No. 96967-1

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 32650-1-III

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

In re the Marriage of:

KERT A. CARLSON, Petitioner,
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

ANSWER TO PETITION FOR REVIEW

Hailey L. Landrus, WSBA #39432
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Attorney for Respondent

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A. IDENTITY OF RESPONDENT

Respondent Rebecca Carlson (n/k/a Rebecca Eismann) asks this Court to deny Petitioner Kert A. Carlson's Petition for Review of the Court of Appeals opinion designated in Part B and attached as an Appendix to the Petition for Review.

B. STATEMENT OF THE CASE

Ms. Eismann incorporates by reference the statement of facts from her Court of Appeals' response brief.

C. ARGUMENT WHY REVIEW SHOULD BE DENIED.

1. The February 14, 2014 temporary order and judgment was not reviewable where review was sought only after entry of final orders, temporary orders terminate upon entry of final orders, vested back support judgments may not be retrospectively modified, and temporary orders and judgment do not prejudicially affect the designated orders on appeal.

The Court of Appeals did not err by refusing to review the trial court's February 14, 2014, temporary child support order, finding Mr. Carlson's monthly net income to be $13,903 and Ms. Eismann's monthly net income to be $5,471. Mr. Carlson did not designate this temporary order in his notice of appeal.

In the instances in which the appellate court has reviewed temporary orders, it has done so prior to entry of a final order and consistent with RAP 2.3, pertaining to the rules for discretionary review upon a finding the temporary orders altered the status quo. *In re Marriage of Greenlaw*, 67 Wn. App. 755, 759, 840 P.2d 223 (1992), r*ev'd on other grounds*, 123 Wn.2d 593, 869 P.2d 1024, *cert. denied*, 513 U.S. 935 (1994). Here, Mr. Carlson never sought discretionary review of the February 14, 2014 temporary order, which terminated upon entry of the final dissolution decree. RCW 26.09.060(10)(c). Accordingly, there is no basis for this order to be reviewed on appeal.

The trial court also entered a judgment for back child support, maintenance, attorney fees, and expert fees in the amount of $43,862.07 on February 14, 2014. CP 1349. Delinquent support payments that have accrued before a trial is held become vested judgments and may not be retrospectively modified. *In re Marriage of Barone*, 100 Wn. App. 241, 244, 996 P.2d 654 (2000); RCW 26.09.170(1). According to *Barone*, the trial court could not have changed the February 14, 2014, judgment after trial. And, indeed, it did not change the judgment.

The February 14, 2014, temporary order and judgment did not prejudice the trial court's final orders designated in Mr. Carlson's notice of

appeal. An order "prejudicially affects" a decision designated in a notice of appeal (here, the June 2014 decree and child support order) only where the designated decision would not have occurred in the absence of the undesignated ruling or order. *Anaya Gomez v. Sauerwein*, 172 Wn. App. 370, 376, 289 P.3d 755 (2012). A trial and entry of final child support orders and a decree of dissolution would have occurred regardless of the trial court's entry of the February 14, 2014, temporary order and judgment against Mr. Carlson. Moreover, the designated final decisions could be decided without considering the merits of the February 14, 2014 temporary orders. *See* RCW 26.09.060(10)(a) ("A temporary order . . . [d]oes not prejudice the rights of a party . . . which are to be adjudicated at subsequent hearings in the proceeding"). Thus, the February 14, 2014, temporary order and judgment did not prejudicially affect the trial court's final decisions designated in Mr. Carlson's notice of appeal. And the Court of Appeals did not err by declining to review them.

2. Substantial evidence supports the April 2017 ruling on Mr. Carlson's petition to modify child support.

Mr. Carlson asks this Court to review the Court of Appeals affirmation of the April 2017 child support order reducing his child support obligation on the ground that the trial court did not find a

substantial change in circumstances. Such a finding would not have changed the outcome of the child support modification proceedings: Mr. Carlson's child support obligation would have been reduced. Substantial evidence supported the trial court's finding reducing the parties' monthly net incomes. A trial court judgment may be affirmed by any basis supported by the record. *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984).

3. The trial court's intransigence finding was based supported by the record.

Mr. Carlson contends the Court of Appeals erred by stating that Ms. Eismann's need as well as his intransigence justified the trial court's $20,000 attorney fee award even though the trial court's award was not based on Ms. Eismann's need. Again, a trial court judgment may be affirmed by any basis supported by the record. *Id.* Ms. Eismann's need is well-established in the trial court record on appeal. Moreover, the Court of Appeals opinion identifies specific facts that support the trial court's intransigence finding, including delaying production of documents, refusing to obey court orders, and aligning the parties' eldest daughters against Ms. Eismann. Opinion at 8-9.

4. Ms. Eismann moves the Court for an attorney fee award.

RAP 18.1 provides, "If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed at the trial court." RAP 18.1(a).

RAP 18.1(j) allows an award of attorney fees for preparing and filing a timely answer to a petition for review if fees have been awarded to the party who prevailed in the Court of Appeals and a petition for review to the Supreme Court is denied. Additionally, "[t]he trial court has authority to award attorney fees for an appeal in an action to modify a marriage dissolution decree." RAP 7.2(d). And, finally, the trial court has authority to award attorney fees based on either need or intransigence. RCW 26.09.140; *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992).

Ms. Eismann was awarded attorney fees multiple times. She prevailed in the Court of Appeals, and Mr. Carlson's petition for review should be denied. As the Court of Appeals opinion confirms, Ms. Eismann has substantial need and has incurred increased attorney fees due to Mr. Carlson's intransigence. He continues to engage in protracted

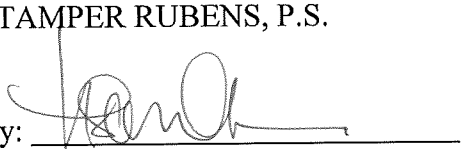
litigation at the trial court and appellate levels, causing Ms. Eismann to continue to incur attorney fees unnecessarily. Ms. Eismann's request for fees should be granted. An Affidavit of Financial Need will be filed in accordance with RAP 18.1(c).

D. CONCLUSION

Based on the foregoing, Ms. Eismann respectfully requests that the Court deny Mr. Carlson's Petition for Review and grant Ms. Eismann an award of reasonable attorney fees.

Respectfully submitted on May 3, 2019.

STAMPER RUBENS, P.S.



By: _____
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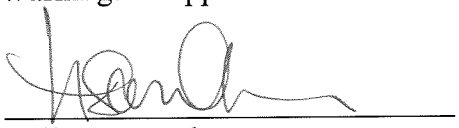
Attorney for Respondent

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 May 3, 2019, I caused to be delivered a true and correct copy of the Answer to Petition for Review by email to Petitioner's counsel, Kenneth H. Kato, at khkato@comcast.net, via the Washington Appellate Court online portal.



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Transmittal Information

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Appellate Court Case Number:	96967-1
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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