COURT OF APPEALS DIVISION III OF THE STATE OF WASHINGTON

In re

PETER JOHNSON	)	
Respondent	)	
	)	No. 309657-III
v.	)	
	)	
ROBIN JOHNSON	)	
Appellant	)	

Respondent's Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases: Page

1. Facts Relevant to Motion

Under Assignment of Errors, Ms. Johnson moves the Court for review claiming Judge James M. Triplet, Judge of the Superior Court of Spokane County, erred when he struck the motion to revise and denied a motion to continue on April 19, 2012. (Appellant's brief, page 1)

On June 28, 2011, Commissioner Valerie D. Jolicoeur denied Ms. Johnson's motion seeking to find Mr. Johnson in contempt for failure to pay maintenance. The Court rejected Ms. Johnson's claim that the decree of legal separation provided for Ms. Johnson to receive lifetime maintenance. This order was not referenced by Ms. Johnson in her pleadings. (Appellant's brief, page 7, referencing to CP 20)

On October 3, 2011, Judge James M. Triplet denied Ms. Johnson's first motion for revision and upheld Commissioner Valerie D. Jolicouer's ruling that Mr. Johnson was not in contempt for alleged violation of the maintenance provision under the decree of legal separation. (CP 1-13). The Court discussed in its ruling that it had read the entire court file including supplemental authority and all cases cited therein. (CP 1)

In that ruling, Judge Triplet discussed that "Interpretation of a dissolution decree is not a question of fact, but is a question of law for this Court, citing to *Farver v. Department of Retirement Systems*, 29 Wn. App. 138 (1981). (CP 4)

In that matter, Ms. Johnson contended that the Decree of Legal Separation was a stand alone document, separate and distinct from the Findings of Fact and Conclusions of Law or that when the Decree of Dissolution was entered, it did not adopt the Findings of Fact and Conclusions of Law. (CP 4-5). Judge Triplet found both of those arguments

were without merit. (CP 5) Ms. Johnson claimed she was awarded lifetime maintenance despite the pleadings stating no more than seven years of maintenance.

On February 28, 2012, Commissioner Joseph F. Valente denied Ms. Johnson's second motion for contempt. This motion for contempt had claimed Mr. Johnson failed to pay maintenance to Ms. Johnson over a specified period of time.

Volumes of documents were furnished to the Court confirming that not only had Mr. Johnson paid Ms. Johnson the sums in the order, he paid more than what was ordered. (CP 25, lines 20-25)

The Court rejected the claim of Ms. Johnson that there was a pooling of resources and a delay in the onset of maintenance.

On March 9, 2012, Ms. Johnson filed a second motion to revise, this time of a ruling on February 28, 2012. (CP 205). The motion to revise was initially scheduled for a hearing on March 29, 2012. (CP 205). This is relevant because Ms. Johnson's counsel realized that Spokane County Local 0.7 requires the moving party to fix the hearing date not later than 30 days from the date the motion to revise is filed.

On March 27, 2012, Ms. Johnson filed a motion to continue the revision hearing to have it expressly heard by Judge Triplet, instead of to Judge Ellen Kalama Clark as Judge Triplet heard the first motion to revise. (CP 205).

On April 13, 2012, a court commissioner signed an order authorizing the revision hearing to be continued from April 12th to April 19, 2012. (CP 206)

On April 19, 2012, Judge Triplet denied a continuance request presented by Ms. Johnson, wherein Ms. Johnson had sought to continue her motion to revise. (CP 52)

This order states that its oral ruling was incorporated therein. (CP 52). However, there was no transcript of that decision obtained by Ms. Johnson for this Court to review.

On April 24, 2012, Ms. Johnson filed a motion for reconsideration challenging the local rule as to motions to revise and contended that they are violative of the controlling statute and legal authorities. (CP 153-202)

Pursuant to Spokane County Local Rule 0.7, Ms. Johnson's counsel was required to call in the motion status no later than noon on Tuesday, April 17, 2012 for an April 19, 2012 hearing. It was not called in as required by that rule and was thus stricken. (CP 206)

On June 12, 2012, Judge James M. Triplet issued a memorandum decision and denied the motion for reconsideration. (CP 204-212)

Legal Argument

In the instant case, there is no legal merit to the claim by Ms. Johnson that Spokane County Superior Court Judges cannot create a rule that addresses the procedures for revision hearings.

Spokane County Local Rule 0.7 deals with revisions of Court Commissioners' orders. Subsection (d) sets forth the hearing procedure relevant to the issues in this case. It provides as follows:

"...The moving party shall confirm with the other party whether they are ready for hearing, or whether a continuance may be requested. The moving party shall notify the judicial assistant to the presiding family law judge by noon, two days before the hearing date, as to the ready status of the motion. Failure to comply with this rule will

result in the motion being stricken...Multiple orders of continuance shall not be freely granted. The agreement of the parties, standing alone, may not be deemed sufficient basis for a continuance. ..."

Despite the position of Ms. Johnson, Judge Triplet found the local rule was clear and unambiguous that failure to call in a motion to revise as ready by noon two days before the hearing requires the Court to strike the motion to revise. (CP 207). It is undisputed that the motion to revise was not called in timely as required by local rule and no explanation was ever given as to why it was not called in as required by the local rule. (CP 207).

Ms. Johnson argues that Judge Triplet should have again continued the motion since it was not called in ready in a timely manner. But the local rule is clear that it is the moving party's obligation to confirm with the other party whether a continuance may be requested before calling the status of the motion. (CP 208). There was no discussion of another continuance of the motion that occurred between the parties before the deadline for the time to call in the motion to revise. (CP 208).

Ms. Johnson contends that Local Rule 0.7 is invalid both because it contravenes legislative intent and because she believes "motion being stricken" refers to the "hearing" being stricken rather than the whole motion, which she argues divests the moving party of a substantial right. (CP 208).

It is undisputed that a right to seek revision of a commissioner's order is of constitutional magnitude (see *State v. Wicker*, 105 Wn. App. 428 (2001).

It is undisputed that it is also a statutory right. See RCW 2.24.050.

It is undisputed that a local rule cannot change the specific directives of a statute or the constitution.

However, Ms. Johnson cites to no language in the Spokane County local revision rule that contravenes any specific statutory or constitutional right. It is true the local rule provides some additional procedural requirements in order to effectively manage the high volume of revision cases that are filed in Spokane County. Those do not contradict any statutory or constitutional provision.

Ms. Johnson argues that only three other Washington counties have call in procedures for motions to revise and only two counties have provisions that strike the motion upon failure to comply with the rule. Yet, Ms. Johnson cites no authority to support the argument that a rule's uniqueness violates the Constitution, a statute or that is should otherwise be ignored.

Ms. Johnson takes the position that the local rule "impinges" on the timing of the revision statute. This position should be rejected. The timing matter relates to calling in the case ready for hearing, not the filing of the motion itself.

Spokane County also has a local rule under this same section that requires the hearing be set within 30 days of the date of the motion to revise. The same result, the motion being stricken, would result. To accept the theory of Ms. Johnson, a party could file a motion to revise and set it out sixty days and the Superior Court could do nothing. Even Ms. Johnson recognized the validity of the rule when she reset her motion to revise hearing to occur within a date less than thirty days from the date of the motion to revise.

The same local rule also requires a party to obtain a transcript of the oral ruling of the Court, unless the Court issued no oral ruling or if the decision was a memorandum

decision. The local rule also requires a copy of the transcript be provided to the Court and to the opposing party-counsel two days prior to the revision hearing. There is no requirement in the revision statute that a party must provide a transcript of the ruling. To accept the position of Ms. Johnson, the Local Rule requiring the production of a transcript is invalid.

The same local rule requires the moving counsel to confer with the other counsel to insure their availability. There is no requirement in the revision statute for such. To accept the position of Ms. Johnson, this is invalid as well.

Ms. Johnson cites to *Marriage of Lemon*, 118 Wn. 2nd 422, 424, 823 P. 2d 1100 (1992) as support for her position. The issue in that case was the failure of a superior court judge to sign an affidavit of prejudice that was not presented them "as soon as the presenting party has knowledge that the case been assigned to that judge." The issue for the Court was the time criteria in presenting the affidavit of prejudice itself. Ms. Johnson misapplies Lemon. In Lemon, the litigant was denied their right to obtain the affidavit of prejudice when they filed it. In the instant case, Ms. Johnson filed her revision, was provided a hearing time, but failed to follow the procedure thereby causing the hearing to be stricken.

Ms. Johnson also cites to the Harbor Enters. Inc (sic) case. See *Harbor Enterprises In, v Gudjonsson*, 116 Wn. 2d 283, 803 P.2d 798 (1991) This case as well involved filing an affidavit of prejudice arising out a maritime case and does not support her position for the same reasons discussed in Lemon.

A local rule is proper if it merely requires that a procedural step be taken by one wishing to assert a legal right. *Heaney v. Seattle Municipal Court,* 35 Wash.App. 150,

155, 665 P.2d 918 (1983). Rules limiting the time for the exercise of substantive rights are routinely held valid. See *Wirtz v. Hooper-Holmes Bureau, Inc.*, 327 F.2d 939 (5th Cir.1967) (approving a local rule permitting dismissal of a case if the plaintiffs did not provide a witness list at least 10 days Before trial); *Nudd v. Fuller,* 150 Wash. 389, 273 P. 200 (1928) (upholding a court rule requiring notice of appeal within 30 days); Heaney v. Seattle Municipal Court, supra (approving a local rule that requires that the right to a speedy trial in justice court be asserted within 10 days).

Similarly, local rules imposing other restrictions on the exercise of substantive rights have also routinely been approved. See *Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378 (9th Cir.1989) (local rule can preclude testimony of expert when qualifications and substance of testimony were not provided to opposing party); *Hicks v. Bekins Moving & Storage Co.,* 115 F.2d 406 (9th Cir.1940) (local rule could authorize court to dismiss action sua sponte for failure to prosecute, even though Fed.R.Civ.P. 41 only specifically permitted the defendant to bring such a motion); State v. Espinoza, supra (upholding local rule precluding the disqualification of a commissioner by affidavit of prejudice); *Hessler Constr. Co., Inc. v. Looney,* 52 Wash.App. 110, 757 P.2d 988 (1988) (local rule can require service of response to summary judgment motion on Civil Motions Coordinator, as well as parties, but sanctions can be imposed upon failure to do so only after notice and a hearing).

Local rules for the conduct of trial courts are desirable and necessary; such rules should not be ignored or declared invalid except for compelling reasons. *Victor P. v. Pasadena Independent School Dist.*, 793 F.2d 633, 635 (5th Cir.1986). There are no such reasons here.

Contempt

The next area, presuming the Court affirms the trial court on the application of the local ruling governing revisions is whether the Court erred in not finding Mr. Johnson in contempt of court as that is the motion that was before the Court.

A trial court's decision on contempt for an abuse of discretion. In re Marriage of James, 79 Wn. App. 436, 439-40, 903 P.2d 470 (1995). Discretion is abused if the court's exercise of discretion was based on untenable grounds or untenable reasons. Id. at 440.

Ms. Johnson's contention that Mr. Johnson "did not produce sufficient proof of compliance" is belied by the financial records submitted to the Court. These documents were not filed as exhibits but copies were provided to counsel for Appellant and referenced. These documents included:

2003 bank statements of Robin Johnson;

2003 checking account records showing payments of mortgage, Robin Johnson auto, auto insurance and inland power;

2004 Checking account records showing payments of Mortgage, Robin Johnson auto, auto insurance, qwest, Inland Power, Cobra Health Insurance and Basic Health Insurance;

2005 Checking account records showing payments of Mortgage, Robin Johnson auto, auto insurance, qwest, Inland Power, Cobra Health Insurance and Basic Health Insurance;

2005 bank statements of Robin Johnson

One American Policy Premiums Paid

Auto Policy premiums paid by Peter Johnson

2012 VISA Statement of Robin Johnson

Qwest bills incurred by Robin Johnson and paid by Peter Johnson (Verbatim report of proceedings of contempt hearing on February 28, 2012)

Ms. Johnson tries to portray Commissioner Valente's ruling as some sort of modification of the decree. This position is unsupported and the Court did not modify the decree in any manner.

Ms. Johnson tried to convince the Court that "the parties forestalled the beginning of maintenance payments until their house had sold..." (Brief of Appellant, page 8). This position was contested by Mr. Johnson and the Court Commissioner agreed with Mr. Johnson's position.

The decree of legal separation required Ms. Johnson to pay:

Half of Mortgage payment, $653.00
Car Payment, $284.61
Car Insurance, $71.14
Horizon VISA Credit Union, $30.00
Total $1,038.75 per month. (CP 2_

It is not disputed by Ms. Johnson that Mr. Johnson paid her half of the mortgage, her car payment and her auto insurance. She tried to claim this was separate and apart beyond the maintenance. (Verbatim Report of Proceedings of February 28, 2012 hearing)

To illustrate exactly how much Mr. Johnson had paid, a breakdown was provided to the Court Commissioner in his declaration filed February 22, 2012.

Qwest-$1,056.31

2003 Checking Account Records

June 2003

Mortgage payment, $1,306.00
Robin Auto , $284.61

Auto insurance , $106.70 (both)
Inland Power, $113.00

July, 2003

Mortgage payment, $1,306
Robin Auto , $284.61
Auto insurance , $106.70 (both)
Qwest, $70.66
Inland Power, $114.00

August 2003

Mortgage payment, $1,306.00
Robin Auto , $284.61
Auto insurance , $106.70 (both)
Qwest, $55.02
Inland Power, $113.00

September 2003

Mortgage payment, $1,306.00
Robin Auto , $284.61
Auto insurance , $117.12 (both)
Qwest, $54.00
Inland Power, $113.00

October, 2003

Mortgage payment, $1,334.00
Robin Auto , $284.61
Auto insurance , $117.12 (both)
Qwest, $58.83
Inland Power, $113.00

November, 2003

Mortgage payment, $1,334.30
Robin Auto , $284.61
Auto insurance , $117.12 (both)
Qwest, $28.87

Inland Power, $113.00

December, 2003

Mortgage payment, $1,334.30
Robin Auto , $284.61
Auto insurance , $117.12 (both)
Qwest, $53.47
Inland Power, $113.00

2004 Checking Account Records

January 2004

Mortgage payment, $1,334.20
Robin Auto , $284.61
Auto insurance , $117.12 (both)
Qwest, $80.70
Inland Power, $113.00

February, 2004

Mortgage payment, $1,334.30
Robin Auto , $284.61
Auto insurance , $117.12 (both)
Qwest, $53.55
Inland Power, $113.00

March, 2004

Mortgage payment, $1,334.30
Robin Auto , $284.61
Auto insurance , $117.12 (both)
Qwest, $53.22
Inland Power, $113.00

April 2004

Mortgage payment, $1,334.20
Robin Auto , $284.61
Auto insurance , $117.12 (both)
Qwest, $47.07
Inland Power, $113.00
Cobra for Robin, $301.88

May, 2004

Mortgage payment, $1,334.30
Robin Auto , $284.61
Auto insurance , $117.12 (both)
Qwest, $56.25
Inland Power, $113.00
Cobra for Robin, $319.06

June, 2004

Mortgage payment, $1,334.00
Robin Auto , $284.61
Auto insurance , $117.12 (both)
Qwest, $65.61
Inland Power, $97.00
Cobra for Robin, $310.47

July, 2004

Robin Auto , $284.61
Auto insurance , $117.12 (both)
Qwest, $49.93
Inland Power, $97.00
Cobra for Robin, $310.47

August 2004

Mortgage payment, $1,334.30 (twice)
Robin Auto , $284.61
Auto insurance , $117.12 (both)
Qwest, $49.18
Inland Power, $97.00
Cobra for Robin, $310.47

September 2004

Mortgage payment, $1,334.30
Robin Auto , $284.61
Auto insurance , $107.18 (both)
Qwest, $48.77
Inland Power, $97.00
Cobra for Robin, $310.47

October 2004

Mortgage payment, $1,334.30
Robin Auto , $284.61
Auto insurance , $107.18(both)
Qwest, $58.07
Inland Power, $97.00
Cobra for Robin, $310.47

November 2004

Mortgage payment, $1,334.30
Robin Auto , $284.61
Auto insurance , $107.18(both)
Qwest, $49.33
Inland Power, $97.00
Cobra for Robin, $56.39

December 2004

Mortgage payment, $1,334.30
Robin Auto , $284.61
Auto insurance , $107.18(both)
Inland Power, $97.00
Cobra for Robin, $56.39

2005 Checking Account Records

January 2005

Mortgage payment, $1,334.00
Robin Auto , $284.61
Auto insurance , $107.18 (both)
Qwest, $101.37
Inland Power, $97.00

February 2005

Health Insurance for Robin, $56.39
Robin Auto, $284.61
Auto insurance, $107.18 (both)
Qwest, 50.42

Inland Power, $97.00

March, 2005

Health Insurance for Robin, $56.39
Robin Auto, $284.61
Auto insurance, $107.18 (both)
Qwest, 50.64
Inland Power, $80.00
Inland Power 101.79 (paid at closing)

The Horizon VISA Credit Union debt was Ms. Johnson's sole obligation. (CP 2) By the time of the closing of the home, Ms. Johnson had maxed out the VISA at $13,000.67. (February 22, 2012 declaration of Peter Johnson, #41). From the sale of the home, $7,352.36 was paid on this card, leaving a balance of $5,722.65. This came off the top of the sale before the parties split the proceeds 50-50. As a result, Ms. Johnson received $7,352.36 off the top she was not entitled. Mr. Johnson provided documents confirming Ms. Johnson maxed out this card to in excess of $10,000. (February 22, 2012 declaration of Peter Johnson, #41).

With regards to the other VISA, Ms. Johnson contended Mr. Johnson had to pay $260.00 a month forever (as maintenance) on this VISA and she could charge on the at will. CP 3

The Court Commissioner was provided with correspondence from Ms. Johnson acknowledging she was to pay on this second VISA, which was related to her student loans. (Exhibit of letter filed February 22, 2012, document #42)

Contrary to the position of Ms. Johnson, there was no modification of the decree by Commissioner Valente and there was no retroactive modification.

III. Conclusion

The Spokane County local rule requiring counsel to call in their motion to revise by noon, two days prior to the hearing and that failure to do so causes the motion to be stricken is valid.

The Court Commissioner correctly declined to find Mr. Johnson in contempt of court.

The Court Commissioner correctly found that Mr. Johnson had more than met his financial obligations to Ms. Johnson and the ruling of Commissioner Valente should be affirmed.

Respectfully submitted on this 2ndth day of June, 2013

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