

70259-9

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No. 70259-9-1

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

DAVID B. RATNER, *Appellant*,

v.

TRINA A. WHERRY, *Respondent*.

BRIEF OF APPELLANT

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COURT OF APPEALS, DIVISION ONE
JULY 15 2011
TRINA A. WHERRY
DAVID B. RATNER
WILLIAM T. LAWRIE

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I. ASSIGNMENTS OF ERROR

Assignments of Error

No. 1: The trial court erred in dismissing the case from the King County Trial by Affidavit calendar.

No. 2: The trial court erred in finding there was no reversible error by the arbitrator.

No. 3: The trial court erred in finding that the parties agreed to arbitrate the January post-change-of-custody child support.

No. 4: The trial court erred in denying David's motion for reconsideration and clarification.

No. 5: The trial court erred in entering findings based on hearsay statements of Trina and her attorney.

No. 6: The trial court erred in denying David's motion to vacate, correct or modify the arbitrator's decision..

No. 7: The trial court erred in entering a finding that the arbitrator made no error that rises to the level of vacating or modifying the arbitrator's decision.

No. 8: The trial court erred in finding it did not have statutory authority to hear a trial de novo pursuant to RCW 7.06.

No. 10: The trial court erred in finding that neither LFLR 14(d)(6) nor RCW 7.06 applied to these proceedings and that RCW 7.04(A) did apply.

No. 11: The trial court erred in dismissing the trial de novo when Judge Ramsdell had already denied Trina's previous motion to dismiss.

No. 12: The trial court erred in not vacating the award of fees made by the arbitrator and awarding fees to Trina.

No. 13: The trial court erred in delegating the determination of attorneys' fees to the arbitrator.

No. 14: The trial court erred in "consulting" with Judge Ramsdell regarding factual information as to the background of his order.

Issues Pertaining to Assignments of Error

No. 1: Did the court abuse its discretion in dismissing the case from the trial by affidavit calendar?

(Assignments of error 1, 4, 8, 10)

No. 2: Did the court abuse its discretion in finding that the arbitrator had committed no error which rose to the level of vacating or modifying his decision?

(Assignments of error 2, 4, 6, 7)

No. 3: Did the court abuse its discretion in finding that the parties had agreed to arbitrate the post change of custody child support

and based on the hearsay statements of the Respondent and her counsel?

(Assignments of error 3, 4, 5, 7)

No. 4: Did the court abuse its discretion in accepting the decision of the arbitrator when no petition for modification or worksheets required by statute were filed or served?

(Assignments of error 2, 4, 6, 7)

No. 5: Did the court abuse its discretion in accepting the decision of the arbitrator that the parties could not provide any additional financial information after the change of custody although the child would be living in a different country?

(Assignments of error 2, 4, 6, 7)

No. 6: Did the court abuse its discretion in delegating the determination of the award of attorney's fees to the arbitrator?

(Assignments of error 4, 13)

No. 7: Did the adoption of RCW 7.06.020(2) by the King County Superior Court preclude arbitration of child support under RCW 7.04A?

(Assignments of error 1, 4, 8, 10)

No. 8: Did the court abuse its discretion in dismissing the case from the trial by affidavit calendar when another judge had already

denied the same motion which was never appealed, clarified or reconsidered?

(Assignments of error 1, 4, 8, 10, 11)

No. 9: Did the court abuse its discretion in consulting with another judge to obtain factual information pertaining to the other judge's previous order?

(Assignments of error 14)

No. 10: Does the child support statute requiring judicial review of all child support orders and worksheets require that the review must be de novo and not subject to RCW 7.04?

(Assignments of error 1, 10)

No. 11: Did the trial court err in not setting aside the arbitrator's award of \$1,500 in fees?

(Assignments of error 6, 12)

III. STATEMENT OF THE CASE

A. PRE-ARBITRATION PROCEEDINGS.

This case initially began as a dissolution of marriage between the respondent (petitioner below), Trina Wherry, and the appellant (respondent below), David Ratner. For purposes of this brief the parties will be referred to as “Trina” and “David.” After the entry of a decree, a modification of both the Parenting Plan (CP 176, pp.1-14) and Order of Child Support (CP 178, pp.15-29) took place.

In October of 2010, David commenced a proceeding to modify the Parenting Plan and the Order of Child Support (CP 201, pp.30-40). The court (1) found adequate cause to proceed to trial (CP 239, pp. 46-48), (2) entered a temporary Order of Support (CP 240, pp.49-69) and a temporary order that granted David residential time and directed the parties to agree to a GAL (CP 238, pp. 41-45). An order appointing a GAL was entered on January 18, 2011 (CP 251, pp. 70-74). The parties entered an agreed parenting plan December 1, 2011 (CP 291, pp. 79-87).

Thereafter, the parties agreed to a new parenting plan (CP 292, pp. 88-97) on January 13, 2012, changing the primary residential parent from Trina to David. An order was entered terminating David’s support obligation on February 17, 2012, effective January 13, 2012

(CP 293, pp.98-100) but retaining jurisdiction to enter a new support order effective that date.

B. ARBITRATION AGREEMENT CHRONOLOGY

The parties entered into an arbitration agreement dated September/October, 2012 (CP 320, pp. 425-430) agreeing to arbitrate remaining issues: i.e. child support, GAL fees and a review of the temporary child support in accordance with RCW 26.09. (These copies do not indicate if the arbitrator, Howard Bartlett, ever signed the agreement.). The standard form agreement provided by Mr. Bartlett included this provision:

7. Agreement of Parties as to Finality of Rulings. Except for arbitration of parenting plan issues, both parties agree that the arbitration ruling is binding, subject to the specific rights of appeal enumerated in RCW 7.04A. Parenting issues will be arbitrated in accordance with RCW 26.09 and will be binding, if neither party files a motion for de novo review with the court within fifteen (15) days of the date of the arbitrator's final decision. If either party does timely file a motion with the court, the arbitrator's ruling shall remain in full force and effect pending written agreement of the parties or Court Order to the contrary. (CP 426, ll. 10-16).

Over the course of the arbitration, the arbitrator made several (decisions) awards (CP 315, pp. 375-421; CP 320, pp. 454-455). On January 1, 2012, he stayed the arbitration because of the impending change of primary residential parent from Trina to David. (CP 315, pp. 401, 403). In February, Mr. Bartlett entered a "decision" indicating he

refused to reopen to take further evidence except for the limited purpose of obtaining health information (CP 320, pp. 454-455). This ruling precluded the parties from presenting their latest tax returns even though the child's expenses were now related to her residence primarily in the father's home, not the mother's.

Both David and Trina filed motions for reconsideration pursuant to the terms of the arbitration agreement. The arbitrator ruled on these motions on September 19, 2012 (CO 315, pp. 405-417), relying on the mother's newly provided post-June 2012 income (despite the fact that, in February, Mr. Bartlett had precluded the father from reopening and presenting new evidence except as to health insurance).

The arbitrator also refused to require the mother to pay the GAL's fees (The mother previously had agreed to pay them, and then later reneged, claiming they were more than she thought they would be) (CP 315, p. 381, para. 10, ll. 10-26; p. 410, para. 13, ll. 22-29; p.411, ll. 1-2).

C. POST ARBITRATION COURT PROCEEDING

After Mr. Bartlett's final decision/award, David first made a request for trial de novo (within 20 days of the arbitrator's decision) in accordance with statute (RCW 7.06), and King County Local Family

Law Rule 14(d)(6) (CP 297, pp. 101-102). A trial date was set by the clerk (CP 307, p. 151); Trina moved to dismiss the request (CP 303, pp. 104-109). Trina's motion was denied on December 12, 2012 (CP 310, pp. 172-173). David, out of caution, also made a motion to vacate/ modify the arbitration award within 90 days (CP 313, pp. 174-185) in accordance with RCW 7.04A, as stated in the arbitration agreement. David moved to continue the trial by affidavit hearing while the (now) procedural morass was clarified. (CP 317, pp. 225-227). That motion was granted on February 19, 2013 (CP 326, pp. 312-314).

David's motion to vacate, etc., pursuant to RCW 7.04 was denied and that proceeding and the trial by affidavit hearing was stricken by Judge Laura Inveen on March 15, 2013. (CP 330, pp. 325-326. (Attachment A). David filed a motion for reconsideration on March 25, 2013 (CP 332, pp. 327-334). That motion was denied on April 5, 2013 (CP 333, pp. 335-336). (Attachment B.) David filed a notice of appeal of those two orders on May 2, 2013 (CP 334, pp. 337-341).

IV. SUMMARY OF ARGUMENT

David contends under the facts of this case that there exist inconsistencies in the orders of the court, local rules and the statutes regarding both family law and arbitrations which warrant reversal of the trial court's decision(s).

David also contends that when the King County Court adopted the rule for Mandatory Arbitration (LFLR 14(d)(6) of child support pursuant to RCW 7.06.020(2), that arbitrations that purported to use RW 7.04(A) for child support arbitrations became unenforceable and against public policy. In fact, because of the statutory review requirement for the adequacy of the amount of support, only Mandatory Arbitration rules would apply. Otherwise, support orders in King County would follow two different paths, one with judicial review and one without.

David also contends that the arbitrator's refusal to accept current financial information made his decision pure speculation and not based on any grounds that a reviewing court could rely on. His refusal was arbitrary and capricious.

V. ARGUMENT

A. ARBITRATION AGREEMENT

After entering into the modified agreed parenting plan (which was entered on December 1, 2011), the parties entered into an arbitration agreement dated September/October, 2012 (CP 320, pp. 425-430) agreeing to arbitrate the remaining issues: i.e. child support, GAL fees and a review of the temporary child support in accordance with RCW 26.09. (The copies on the record do not indicate if the arbitrator, Howard Bartlett, ever signed the agreement.). The standard form agreement provided by Mr. Bartlett included this provision:

7. Agreement of Parties as to Finality of Rulings. Except for arbitration of parenting plan issues, both parties agree that the arbitration ruling is binding, subject to the specific rights of appeal enumerated in RCW 7.04A. Parenting issues will be arbitrated in accordance with RCW 26.09 and will be binding, if neither party files a motion for de novo review with the court within fifteen (15) days of the date of the arbitrator's final decision. If either party does timely file a motion with the court, the arbitrator's ruling shall remain in full force and effect pending written agreement of the parties or Court Order to the contrary. (CP 426, ll. 10-16).

As an aside, the paragraph is somewhat inconsistent with preceding Paragraph 6 regarding parenting plans.

Over the course of the arbitration, the arbitrator made several (decisions) awards (CP 315, pp. 375-421; CP 320, pp. 454-455). On January 12th and 13th, 2012, he stayed the arbitration because of the

impending change of primary residential parent from Trina to David. (CP 315, pp. 401, 403). In February, Mr. Bartlett entered a “decision” indicating he refused to reopen to take further evidence except for the limited purpose of obtaining health information (CP 320, pp. 454-455). This ruling precluded the parties from presenting their latest tax returns, new financial declarations or other information even though the child’s expenses were now related to her residence primarily in the father’s home, not the mother’s.

Both David and Trina filed motions for reconsideration of the pre change-of-custody support rulings pursuant to the terms of the arbitration agreement. The arbitrator ruled on these motions on September 19, 2012 (CO 315, pp. 405-417), relying on the mother’s new employment post-June 2012 income (despite the fact that, in February, Mr. Bartlett had precluded the father from reopening and presenting new evidence except as to health insurance).

The arbitrator also refused to require the mother to pay the GAL’s fees (The mother previously had agreed to pay them, and then later reneged, claiming they were more than she thought they would be) (CP 315, p. 381, para. 10, ll. 10-26; p. 410, para. 13, ll. 22-29; p.411, ll. 1-2).

B. POST ARBITRATION COURT PROCEEDINGS/RULINGS

David contends that the orders being appealed in this case are in conflict with Washington statutes, local rules, the case law, the previous support order and public policy which have resulted in bizarre and unconscionable decisions detrimental to both the child and David. David also contends the provision quoted above from paragraph 7 of the arbitration agreement the parties signed is contrary to statute, local rule and public policy and is therefore unenforceable.

A review of the applicable statutes, local rules and case law is pertinent:

1. Pertinent Family Law Statutes

a. Child support Modifications.

1. RCW 26.09.100 provides as follows:

(1) In a proceeding for dissolution of marriage or domestic partnership, legal separation, declaration of invalidity, maintenance, or child support, after considering all relevant factors but without regard to misconduct, the court shall order either or both parents owing a duty of support to any child of the marriage or the domestic partnership dependent upon either or both spouses or domestic partners to pay an amount determined under chapter 26.19 RCW.

(2) The court may require automatic periodic adjustments or modifications of child support. That portion of any decree that requires periodic adjustments or modifications of child support shall use the provisions in chapter 26.19 RCW as the basis for the adjustment or modification. Provisions in the decree for periodic adjustment or modification shall not conflict with RCW 26.09.170 except that the decree may require periodic adjustments or modifications of support more frequently than the time periods established pursuant to RCW 26.09.170.

b. RCW 26.09.170 provides in pertinent part as follows:

(5)(a) A party to an order of child support may petition for a modification based upon a showing of substantially changed circumstances at any time.

(b) An obligor's voluntary unemployment or voluntary underemployment, by itself, is not a substantial change of circumstances.

c. RCW 26.09.175 provides in pertinent part as follows:

(1) A proceeding for the modification of an order of child support shall commence with the filing of a petition and worksheets. The petition shall be in the form prescribed by the administrator for the courts. There shall be a fee of twenty dollars for the filing of a petition for modification of dissolution.

(2)(a) The petitioner shall serve upon the other party the summons, a copy of the petition, and the worksheets in the form prescribed by the administrator for the courts. (emphasis added.)

d. RCW 26.19.011(3) provides in pertinent part as follows:

(3) "Court" means a superior court judge, court commissioner, and presiding and reviewing officers who administratively determine or enforce child support orders.

e. RCW 26.19.035 reads as follows:

(1) **Application of the child support schedule.** The child support schedule shall be applied:

(a) In each county of the state;

(b) In judicial and administrative proceedings under this title or Title 13 or 74 RCW;

(c) In all proceedings in which child support is determined or modified;

(d) In setting temporary and permanent support;

(e) In automatic modification provisions or decrees entered pursuant to RCW 26.09.100; and

(f) In addition to proceedings in which child support is determined for minors, to adult children who are dependent on their parents and for whom support is ordered pursuant to RCW 26.09.100.

The provisions of this chapter for determining child support and reasons for deviation from the standard calculation shall be applied in the same manner by the court, presiding officers, and reviewing officers.

(2) **Written findings of fact supported by the evidence.** An order for child support shall be supported by written findings of fact upon which the support determination is based and shall include reasons for any deviation from the standard calculation and reasons for denial of a party's request for deviation from the standard calculation. The court shall enter written findings of fact in all cases whether or not the court: (a) Sets the support at the presumptive amount, for combined monthly net incomes below five thousand dollars; (b) sets the support at an advisory amount, for combined monthly net incomes between five thousand and seven thousand dollars; or (c) deviates from the presumptive or advisory amounts.

(3) **Completion of worksheets.** Worksheets in the form developed by the administrative office of the courts shall be completed under penalty of perjury and filed in every proceeding in which child support is determined. **The court shall not accept incomplete worksheets or worksheets that vary from the worksheets developed by the administrative office of the courts.**

(4) **Court review of the worksheets and order.** The court shall review the worksheets and the order setting support for the adequacy of the reasons set forth for any deviation or denial of any request for deviation and for the adequacy of the amount of support ordered. Each order shall state the amount of child support calculated using the standard calculation and the amount of child support actually ordered. Worksheets shall be attached to the decree or order or if filed separately shall be initialed or signed by the judge and filed with the order.
(Emphasis added.)

2. Applicable Arbitration Statute

RCW 7.06.020(2) provides as follows:

(2) If approved by majority vote of the superior court judges of a county which has authorized arbitration, all civil actions which are at issue in the superior court in which the sole relief sought is the establishment, termination or modification of maintenance or child support payments are subject to mandatory arbitration. The arbitrability of any such action shall not be affected by the amount or number of payments involved. (Emphasis added.)

3. Local Rule

a. King County Local Rule 14(d) recognizes the only methods of disposition of support modification proceedings in King County. King County Local Rule 14(d)(6) states as follows:

(6) Arbitration. The parties may stipulate to arbitrate the issues in the petition pursuant to the state and local Mandatory Arbitration Rules. The stipulation must be in writing, in a form as prescribed by the Court. The stipulation must state whether the issues will be handled by private arbitration or will be submitted to the King County Arbitration Department for assignment of an arbitrator.

(A) Motions for Temporary Relief. Once an arbitrator has been appointed, all motions shall be decided by the arbitrator.

(B) Appeals from Arbitration. Requests for a trial de novo from the decision of an arbitrator shall be heard on the Trial by Affidavit Calendar.

4. Case Law

Burke v. Burke, 96 Wn. App. 474 (1999)

Coy v. Coy, 160 Wn. App. 797 (2013)

Fox v. Fox, 87 Wn. App. 782 (1977)

In Re Marriage of Morrison, 26 Wn. App. 571 (1980)

In Re Parentage of Austin Smith-Bartlett, 95 Wn.App. 633 (1995)

Malted Mousse, Inc. v. Steinmetz, 150 Wn.2d 518 (2003)

McDaniel v. McDaniel, 64 Wn.2d 273 (1964)

Sherman v. State, 128 Wn.2d 164 (1995)

State ex rel Mauerman v. Superior Court, 44Wn.2d, 828 (1954)

Reconciling the law with the facts of this case is similar to untangling a plate of spaghetti: it is logical to work backwards. In In Re Parentage of Austin Smith-Bartlett, *supra*, the court stated it will first look at what arbitration procedure applies.

First, an arbitrator is not a “court” under RCW 26.19.011(3). See also Coy v. Coy, *supra*.

Second, a careful reading of RCW 26.19.035(4) requires the *court* to independently review both the court order and the worksheets for, among other things, “...the adequacy of the amount of support ordered” and that the worksheets and order shall be initialed or signed by the “judge”. The trial

court's order deprived David and the child of the mandatory review of Mr. Bartlett's erroneous decisions.

Third, public policy as stated in both RCW 7.06.020(2) and King County LFLR14(d)(6) only recognize arbitrations of child support only pursuant to the Mandatory Arbitration Rules; appeals of those arbitrations are to be taken to the Trial by Affidavit calendar. There are certain prerequisites under the local rule that were not followed in this case. While this case started out as one including a parenting plan modification, it was subject to transfer to the Trial by Affidavit calendar when the parenting plan issues were resolved [LFLR 14(a)(2)]. (There remained issues ancillary to support obligations of the parties including a review of the support under the temporary order, attorneys' fees and payment of GAL fees: these also could be resolved on the trial by affidavit calendar.) See Burke v. Burke, *supra*. The trial court mistakenly believed that the parties could agree to arbitrate child support under RCW 7.04A. David asserts that once a superior court has adopted the mandatory arbitration rules regarding child support under RCW 7.06.020(2), no other arbitration remedy is available. David also asserts that LFLR 14(d)(6)(B) provides the only avenue of appeal: a trial de novo on the trial by affidavit calendar. See Burke, *supra*, and Coy, *supra*.

Fourth, every order of child support with accompanying worksheets is subject to review by the court. This is identical and analogous to the requirement of court review of parenting plans and restrictions on the award of attorneys' fees in such cases .

Fifth, the following specific provisions of the arbitration contract are contrary to law and public policy:

(a.) The first sentence of the arbitration clause in the parties' contract reads as follows: "...Except for arbitration of parenting plan issues, both parties agree the arbitration ruling is binding, subject to the specific rights of appeal enumerated in RCW 7.04A..." (emphasis added).

A support order and worksheets cannot be "binding" until they are reviewed by a "court", not an "arbitrator", as is provided for in RCW 26.19.035(4) to determine whether the award was "adequate."

The meaning of rights to "appeal" under RCW 7.04A in the arbitration agreement clause is somewhat ambiguous. It would seem to suggest that there is no right to make motions under 7.04A. 230 and 240, but only to appeal to the Court of Appeals under RCW 7.04A.280.

The arbitration agreement clause also seems to lump child support with division of assets and liabilities. The situation here is the same as in a

parenting plan: by statute an arbitrator is not a “court” and cannot sign off on or approve worksheets and a support order. Coy v. Coy, *supra*.

(b.) The next sentence in the arbitration agreement states “Parenting Plan issues will be arbitrated in accordance with RCW 26.09 and will be binding (*sic*) if neither party files a motion (*sic*) for trial de novo review with the court within fifteen (15) days of the date of the arbitrator’s final decision.” In fact, there is no provision in RCW 26.09 for arbitration except the provisions regarding dispute resolution at RCW 26.09.184(3). There is also no such thing as a “motion” for trial de novo: MAR 7.1 states it is a “request.”

It is unknown where this fifteen day limit came from. RCW 7.06.050 states it is a twenty day limit. Even RCW 7.04A.230 gives a party 90 days to file motions. However, the arbitrator cannot make a final decision in a parenting plan case, nor can parenting plan issues be subject to “binding arbitration.” Coy v. Coy, *supra*, and RCW 7.04A.240. The arbitrator can only make a decision.

(c.) The final sentence of the arbitration contract reads “If either party does timely file a motion with the court, the arbitrator’s decision shall

remain in full force and effect pending written agreement of the parties or court order to the contrary.”

Presumably, this applies to the preceding sentence regarding parenting plans but is inconsistent with paragraph 6 which precedes it but again is contrary to public policy as an arbitrator cannot make a binding decision (award) on a parenting plan even if only temporary one , since it is subject to “de novo” review. In Re Austin Smith-Bartlett, *supra*; Coy v. Coy, *supra*. In fact, in In Re Austin Smith-Bartlett, *supra*, the court stated “as a general rule, when statute provides for superior court review, it means review de novo.”

5. The Binding Arbitration Paragraph as a Whole.

The arbitration paragraph suggests a bifurcation of remedies: (1) Parenting Plan issues are subject to de novo review only if a party files a “motion” within 15 days (it is unknown whether this “review” was to be pursuant to RCW 7.06) *and* (2) all other issues (including child support, attorneys’ fees, property division, etc.) were to be subject to the appeal provision of RCW 7.04A . That clearly violates the state Supreme Court’s restriction that a party cannot have two remedies; it also defies logic. Trina

provided citations to cases which were decided *before* Malted Mousse. See Malted Mousse, *supra*.

However, David asserts there is a more compelling reason to void this paragraph and the agreement: child support is in a separate category from the division of assets and liabilities: RCW 7.06.020(2) allows, under certain conditions, for child support to be handled only under the statutes and Rules for Mandatory Arbitration. King County adopted LFLR 14(d) Method of Disposition of Support Modification in 2004 and amended it in 2008 and 2009. The only provision for arbitration is found in subparagraph (6) of that rule. It provides in part “The parties may stipulate to arbitrate the issues in the petition pursuant to the state and local Mandatory Arbitration Rules.” There is no provision for arbitration under RCW 7.04A in LFLR 14. The local rule goes on to provide “The stipulation must be in writing...” (Emphasis added.)

Finally, LFLR 14(d)(6)(B) provides: “Appeals from Arbitration. Requests for a trial de novo from the decision of an arbitrator shall be heard on the Trial by Affidavit Calendar.”

David believes both the statutes and the local rules make it perfectly clear that in King County a support modification may be arbitrated only

under the Mandatory Arbitration Rules and that the arbitration agreement clause citing RCW 7.04A regarding child support is not enforceable and is against public policy. Trina, in her memorandum, argued that King County had never adopted RCW 7.06.020(2). (CP 303, p. 106, l.22, and p. 109, l. 3) In fact, this is and was not true.

6. RCW 7.04A.

David, out of caution also filed a motion to vacate, modify and correct the decision under RCW 7.04A, 230 and 240. (CP 313, pp. 174-185).

If the court finds that the arbitration support proceeding was enforceable and not against public policy, RCW 7.04A may apply.

The arbitrator in his February 12 letter made it clear he would not reopen to take additional evidence. He stated:

Mr. Ratner has requested reopening the arbitration for additional information. As mentioned above I am not interested in reopening the arbitration for all purposes. The health insurance is a discrete issue. The fact that Hailey is now living with Mr. Ratner does not change my decision with regard to the financial issues and basic child support, it merely changes who pays child support to whom. (CP 320, p. 455)

David believes he never agreed to arbitrate anything other than the support order that the arbitrator had been retained to arbitrate.

The new parenting plan of January, 2012, was a new proceeding. McDaniel v. McDaniel, 64 Wn. 2d 273 (1964) *citing* State ex rel Mauerman v. Superior Court, 44 Wn.2d 828 (1954).

Since the original modification of the support order was moot when the modified parenting plan was entered in January, 2012, RCW 26.09.175 requires a party to commence a new support modification by filing and then serving a summons and Petition for Modification with worksheets. None of these documents were ever filed: There is no way the trial court could have “reviewed” any new determination of support for adequacy. The arbitration agreement states the arbitration will be in accordance with RCW 26.09: how did the arbitrator have anything to arbitrate after mid-January, 2012, with the required pleadings neither filed nor served?

Furthermore, no new arbitration agreement was signed. There are not even emails which would support the contention that there was a stipulated, written agreement to submit the new orders to Mr. Bartlett for arbitration—as required by LFLR 14(d)(6). Mr. Bartlett’s refusal to allow new evidence was contrary to law (RCW 26.09) and public policy. It was an abuse of discretion. At the least, David should have been given an opportunity to submit current information, since the only information the

arbitrator had dated back to 2010 and was based on Trina's expenses including the child, not David's expenses with the child.

Mr. Bartlett had no jurisdiction over this under either RCW 7.04A or 7.06. The trial court in its March 15, 2013, order stated "...the arbitrator made no error that rises to the level of vacating or modifying the arbitrator's decision." In fact, the September, 2012 decision, as the arbitrator stated, was based on two succinct motions for reconsideration of the original December, 2011 and January, 2012, decisions, not on anything else. As the arbitrator stated, there were no oral arguments; everything was submitted in writing. It was therefore disingenuous for the court to make the following findings:

"The court finds the parties agreed to the arbitrator's authority to rule on post January, 2012 issues, in accordance with the Rules and Procedures for Binding Arbitration signed by the parties on 9/29/11 & 10/31/11. This agreement is demonstrated 1) by the oral & email communications between the parties; 2) The parties actively submitted current issues of child support to the arbitrator before the hearing; 3) line of questioning in the arbitration by the respondent referenced post 1/12 issues such as pet'r's (*sic*) current position at the medical center; 4) respondent's briefing called for decision's (*sic*) regarding current income & child support expenses; 5) no objection to the arbitrator's authority was made at the September hearing."

The court completely ignored the fact that the arbitrator ignored the requirements necessary to commence an action for modification.

a. The trial court stated the parties “agreed” to allow the arbitrator to rule on post January 2012 issues based on the “oral and email communications”. What oral communications was the court referring to? There were none authenticated by the arbitrator in the record. The email communications certainly do not support an agreement. To the contrary, David’s attorney suggested a new, written agreement.

The trial court stated she found the parties submitted “current” issues of child support to the arbitrator before the hearing. What is the court possibly referring to? The court then stated there was a line of questioning by respondent regarding the petitioner’s current employment. Where? Was the court referring to Trina’s or Ms. Thompson’s hearsay statements? There is no other portion of the record David can find which substantiates that finding. The court is required to ignore hearsay statements in declarations. In Re Marriage of Morrison, 26 Wn. App. 571, 576 (footnote 2)).

In fact the reference the arbitrator made to Trina’s current employment was contrary to the arbitrator’s own decision not to reopen in his February 22nd letter. (He did, in fact, reopen to David for the limited purposes of exploring Trina’s claimed health insurance premiums under the pre-January order.)

b. The trial court found that the “agreement” of the parties to arbitration is supported by the fact David’s “briefing” called for current income and child support expenses: how does his asking for current income as required by RCW 26.09 and local rule, and for child support expenses as required by the 2004 support order, constitute an agreement to arbitrate? Trina was allowed to ignore the February 22, 2012 arbitration letter that forbade the parties from reopening; however, David was not allowed to similarly ignore it.

The most bizarre part of the arbitrator’s September 19th decision is found on Page 3, lines 25-26, where Mr. Bartlett states: “It should be pointed out that neither party provided me a copy of a 2011 tax return for the purpose of this child support determination.” How could they? He had refused to reopen to take additional evidence (except for Trina’s medical insurance costs) in his February 22nd letter/decision.

Finally, the trial judge stated no objection was made to the arbitrator’s authority at the September hearing. This is perplexing, as the only issues before the arbitrator in September were motions for reconsideration of the December, 2011, and January, 2012 decisions which dealt with the pre-change-of-custody, child support. In fact, the arbitrator

reiterated that he was not changing his February 22nd ruling on support, where he stated there would be no additional evidence. In addition, there is nothing in the arbitration decision about what was or wasn't pursued at the September 10, 2012, hearing. In Trina's self-serving statements about her current income she noted she had crossed the line and was presenting prohibited new evidence. Ms. Thompson's representations of what occurred are hearsay and not part of any authenticated record.

The trial judge also improperly delegated the determination of attorneys' fees to the arbitrator, Mr. Bartlett. RCW 7.04A.010(4) defines "court" as meaning a court of competent jurisdiction in this state. The statute related to fees, RCW7.04A.250(2) and (3) only allows the "court" to award fees. The arbitrator is not a "court". See Coy v. Coy, supra.

7.The Merits of the Motion

1. The ongoing tenor of the arbitrator's decision was "fairness" to Trina. Two examples are as follows:

a. Trina admitted that after consulting with an attorney she had agreed to pay the fees of the Guardian ad Litem. Trina's argument to the arbitrator was that the GAL's fees were more than she had anticipated (Trina is a multi-millionaire). Trina offered no other equitable arguments.

The arbitrator's decision wasn't based on her complaint of the amount of the fees; instead, he based his arbitrary fifty-fifty payment of fees decision on the fact that 1) the parenting plan dispute was contested and 2) the parties entered into an agreed order to advance the fees fifty-fifty and then have them reallocated at trial. This is logically baffling: 1) a party or parties normally would not obtain the services of a GAL unless the matter was contested; 2) Trina did not deny making the offer, which was then accepted, and 3) the reallocation of fees at trial was part of the form order. Not signing the form order would have delayed the GAL appointment.

b. Trina claimed that her reduction in income (contracted sale of her interest in her RBC) while she waited for her employment to end was not a voluntary reduction in income and that she was transitioning or trying to transition into a new field of employment. Trina's income went from \$450,000 a year to \$144,000 a year. (CP 315, pp. 378-379.)

This factual situation is similar to a prior case before this court, in Fox v. Fox, 87 Wn. App. 782 (1977) where a surgeon, age 66, stated he was nearing retirement and wanted to cut back: the court in Fox seemed to find Dr. Fox had merely transferred his income to his wife. In the instant case, no reason was even offered as to why Trina intentionally, contractually, quit

and cut back her income by two-thirds to work the same number of hours while doing the same work. By June, 2012, she was voluntarily unemployed under her contract. By law, income should have been imputed to her at \$40,000 a month, the amount she had voluntarily abandoned when she signed the sale contract in 2009. (She didn't tell David about this until shortly before he started the modification proceeding in 2010.)

David, on the other hand, had been retired for more than ten years before he even met Trina, and he had lived off his separate rental income. (CP 315, page 379, ll. 8-10.) By the time of the arbitration he had been retired for more than 25 years! In fact, in 2004 Judge Trickey accepted this factor in his support order. Yet, in arbitration, Mr. Bartlett decided David was also voluntarily unemployed. (CP 315, p. 379, ll. 22-23.) The arbitrator erred in deciding David was voluntarily unemployed: this was *res judicata* under Judge Trickey's 2004 order.

c. The 2004 support order called for "arbitration of non-payment of child support and/or expenses." without stating a statute that applied. (CP 178. P. 22, para. 3.22, ll.19-20.)

In early summer of 2012, David brought to the attention of the arbitrator that Trina was not paying any support or expenses for the child.

Judge Inveen seemed to believe the “complaint” meant David was agreeing to arbitration under the same clause that the parties had previously signed. Yet the 2004 order was the only final order of child support the parties had in effect: how could compliance with that support order become the basis, essentially, of a waiver? David was boxed in: the trial court began to confuse the arbitration requirement within the 2004 support order with the separate agreement signed by the parties in 2011 over an entirely separate set of issues and facts.

8. Dismissal of Trial de Novo.

When David filed his request for a trial de novo, a case schedule was entered; as stated above, in December of 2012 Trina filed a motion to dismiss David’s request for a trial de novo. This motion was heard before Judge Ramsdell. Among other arguments, Trina argued that King County had never adopted RCW 7.06.020(2).

The court denied Trina’s motion on December 22, 2012 (CP 310). When David filed his motion to vacate, etc., Trina responded with, in part, another motion to dismiss the trial de novo without noting it for hearing. (CP 309, p. 228, ll. 15-17.)

Judge Inveen, before whom the hearing was held March 4, 2013, on the record disclosed that she had “consulted” with Judge Ramsdell about his order. RP, page 14, l. 25, to page 15, ll. 1-18.

The Code of Judicial Conduct provides that under very narrow and limited circumstances a judge may consult with another judge. CJC Rule 2.9(A)(3) provides in part “A judge may consult... with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record...”

In this case it appears that Judge Inveen’s conduct and comments were intended to find a way to avoid Judge Ramsdell’s order, which Trina had never sought to clarify, reconsider or appeal.

CJC Rule 2.9(C) provides in part: “A judge shall not investigate facts in a matter pending or impending before that judge...” Judge Inveen made no “reasonable effort to avoid factual information that was not part of the record.” When Judge Ramsdell told her he had “no independent recollection” of the order, as she disclosed to the parties, she should have stopped her inquiry. (A caption is not part of an order.)

The “appearance of fairness” has been violated here and a new judge should hear this case if remanded. Sherman v. State, 128 Wn.2d 164, pp.203-206 (1995).

VI. CONCLUSION

In similar decisions the Supreme Court and Courts of Appeal have stated the same thing: the determination of what arbitration statute applies is a question of law to be reviewed de novo by the appellate courts. Some of the decisions were made before the amendment to RCW 7.06.020 allowing mandatory arbitration of child support orders. It seems that the legislature limited the trial courts to electing the MAR method but not the binding arbitration method. The agreement in this case is unenforceable. However, all of the cases are clear are a party and the courts are limited to either the voluntary or the Mandatory rules for review of a decision but not both. The 2004 Order of Child Support adds another layer to this procedural dilemma.

It is also noted that the requirements for mandatory court review of support orders and work sheets are completely inconsistent

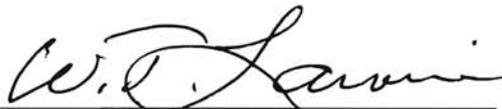
with the remedies available in RCW 7.04A. However, the failure of the arbitrator to use or allow current financial information and then criticizing them for obeying his decision defies reasoning.

The simple resolution to this case is to have the parties start over either with an agreement to arbitrate consistent with court rules or just refer the original order to the Trial by Affidavit Calendar and let David file a modification proceeding.

To maintain the appearance of fairness, it is requested the court have this matter resolved by another judge.

The arbitrator's ruling and the court's ruling on attorneys' fees should be vacated: there is no basis for them. The court cannot order the arbitrator to award fees and cannot delegate that responsibility.

RESPECTFULLY SUBMITTED this 16th day of September, 2013.



WILLIAM T. LAWRIE, WSBA #4933
Of LAWRIE & GILBERT, P.L.L.C.
Attorneys for Appellant

VII. APPENDIX

- A. Order on Motion to Vacate/Dismiss (CP 333-334).....
- B. Order Denying Motions for Reconsideration,/Clarification..

M

FILED
KING COUNTY, WASHINGTON

APR 05 2013

**SUPERIOR COURT CLERK
BY JANIE SMOTER
DEPLRY**

**Superior Court of Washington
County of KING**

In re the Marriage of:

TRINA A WHERRY

No. 99-3-03726-3 SEA

Order Denying jcr
**Order on Motions for
Reconsideration/Clarification**

Petitioner,

and

DAVID B. RATNER

Respondent.

Clerk's Action Required

I. Basis

The court having heard a motion by the respondent for reconsideration and clarification of the order entered March 15, 2013, it is hereby

II. Order

It is Ordered:

1. The motion for reconsideration is ~~granted~~ *Denied.* and (a) the order directing the arbitrator to determine post arbitration attorney's fees and costs is vacated and (b) the order dismissing the Trial de novo is vacated;
2. The order is clarified so that the court reviewing the order of child support for adequacy shall

ORDER ON MOTIONS FOR RECONSIDERATION AND CLARIFICATION

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[] Other:

Dated: 4/5/13

Jenna E
Judge Laura Inveen

Presented by:

Approved by:

William T. Lawrie 4933
William T. Lawrie Date
Signature of Party or Lawyer/WSBA No.

30163
Shana E. Thompson Date
Signature of Party or Lawyer/WSBA No.

ORDER ON MOTIONS FOR RECONSIDERATION AND CLARIFICATION

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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

In re the Marriage of:

TRINA A. WHERRY,

Petitioner,

and

DAVID B. RATNER,

Respondent.

No. 99-3-03726-3 SEA

ORDER ON PETITIONER'S MOTION TO VACATE/
DISMISS

I.C. JUDGE INVEEN

CLERK'S ACTION

THIS MATTER came before the Court on Respondent's motion to vacate the arbitrator's decisions of September and October 2012, and the Court, being fully advised of the premises, and having reviewed the pleadings filed herein,

IT IS HEREBY ORDER:

The court has reviewed materials provided by parties, statutory and caselaw and finds it inconsistent to allow both a trial de novo under RCW 7.06 and a motion to vacate filed under RCW 7.04. The court finds it does not have statutory authority to hear a trial de novo pursuant to RCW 7.06 because this is not a type of case that court rules provide for mandatory jurisdiction and parties did not agree to arbitrate under RCW 7.06. Therefore the trial de novo is dismissed with prejudice.

or court rule

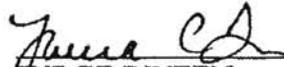
LFLR 14(c)(6) does not apply. JOT

1 The motion to vacate the arbitrator's decision is denied. This court finds that per RCW
2 7.04^A the arbitrator made no error that rises to the level of vacating or modifying the
3 arbitrator's decision.

4
5 Petitioner shall submit an attorney fee and cost declaration to this ~~court~~^{arbitrator} for determination of
6 an award of fees and costs for having to respond to both Respondent's trial de novo action
7 and motion to vacate the arbitration decision.

8 *The court finds the parties agreed to the arbitrator's authority to*
9 *rule on post January, 2012 issues in accordance with the Rules and*
10 *Procedures for Binding Arbitration signed by the parties on 9/24/11 + 10/3/11.*
11 *This agreement is demonstrated by the oral + email communication between*
12 *the parties; 2) the parties actively submitted current issues of child support*
13 *to the arbitrator before the hearing; 3) line of questioning in the arbitration*
14 *hearing by respondent referenced post 1/2 issues such as pet's*
15 *current position at the medical center; 4) respondent's briefing*
16 *called for decision regarding current income + child support*
17 *expenses; 5) no objection to the arbitrator's authority was*
18 *made at the september hearing.*

19 DONE IN OPEN COURT this 15 day of March, 2013.

20 
21 JUDGE INVEEN

22 Presented by:

22 Approved for entry:

23 Shana E. Thompson, WSBA#30163
24 Attorney for Petitioner

23 William T. Lawrie, WSBA #
24 Attorney for Respondent

25 _____
26 Petitioner

_____ Respondent