income tax amount, Fearghal cites to her chapter 13 bankruptcy plan, which provided that she will "[r]etain [the f]irst $1400 of each [tax] refund." CP at 111. Averaged over 12 months, Fearghal arrives at the $116 per month figure. The bankruptcy plan was not evidence of Patricia's expected tax refund. Rather, it is the highest amount that she might receive under her bankruptcy plan because any amount above $1400 would be applied to her creditors. Thus, Fearghal's argument fails because he does not adequately support it.

Fearghal also argues that the trial court's withholding of $542 for Patricia's Social Security and Medicare taxes in the child support worksheet is erroneous, but he is incorrect. Fearghal provided this number in his proposed child support worksheet filed together with his motion for an adjustment of child support. To the extent that the trial court's withholding amount may be

incorrect, it was invited error. *In re Marriage of Morris*, 176 Wn. App. 893, 900, 309 P.3d 767 (2013) (the doctrine of invited error prohibits a party from setting up an error below and then complaining of it on appeal).

B. HEALTH INSURANCE COSTS

Fearghal argues that the child support worksheet, approved by the trial court, incorrectly calculated two health care provisions for the children in (1) including Patricia's cost to insure herself in the $333 calculation for Patricia's cost to insure the children and (2) not including Fearghal's cost to insure the children even though the court found that he had available coverage. We disagree.

The trial court set the amount of Patricia's health care coverage at $333.00 per month, which amount the record demonstrates was calculated based on the cost for Patricia's own health insurance subtracted from the cost to insure herself and two children to arrive at $332.58 per month. The trial court did not err.

As to Fearghal's healthcare costs, the 2009 child support order required Fearghal to provide insurance coverage for the children only if the cost did not exceed 25 percent of his child support obligation.[7] In the child support modification order, the trial court found that Fearghal's cost of health insurance coverage was $260.68, which is greater than 25 percent of his support obligation

[7] Fearghal assigns error to the trial court's removal of the 2009 child support order requirement that both parents provide health insurance for the children as long as it does not exceed 25 percent of the parent's basic support obligation. First, by Fearghal's own calculation, his current health care costs would exceed the 25 percent limit. Second, we have already rejected Fearghal's argument that the trial court was prohibited from modifying the support order under his adjustment motion.

of $411.00. The 2009 child support order also provided that the parents would each maintain coverage for the children "until further order of the court." CP at 5. Thus, the trial court did not abuse its discretion in relieving Fearghal of the requirement to cover the children's health insurance under RCW 26.09.105.[8]

III. THE TRIAL COURT'S RETROACTIVE COMMENCEMENT DATE WAS NOT ERROR

Lastly, Fearghal argues that the trial court abused its discretion by setting January 1, 2014, as the retroactive commencement date on the modification order rather than May 29, 2013, the date he filed his petition to adjust. He argues that the delay violated legislative intent to ensure children's basic needs are met commensurate with parents' income and standard of living. The record does not contain any indication that Fearghal objected to the commencement date or to any delay in the proceedings below. Fearghal cites no authority for the proposition that a trial court *must* order a retroactive commencement date. Thus, we decline to address this claim of error under RAP 2.5(a) because Fearghal failed to raise it in the trial court.[9]

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[8] In any child support order or modification of child support, RCW 26.09.105 requires the trial court to order both parents to provide health insurance for the children unless, "[u]nder appropriate circumstances," the trial court excuses one parent from the responsibility. RCW 26.09.-105(1)(a)(i), (1)(c).

[9] This is not an error of constitutional magnitude that requires our review under RAP 2.5(a). Although Fearghal cites two provisions of the Washington Constitution that prohibit the trial court from unnecessarily delaying resolution and require the trial court to rule within 90 days that a matter is submitted to it, those provisions do not apply here. CONST. art. I, § 10; CONST. art. IV, § 20. After delays due to unavailability and evidence gathering, the trial court made its decision within 90 days after the hearing.

IV. ATTORNEY FEES

Fearghal requests statutory attorney fees and $600 of costs under RAP 14.2, RAP 18.1, and RCW 26.09.140. Patricia requests reasonable attorney fees and costs under RAP 14.2, RAP 18.1, and RCW 26.09.140. Both parties submitted timely financial affidavits. We deny both requests.

RAP 14.2 provides that a party who substantially prevails on review will be awarded statutory attorney fees and reasonable expenses incurred on this court's review. RAP 18.1 provides that we will grant an award of reasonable attorney fees if a statute so provides. RCW 26.09.140 allows for an award of attorney fees and statutory costs on appeal for proceedings under chapter 26.09 RCW. Our decision to award attorney fees under RCW 26.09.140 is discretionary based upon each parties' ability to pay and the merits of the issues raised on appeal. *In re Marriage of Muhammad*, 153 Wn.2d 795, 807, 108 P.3d 779 (2005).

We deny Fearghal's request because he is not the prevailing party on appeal. Fearghal asserts, and Patricia does not dispute, that he is currently unemployed. Thus, although Patricia's arguments on appeal were meritorious, we do not grant her request for reasonable attorney fees and costs under RAP 18.1 and RCW 26.09.140.

CONCLUSION

Because the trial court did not abuse its discretion on any of Fearghal's claims of error, we affirm the trial court's modification of the child support order. We deny both parties' request for costs and attorney fees.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.
SUTTON, J.

We concur:

Johanson, C.J.
JOHANSON, C.J.

Bjorgen, J.
BJORGEN, J.