

No. 64679-6-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

IN RE THE MARRIAGE OF:
D.J. BARRETT, APPELLANT

V.

N.L. BARRETT, RESPONDENT

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 SEP 16 AM 10:02

BRIEF OF RESPONDENT

Gregg E. Bradshaw
WSBA # 21299
Attorney for Respondent
1011 E. Main, Ste 455
Puyallup, WA 98372
253-864-3061

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RESPONSE TO THE ASSIGNMENTS OF ERROR

ERROR 1: THE COURT DID NOT
ERR IN MAKING THE
RULINGS, FOLLOWING
HEARING AND FAIR
OPPORTUNITY FOR THE
PARTIES TO BE HEARD.

ERROR 2: RESPONDENT AGREES
THAT THE JUDGE OF THE
SUPERIOR COURT ERRED
IN REVISING THE ORDER
OF THE COMMISSIONER
TO MAKE WEDNESDAY
VISITATIONS EVERY
WEDNESDAY RATHER
THAN EVERY OTHER
WEDNESDAY AS NOTED
IN THE ORDER DATED
OCTOBER 27, 2009.

ERROR 3: THE JUDGE OF THE
SUPERIOR COURT WAS
WITHIN HIS DISCRETION
IN REMANDING
PORTIONS OF THE CASE
BACK TO THE
COMMISSIONER FOR
ENTRY OF ORDERS
CONSISTENT WITH HIS
RULING.

note: Revision and Reconsideration are distinctly different matters at law. It is unclear whether appellant truly means to refer to the revisions or the reconsideration or both. As such, they are being taken for face value and argued as such.

STATEMENT OF THE CASE

This matter commenced a full two years after the parties anticipated that it should happen. The original parenting plan appears to not have been included in the clerks papers. However, it was referenced in hearings before the court. In pertinent part, the order read:

““Upon enrollment in school, the child shall reside with the Mother... “ - - clearly, she’s made primary.
““...except for the following days and times, when the child will reside with of be with the Father ...” And then it says:
“... at times to be worked out by agreement or in mediation prior to the child entering school. If an agreement cannot be reached and mediation fails, either party may bring a motion before the Family Law Motions Department ...” - - that’s - - that’s me, right here - -“...of this Court, to establish the schedule for the school year and vacation periods.”

RP of Sept 3, 2009 p 27.

Upon reaching no agreement, the parties continued in the pre-school schedule for all of Kindergarten and First Grade. This action was not brought until she was headed into second grade.

Nonetheless, a petition was filed by Mr. Barrett and the procedure followed much as outlined in his Statement of the Case.

The arguments made in the appellant’s brief are without merit. The court (at both the Commissioner level and Judge level acted well within their discretion. This appeal has no merits to proceed and should

be dismissed on the merits.

LAW AND ARGUMENT

APPELLANTS FIRST ISSUE IS WITHOUT MERIT AND UNCLEAR AS TO THE ACTUAL ARGUMENT MADE

Modification of a parenting plan is reviewed for an abuse of discretion. See generally, In re Marriage of Zigler and Sidwell, 154 Wash.App. 803, 226 P.3d 202 (2010). This case is not a modification of a parenting plan, but rather an establishment of a visitation schedule. Even so, the court applied principles of law consistent with modification statutes to determine the best interests of the child. As such, the abuse of discretion standard appears to be the proper standard on review. Given this standard, Appellant provides not issues or arguments on which this court should grant relief.

Appellant first argues that the Commissioner must use the standards in RCW 26.09.187 in making her decision. This is without any support. The Court clearly found that there was not adequate cause to proceed on a modification under RCW 26.09.187. In order to proceed on a modification of a parenting plan, invoking this statute, the court must first make a finding of adequate cause. The court made just the opposite finding and dismissed the portion of the modification that was sought

under RCW 26.09.260 and entered an order so stating on October 1, 2009. CP 325-327.

This left the court with only the language in the original parenting plan stating “Upon enrollment in school, the child shall reside with the mother, except for the following days and times when the child will reside with or be with the father at times to be worked out by agreement or in mediation prior to the child entering school. If an agreement cannot be reached and mediation fails, either party may bring a motion before the Family Law Motions Department of this court to establish the schedule for the school year, and vacation periods” The court was limited by the agreement of the parties and ruled within those agreements. This issue was discussed at length in the Memorandum and Order Denying Respondent’s Motion for Reconsideration and need not be re-argued here. CP 424-427

Both terms “school year” and “vacation periods” are specific terms within the parenting plan and no reasonable reading of the old parenting plan can reasonably extend the court’s authority to modify the parenting plan beyond these limitations when no adequate cause was found. The exact language of the original parenting plan referred winter vacation, spring, and summer to paragraph 3.2 (the enabling paragraph for the court

to proceed.). Thus, the court could reasonably have read the authority to modify these visitation times as well. **Respondent would gladly concede that the court exceeded its discretion and that those visitation times should remain limited to that ordered in paragraph 3.2.**

To the extent the Appellant benefitted by additional visitation time over winter, spring, and summer, it would be easiest to agree with him and remove those additional times from his visitation schedule (recall that the mother argued that his time with the child should be decreased and not increased). This included reference to behavior of the father and reactions of the child along with declarations of the father's older children making the argument that this child is subject to the same abuse they were subjected to. That case finally ended on appeal to Division Three of the court of appeals. See, In re the Custody of BJB and BNB v. Barrett, 146 Wash. App 1, 189 P.3d 800 (2008).

The ultimate conclusion of Appellant that “[T]he most egregious was to instruct the commissioner to perform as his law clerk when he should have remanded the entire matter for further action”, Brief of Appellant at 4, further sustains that his argument is without merit or any

basis in argument. To argue that a court has no authority to remand a matter for entry of orders consistent with It's ruling is contrary to regular practice. Many appellate cases have as the ultimate conclusion a referral back to the lower court for further findings or simple entry of orders consistent with the appellate opinion. Appellant argues this issue with no legal support.

Appellant raises the argument and then verifies the court's limited ability in his own brief. This appears confusing and in opposition to his other arguments. On page 6 of his brief, he argues "Based on this ruling, the only remaining issue before the court was the issue of the determination of the school schedule in the parenting plan". This is agreed. The appellant gives this court no basis to find that either the Commissioner or the Judge abused their discretion in making their decision. He just disagrees with them.

After all of this argument, Appellant appears to agree that the court acted within it's discretion, but exceeded it's authority in ordering the father to provided transportation for the limited time that he may have overnight visits on Wednesday. Really? Is it reasonable for the mother to face the expense and legal action of an appeal for this argument? He

wants some of the benefit of the ruling, but not all the consideration of the ruling. He relies on Chirstel, infra, to support his argument, claiming this is akin to a clarification. It is no-where near a clarification. It is the establishment of visitation as per the prior parenting plan.

Appellants reliance on Marriage of Christel, 101 Wn. App 13, 1 P.3d 600 (2000) is without merit. At no time was this action by the court treated as a clarification. The court acted under the enabling authority of paragraph 3.2 of the old parenting plan to fashion a parenting plan. It was to “establish the schedule”. Supplemental CP parenting plan section 3.2. It was not a ‘clarification’ of an existing plan. Here, again, the court does not exceed it’s authority.

The argument of appellant, insofar as it appears, is insufficient to even raise an issue on the merits. The matter should be dismissed on the merits, or at minimum the rulings of the court below should be affirmed.

THE COURT DID NOT ABUSE ITS DISCRETION IN NOT TAKING ORAL TESTIMONY OR HOLDING A TRIAL - IN FACT THE ENABLING PARAGRAPHS DID NOT GIVE THE COURT ANY SUCH AUTHORITY

As a second argument, the appellant claims that this matter should have been set for trial or evidentiary hearing rather than a motion.

Appellant cites no relevant statute or case law. Further, the ‘agreement’

that is the old parenting plan (to which appellant regularly refers) provides no such provision. In fact, it is just the opposite. The specific language of the parenting plan reads:

“either party may bring a **MOTION** before the Family Law Motions Department of this court to establish the schedule for the school year.”

supplemental CP - Parenting Plan page 2, paragraph 3.2 line 16-17

(emphasis mine).

This is in direct contravention of his argument. He further cites to a case about vacating a default and quotes language giving the court authority (in that case) to hear ora testimony. The key word in that quote is “MAY”. The decision does not use ‘shall’ or ‘ must’. The case further indicates that the lack of holding an evidentiary hearing ‘may’ be abuse of discretion IF the court has found that the affidavits present an issue of fact that requires determination of witness credibility to resolve. No such findings or even references by the court are made in this case. Appellants reliance on Woodruff v. Spence, 76 Wn. App. 207, 883 P.2d 936 (1994) is misplaced.

There is no merit to this final argument. Once again, the ruling of the court below must be upheld. The appeal of the Appellant must be

denied.

ATTORNEY FEES

Respondent is specifically requesting the court to award attorney fees to her for having to respond to this appeal. The court can see that this has been an expensive process to resolve what should have been resolved with a motion before the court. It has not been. The financial burden on the Respondent has been enormous. The court has the authority under RCW 26.09.140¹ to award attorney fees based on need and ability to pay. The court further has the authority to award fees based on the arguable merits of the issues raised on appeal.

“An award of attorney fees and costs may be granted in an appellate court's discretion under RCW 26.09.140. Upon a request for fees and costs under RCW 26.09.140, courts will consider “the parties' relative ability to pay” and “the arguable merit of the issues raised on appeal.” In re Marriage of Leslie, 90 Wash.App. 796, 807, 954 P.2d 330 (1998).”

In re the Marriage of Muhammed, 153 Wash.2d 795, 807, 108 P.3d 779

¹RCW 26.09.140 “The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.

The court may order that the attorney's fees be paid directly to the attorney who may enforce the order in his name.”

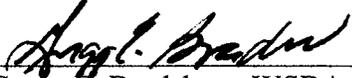
(2005).

An award of attorney fees is appropriate in this case.

CONCLUSION:

The arguments in the Appellants brief are without merit and should be summarily denied. The decisions of the court below must be affirmed.

Respectfully submitted this 15th day of September, 2010.



Gregg E. Bradshaw, WSBA #21299
Attorney for Respondent

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IN THE COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

D. J. BARRETT,

Appellant,

NO. 64679-6-I

v

DECLARATION OF MAILING

N. L. BARRETT,

Respondent.

Comes now Gregg E. Bradshaw and declares as follows:

That I am over the age of twenty-one (21) years and not a party interested in the above proceeding.

That on the 15 day of September, 2010, I personally placed a copy of Brief of Respondent in the above-entitled cause sent next day delivery in a United States mail receptacle addressed to:

Court of Appeals, Division One
One Union Square
600 University St.
Seattle, WA 98101

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

Dated this 15 day of Sept, 2010.



Gregg E. Bradshaw, WSBA 21299
Attorney for Respondent

Declaration of Mailing

- 1

GREGG E. BRADSHAW
1011 E. MAIN, SUITE 455
Puyallup, Washington 98372
253-864-3061

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IN THE COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

D. J. BARRETT,

Appellant,

v

N. L. BARRETT,

Respondent

NO. 64679-6-I

DECLARATION OF MAILING

Comes now Gregg E. Bradshaw and declares as follows:

That I am over the age of twenty-one (21) years and not a party interested in the above proceeding.

That on the 15 day of September, 2010, I personally placed a copy of Brief of Respondent, and certified copies of Transcripts for September 3, 2009 and October 27, 2009 Hearings in King County Superior Court cause number 02-3-01590-9 KNT in the above-entitled cause sent next day delivery in a United States mail receptacle addressed to:

Dan Barrett
P.O. Box 361
South Prairie, WA 98358

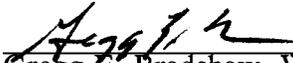
I declare under the penalty of perjury under the laws of the State of Washington

Declaration of Mailing

GREGG E. BRADSHAW
1011 E. MAIN, SUITE 455
Puyallup, Washington 98372
253-864-3061

1 that the foregoing is true and correct.

2 Dated this 15 day of Sept, 2010.

3
4 
5 _____
6 Gregg E. Bradshaw, WSBA 21299
7 Attorney for Respondent
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Declaration of Mailing

GREGG E. BRADSHAW
1011 E. MAIN, SUITE 455
Puyallup, Washington 98372
253-864-3061

GREGG E. BRADSHAW, LLC

ATTORNEY AT LAW

1011 E. MAIN, SUITE 455
PUYALLUP WASHINGTON 98372
(253) 864-3061 fax (253) 864-3063

September 15, 2010

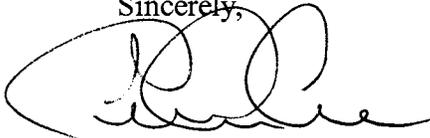
Court of Appeals, Division 1
Attn: Clerk of the Court
One Union Square
600 University St.
Seattle, WA 98101

RE: Barrett v. Barrett / 64679-6-I

Dear Sir or Madam:

Enclosed please find an Original Brief of Respondent for filing with the court. Thank you for your prompt attention to this matter. If you have any questions please call our office.

Sincerely,



Anneke Lee

Paralegal

Enclosure

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