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COURT OF APPEALS

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STATE OF WASHINGTON

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**COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON
Case No. 39690-4-II**

MARK A. COY,
Appellant,

v.

KRISTINE J. COY,
Respondent.

REPLY BRIEF OF APPELLANT

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I. REPLY TO STATEMENT OF THE CASE

Rather than a statement of the case, Ms. Coy incorporates by reference the arbitrator's findings of fact, and claims these findings are "more accurate" than Mr. Coy's Statement of the Case. Under RAP 10.3(a)(5), reference to the record "must be included for each factual statement" in the statement of the case. Ms. Coy includes no record references, and fails to specify a single inaccuracy. Ms. Coy's statement does not comply with RAP 10.3(a), does not facilitate meaningful appellate review, and may be disregarded.

II. REPLY TO ARGUMENT

A. RCW 26.09.184(4)(e) Grants a Right of *De Novo* Review.

Mr. Coy's right to de novo review is guaranteed by RCW 26.09.184(4)(e), by appellate decision, and by the Parenting Plan which complied with the statutory mandate for a right of superior court review. In re Smith-Bartlett, 95 Wn. App. 633, 976 P.2d 173 (1999). The CR 2A agreement used language paralleling the Parenting Plan, referencing the dispute resolution process to occur before a parent seeks de novo review.

In her response, Ms. Coy acknowledges on one hand that Smith-Bartlett requires de novo review of the arbitration. Respondent's Brief,

pp. 4-5, quoting In re Smith-Bartlett, 95 Wn. App. 633, 976 P.2d 173 (1999). Yet, on the other hand (and without citation), she states that this Court need only review the arbitrator's decision for abuse of discretion. Respondent's Brief, p. 5. She seems to be arguing that because RCW 26.09.184(4)(e) does not explicitly refer to de novo review, the statute only requires review for an abuse of discretion. Respondent's Brief, p. 4 (noting that *de novo* review "is not specified in the statute").

This argument is contrary to the law. In Smith-Bartlett, this Court made it clear that the statute guarantees a right to *de novo* review. The Court's interpretation of the statute was unequivocal: "The only relevant statute is RCW 26.09. And it mandates de novo review." Id. at 641, citing RCW 26.09.184(3)(e) (now (4)(e)). The clear holding was repeated later in the decision: "The term review is undefined in the statute, but the nature of the contemplated review must necessarily be de novo." Id. at 643.

The Smith-Bartlett decision was well reasoned, and there is no basis for overruling it. As the Court noted, the ultimate responsibility for overseeing the performance of the parenting plan is the superior court; this is even true with respect to the court's power to delegate its interpretive

function. Smith-Bartlett, 95 Wn. App. at 640; Kirshenbaum, 84 Wn. App. at 807. The theory that the superior court only reviews for abuse of discretion conflicts with the provision that only requires a record of the actual award of the arbitration proceedings. Smith-Bartlett, 95 Wn. App. at 638; see RCW 26.09.184(4)(c). The Court also noted that when a statute provides for superior court review, it generally means review de novo. Id. at 641 (citations omitted). As a matter of law, Mr. Coy has an unwaivable right to superior court review from the parties' dispute resolution process.

B. RCW 26.09.187(2)(a)(ii) Does Not Modify the Statutory Right to *De Novo* Review.

Ms. Coy also argues that RCW 26.09.187(2)(a) implicitly overrides the right to de novo review. Here again she is wrong. This statute merely allows the court to approve agreements to allocate decision-making authority under a parenting plan, with specific reference to the children's education, health care, and religious upbringing. See RCW 26.09.187(2)(a), referring to RCW 26.09.184(5)(a). The statute says nothing about overriding the right to de novo review of disputes arising under parenting plans.

C. This Case Presents A Dispute Arising From The Parenting Plan.

Ms. Coy also claims that in this case “there is no issue regarding the parenting plan.” Respondent’s Brief, p. 4. Ms. Coy removed Abby from her primary residence. This was a fundamental change in residential stability, and gave Mr. Coy the automatic right to superior court review of the parenting plan residential provisions. RCW 26.09.260(6); RCW 26.09.440(2)(a) and (b)(iv) (relocation gives rise to parent’s right to petition court for review of residential schedule provisions).

In mediation, Ms. Coy convinced Mr. Coy to delay review of the residential issues for one year. This voluntary delay of the residential issue was based on Mrs. Coy’s suggestion that she would grant him an opportunity to one additional residential evening with Abby after one year, with an assurance that any disagreement would be subject to his parenting plan review process. This mediated agreement did not destroy the process for superior court review of unresolved issues presented in Mr. Coy’s petition to the superior court. See RCW 26.09.260(6). Ms. Coy cannot credibly argue that the parenting plan is not implicated by Mr. Coy’s right to seek one additional night of residential time with his relocated daughter.

D. Ms. Coy Was Not Appointed as a Self-Serving “Arbitrator”, with Immunity from Judicial Review.

Ms. Coy also relies on Kirshenbaum for the proposition that the superior court had the authority to appoint her as an arbitrator with unfettered power to oversee issues arising under her own parenting plan. Respondent’s Brief, p. 5 (“In this particular case, the arbitrator happened to be Ms. Coy.”). Ms. Coy’s argument is absurd.

Ms. Coy was not the arbitrator in this case. She is a parent who initially sought to relocate her child without notifying Mr. Coy of his automatic right to petition the court for review of the residential provisions. As the court concluded, this was a violation of the statute. See Appellant’s Brief, pp. 6-7; CP 133-134; VRP 11 (May 16, 2008). Now Ms. Coy again seeks to avoid superior court review, arguing that she is an arbitrator immune from judicial review. Ms. Coy was not made arbitrator. Even if she were, the Kirshenbaum case would have required a de novo review of her self-serving rulings. Kirshenbaum, 84 Wn. App. at 807.

With Chapter 26.09 RCW, the legislature has established a system under which the superior court plays an important role in reviewing and determining the best interests of the child. This right of review was triggered when Ms. Coy decided to relocate Abby from the primary

residence. As a result of that fundamental decision, Mr. Coy had a right to petition the superior court for review and modification of the parenting plan. Now that their alternative dispute resolution process has failed to address his claims, he respectfully and properly seeks de novo review by the superior court. There is no support for Ms. Coy's novel theory that she was herself given the right to act as "arbitrator" with unbridled and essentially unreviewable discretion.

E. The Parenting Plan Was Modified.

Ms. Coy notes that a modification of the parenting plan, no matter how slight, requires an independent inquiry by the court. Respondent's Brief, p. 6 (citations omitted). She goes on to argue that the parenting plan in this case was not modified. *Id.* ("In this particular instance, the Court needs to understand that the parenting plan was not modified in any manner."). Here again, Ms. Coy is incorrect. The Parenting Plan was modified as a result of the residential relocation. Moreover, the right to superior court review is not limited to parenting plan modifications, but applies to any disputes arising under a parenting plan, including disputes arising from a superior court petition to modify the parenting plan under RCW 26.09.260(6).

F. Mrs. Coy Has Failed to Provide Argument or Authority in Response to Mr. Coy's Argument That the Ruling on Attorney's Fees Must Be Reversed.

Mrs. Coy failed to respond or counter Mr. Coy's argument on attorney's fees in any way. This lack of opposition is tantamount to an admission that the appellant's argument is correct. See also RAP 18.1(b). Accordingly, the failure to respond to Mr. Coy's argument provides an additional basis for reversing the award of fees.

III. CONCLUSION

This case involves Mr. Coy's right to superior court review of his petition to modify residential provisions in the parenting plan based on Abby's relocation from her primary residence. The underlying facts are disputed, and the superior court plays an important role in evaluating the best interests of the child through a de novo review. With respect to attorney's fees, Ms. Coy offers no response to the argument that fees should not have been awarded. The superior court should be reversed, and this matter remanded for a de novo review.

RESPECTFULLY SUBMITTED this 1st day of July, 2010.



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That she placed and affixed proper postage to the said envelopes,
sealed the same, and placed it in a receptacle maintained by the United
States Post Office for the deposit of letters for mailing in the City of
Puyallup, County of Pierce, State of Washington, and that she mailed the
envelopes first class, postage prepaid.

Michelle Lea

MICHELLE A. LEA

SUBSCRIBED AND SWORN to before me this 2nd day of
July, 2010.



M. Y. Lewandowski
Printed Name: M. Y. Lewandowski
NOTARY PUBLIC in and for the State of
Washington residing at Puyallup
My commission expires: 10/15/12