

No. 70259-9-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

DAVID B. RATNER, *Appellant*,

v.

TRINA A. WHERRY, *Respondent*.

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS
DIVISION ONE
SEATTLE, WASHINGTON
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McDaniel v. McDaniel, 64 Wn.2d 273 (1964) p.7

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Satomi Owners Ass'n v. Satomi, LLC, 167 Wn 2d 781,819 (2009), p. 5

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A. REPLY TO TRINA'S STATEMENT OF CASE

David Ratner has never denied he entered into the form agreement provided by the arbitrator. What he has claimed is that this agreement was against public policy and contrary to law. The most baffling part of Trina's time line and argument is when she thinks the arbitrator's decisions took place.

The arbitrator's critical decision occurred on February 22, 2012 (CP 412) when he refused to have an arbitration hearing or accept new evidence after the primary care of the child was transferred from Trina to David and she moved from Seattle to Vancouver, BC. (CP 454-455) He reaffirmed that decision in his September 19th, 2012 decision.

Trina disingenuously argues on page 6 and 7 of her brief that the parties agreed to arbitration in a telephone conference call on March 5, 2012, two weeks after the February 22nd decision. The horse was already out of the barn by that date.

Trina also argues that the stay ordered by Mr. Bartlett on January 6, 2012 was a result of the parties' desire for to ask for reconsideration. The stay was entered because the change in primary parent and the relocation of the child was imminent and would make the child support order meaningless. The only matters to "stay" were the two decisions on the order of child support where David paid support to Trina, entered in December of 2011 and January 2012. Mr. Bartlett incorrectly stated the stay was after his February 22nd decision.

Trina claims that the parties were able to present evidence of the parties' "current" financial situation. As evidence of this she cites she was able to show her current employment at the September hearing. In fact, the arbitrator refused to hold a hearing or reopen except on the limited issue on David's claim that Trina had falsified what she was paying for health insurance. That only occurred because David was able to obtain information (with the arbitrator's limited permission) showing that the amounts she had claimed in her calculations and submitted to the arbitrator were false; that persuaded David to file his motion for reconsideration.

B. ARBITRATION AGREEMENT

As noted above, at no time has David denied that he signed the form agreement which purports to arbitrate the child support modification under RCW 7.04A. His argument is that this agreement violates not only public policy but both King County Local Family Rule 14(d)(6) and RCW 7.06.020 (2).

After the enactment of RCW 7.06.020(2), King County adopted LFLR 14(d)(6) with a bizarre twist: it made the use of Mandatory Arbitration voluntary. This is a legal oxymoron. The additional requirement of a “stipulation” of the parties is contrary to the clear mandate of the statute, which is to either adopt or not adopt the mandatory arbitration provision; the statute does not allow the King County Superior Court to create a “hybrid” or+ allow multiple methods of disposing of support modification proceedings.

An analogous attempt to create a limitation on a statute by use of a local rule has already been rejected by the state Supreme Court in In re

Marriage of Lemon, 118 Wn2d 422 (1992) where the court held (twice) that the superior court could not impose a time limitation for a party to file an affidavit of prejudice.

Here the situation is similar: the superior court cannot adopt a local rule which makes mandatory arbitration left to the whim of one party and restricts the rights of the other. The requirement of consent of both parties violates public policy and is unenforceable.

Citing *Lemon*, the Court of Appeals in *In re the Dependency of RL, et al v. Johnson*, 123 Wn App 215, at 219 (2004) stated:

“...where a statute grants a valuable right to a litigant, a local rule cannot restrict the exercise of that right.” *In re the Marriage of Lemon*, 118 Wash.2d 422, 424, **823 P.2d 1100** (1992).

The Johnson case went on to say that, while local rules are important, they must be “harmonized” with the statute on which they are based.

Trina continues to argue that the parties are free to use other methods of arbitration in King County-- despite the fact that King County adopted the LFLR 14(d)(6) rule as its only arbitration rule for child support modifications. The meaning of RCW 7.06.020(2) is clear:

“...all civil actions which are at issue in the superior court , in which the sole relief is the ... modification of ...child support payments are subject to mandatory arbitration.” It does not permit arbitration under RCW 7.04(A) and applies to all civil cases. Trina’s theory of multiple arbitration methods and procedures fails.

The use of the law regarding private arbitration agreements when the court has stated only mandatory arbitration rules are applicable is inconsistent with public policy and decisions of the Supreme Court:

“...the standards by which an aggrieved party appeals an arbitral proceeding differ between private arbitration and mandatory arbitration. We hold these standards may not be intertwined. Malted Mousse, Inc. v. Steinmetz, 79 P.3d 1154, 150 Wn.2d 518 (2003).

C. DAVID NEVER AGREED TO ARBITRATE THE CHILD SUPPORT AFTER THE CHANGE OF RESIDENCE OF THE CHILD

“...a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” Woodall v. Avalon Care Denter-Fe. Way, LLC, 155 Wn App 919, 923(2010) (quoting Satomi Owners Ass’n v. Satomi, LLC, 167 Wn 2d 781,819 (2009).

(1) Nothing in the record supports the allegation that David agreed to arbitrate the post change of residential parent child support. He asked

for a new agreement. Trina and the arbitrator assumed it was a continuation of the previous proceeding. Without citing any pertinent authority to the contrary, Trina asks the court to believe that once you file a modification, if it isn't resolved and entered, it continues on and includes issues the parties did not agree to arbitrate. She then claims that David had asked for more time (ignoring the December 1, 2011 parenting plan that gave him that time) and that David had asked to reduce his support. In fact, he asked for a modification of his residential time with the child and not a change of the primary residential parent: that was the order which was entered. He also asked for a modification of the support order and to set support consistent with child support schedule. He did not ask to lower his support. Trina's income had increased fivefold at the time since the 2004 order and she had entered into a contract to voluntarily terminate her employment. The December 1, 2011 agreed Parenting Plan was tied to the two decisions on child support entered on December 1, 2011 and January 3, 2012. To modify support as she suggests requires an amendment to pleadings which never occurred. A support modification proceeding, whether contested

or agreed to, is a new proceeding -- not ancillary to or in aid of the original decree or any modifications entered thereafter. McDaniel v. McDaniel, 64 Wn2d 273, 275-276 (1964). As previously stated, in a contested proceeding such as this, the modification statute requires a new summons and a new petition with worksheets and other documents required under LFLR 14(b)(1). This never happened and the arbitrator would not allow it.

(2) Under this same legal theory the court cannot require the parties to go back to the arbitrator to decide post arbitration fees. There is no agreement to arbitrate this matter as this did not arise out of the arbitration but the post arbitration proceedings. An arbitrator is neither a court nor a court officer.

**D. THE ARBITRATOR NEVER COMPLIED WITH THE
STATUTORY ARBITRATION PROCESS EVEN UNDER
RCW 7.040(A)**

David continues to assert the arbitrator curtailed David's ability to present evidence. Trina asserts the arbitrator could conduct the proceeding as he saw fit.

The statute requires the arbitration be “fair”. RCW 7.04A.150(1). David sees nothing fair about what Mr. Bartlett did.

The arbitrator may decide a request for a summary disposition of a claim upon notice and an opportunity to respond. RCW 7.04A.150(1). David asserts this never happened. The parties to the arbitration proceeding are entitled to be heard, present evidence material to the controversy and to cross-examine witnesses. RCW 7.04A.150 (4). David was never given this opportunity. The only person allowed to present evidence was Trina. No documentary evidence complying with King County LFLR 14(b)(1) was presented after the change in the primary residential parent.

E. THE ARBITRATOR’S DECISION PROVIDES NOTHING FOR THE COURT TO REVIEW UNDER RCW 26.19.035 (4)

Trina believes that the review of the order of child support is limited to a (1) review of the worksheets and (2) to see if the decision complies with the support schedules. RCW 26.19.035(4) does not limit review to these two issues. How would a reviewing court know the basis of the

denial or granting of a deviation under this factual situation if there is no evidence allowed? It cannot!

Unlike the cases cited by Trina, the support modification statute has another layer of mandatory review other than the normal cursory review for substantial error in RCW 7.04(A) arbitration cases. David contends the process not only did not comply with RCW 7.04(A) but that RCW 7.04(A) does not provide a sufficient mechanism to review decisions in child support modifications. The proper remedy is use of the Mandatory Arbitration Statute (RCW 7.06) and local rules related to that statute.

Here the arbitrator did not allow any evidence and the superior court has nothing to review.

F. JUDGE INVEEN'S CONSULTATION WITH JUDGE RAMSDELL WAS IMPROPER AND HEARSAY

On page 10 of her brief, Trina relies on Judge Inveen's recitation of a conversation she had with Judge Ramsdell regarding the meaning of an order denying Trina's motion to dismiss the case from the Trial by Affidavit calendar. This situation is discussed in more detail in David's

brief. Judge Inveen did not present Judge Ramsdell with the pleadings on the previous motion. Understandably, he had no independent recollection of the reasons behind his order. Judge Inveen's action was improper: under King County LCR 7(b)(7) it was up to a party, not Judge Inveen, to present new facts warranting bringing the order before a different judge. She did not comply with this and did not even note her motion up for a hearing. This was trial by ambush and she never sought to vacate Judge Ramsdell's order.

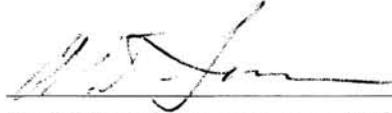
G. CONCLUSION

Trina has intentionally ignored the entirety of the child support review statute and has no explanation how there can be voluntary mandatory arbitration. Citing no authority she claims the parties have two separate mechanisms they can choose from to arbitrate child support modifications. This is inconsistent with Washington Supreme Court decisions.

Trina is not entitled to attorneys' fees.

The relief sought by David in his Appellate Brief should be granted.

Respectfully submitted this 19th day of November, 2013



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PROOF OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on the 19th day of November, 2013 I deposited in the mails of the United States of America, properly stamped and addressed envelopes directed to Shana E Thompson and Valerie A Villacin and Catherine W Smith containing a copy of the document(s) to which the certificate is affixed and had sent copies for delivery by ABC legal service.

Signed at Seattle, Washington on November 19th, 2013



WILLIAM T. LAWRIE