

2008 JUN 10 10:10 AM
EM 207 1100
cm

No. 45273-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In Re the Marriage of:

JESSICA EMILY MATTSON (F/K/A STALKER), Respondent,

vs.

NICHOLAS DAVID STALKER, Appellant

Pierce County Superior Court

Cause Nos. 08-3-00030-2

The Honorable Judge Brian Tollefson

Appellant's Reply Brief

Clayton R Dickinson
Attorney for Appellant
6314 19th St. W., #20
Fircrest, WA 98466
PHONE: (253) 564-6253
FAX: (253) 564-6523

TABLE OF CONTENTS

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iii

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

STATEMENT OF FACTS..... 1

ARGUMENT.....2

I. IT WAS AN ABUSE OF DISCRETION FOR THE COURT TO FIND A SUBSTANTIAL CHANGE IN CIRCUMSTANCES WHEN THE EVIDENCE SUBMITTED ONLY SHOWED A MERE CHANGE OF CIRCUMSTANCES WITHOUT EVIDENCE TO SUPPORT THAT THE CHANGE WAS UNANTICIPATED AND SUBSTANTIAL.....2

II. THIS APPEAL IS NOT FRIVOLOUS WHEN IT IS BASED UPON AN ABUSE OF DISCRETION DUE TO A FINDING OF A SUBSTANTIAL CHANGE OF CIRCUMSTANCES WHEN EVIDENCE WAS INSUFFICIENT TO SHOW ANYTHING EXCEPT A MERE CHANGE OF CIRCUMSTANCES AND THERE IS INSUFFICIENT EVIDENCE TO SUPPORT AN AWARD OF FEES BASED UPON NEED AND ABILITY TO PAY, THEREFORE, THE FEE REQUEST SHOULD BE DENIED.....7

CONCLUSION.....10

TABLE OF AUTHORITIES

CASES

In re Marriage of Hoseth, 115 Wash. App. 563, 63 P.3d 164 (2003).....2, 3

In re Marriage of Littlefield, 133 Wash. 2d 39, 940 P.2d 1362 (1997).....2

In re Marriage of Shryock, 76 Wash. App. 848, 888 P.2d 750 (1995).....2

In re Marriage of Tomsovic, 118 Wash. App. 96, 74 P.3d 692 (2003).....3

Protect the Peninsula's Future v. City of Port Angeles, 175 Wash. App. 201, 304 P.3d 914, review denied, 178 Wash. 2d 1022, 312 P.3d 651 (2013).....8

WASHINGTON STATE STATUES

RCW 26.09.2603

ASSIGNMENTS OF ERROR

1. Judge Brian Tollefson committed error in finding that the mother's change in work schedule was a substantial change of circumstances for a minor modification of the parenting plan.
2. Judge Brian Tollefson committed error in finding that the mother's remarriage was a substantial change of circumstances for a minor modification of the parenting plan.
3. Judge Brian Tollefson committed error in finding that the mother having a new child was a substantial change of circumstances for a minor modification of the parenting plan.
4. Judge Brian Tollefson committed error in finding that the mother's change in work schedule made the parenting plan impractical to follow.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was it an abuse of discretion for the court to find a substantial change in circumstances when the evidence submitted only showed a mere change of circumstances without evidence to support that the change was unanticipated and substantial?
2. Is an appeal frivolous when it is filed based upon an abuse of discretion due to a finding of a substantial change of circumstances when evidence was insufficient to show anything except a mere change of circumstances and there is insufficient evidence to support an award of fees based upon need and ability to pay, should the fee request be denied?

STATEMENT OF FACTS

The statement of the case as presented in the appellant's opening brief is incorporated herein by reference.

ARGUMENT

1.

IT WAS AN ABUSE OF DISCRETION FOR THE COURT TO FIND A SUBSTANTIAL CHANGE IN CIRCUMSTANCES WHEN THE EVIDENCE SUBMITTED ONLY SHOWED A MERE CHANGE OF CIRCUMSTANCES WITHOUT EVIDENCE TO SUPPORT THAT THE CHANGE WAS UNANTICIPATED AND SUBSTANTIAL.

In the appellant's opening brief two cases were cited for the standard of an abuse of discretion. The first was *In re Marriage of Hoseth*, 115 Wash. App. 563, 63 P.3d 164 (2003) wherein the court define an abuse of discretion as follows:

An abuse of discretion occurs when the superior court's ruling is manifestly unreasonable or its ruling is based on untenable grounds or untenable reasons. *Id.* at 46-47, 940 P.2d 1362. With respect to modification of parenting plans, the procedures and criteria set forth in RCW 26.09.260 limit the superior court's range of discretion. *In re Marriage of Shryock*, 76 Wash.App. 848, 852, 888 P.2d 750 (1995). **Accordingly, a superior court will abuse its discretion if it fails to base its modification ruling on the statutory criteria.** (at 569 emphasis added)

The second case was *In re Marriage of Littlefield*, 133 Wash. 2d 39, 47, 940 P.2d 1362, 1366 (1997) which further clarified the terms "untenable grounds or untenable reasons". There the court stated:

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds

if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *State v. Rundquist*, 79 Wash.App. 786, 793, 905 P.2d 922 (1995) (citing Washington State Bar Ass'n, Washington Appellate Practice Deskbook § 18.5 (2d ed.1993)), review denied, 129 Wash.2d 1003, 914 P.2d 66 (1996). (at 47)

Basically, an abuse of discretion is any decision made by the court which is based upon untenable grounds, i.e. factual findings that are not supported by the record, or untenable reasons which is an incorrect legal standard, in the case of a modification action an abuse of discretion would be one that does not follow the statutory criteria.

The opening brief clearly established that this case involved an abuse of discretion. RCW 26.09.260 (5) is clear that even for a minor modification there must be “a showing of a substantial change in circumstances of either parent or of the child”. The cases cited in our opening brief, *In re Marriage of Hoseth*, 115 Wash. App. 563, 63 P.3d 164 (2003) and *In re Marriage of Tomsovic*, 118 Wash. App. 96, 74 P.3d 692 (2003) both make it clear that to show a substantial change of circumstances the moving party must present evidence of not just a change of circumstances, but they must also show how that change of circumstances was substantial. This must also be a change that was not anticipated by the court at the time of the entry of the order for which

modification is sought. Without such a showing the evidence is insufficient as a matter of law. In this case, there was no such showing that any change in circumstances was substantial nor that it was unanticipated.

In the respondent's statement of facts she makes the following statement:

The Petitioner (Respondent herein) testified that the parenting plan from 2009 was not working, was resulting in minimal to no quality time with the children (**based upon the change of circumstances**) (emphasis added) (Respondent's brief page 1.)

The problem with this statement is twofold. First of all it is based upon a change of circumstances, not a substantial change of circumstances. Once again, there was no factual evidence presented other than that the parenting plan had never worked and that the mother had remarried, had a new child, and her work changed from 3 days a week to 5 days a week. (Respondent's Brief page 4) However, as pointed out in our opening brief, there was no testimony as to how those events created a change that was substantial to the parenting plan.

The respondent also comments on page 5 that the children did not have an opportunity to bond with their sibling, but once again, there was no citation to the record of any testimony regarding this. The testimony in the record was that the child is two years old and that all of the children

including him are at the same nanny's house after school until picked up by their mother. (RP 35-36) Therefore, according to the record, they actually do have a chance to bond with their sibling after school at the nanny's house.

The second problem with the argument is that the respondent testified that since the parenting plan was originally ordered in 2009 that it did not work. In other words, from the inception of the parenting plan it did not work, not that it ceased to provide her sufficient time with the children because of anything inherent in her remarriage, birth of her new child, or because of her change in work hours. Also, this was the same plan that they had followed since 2007, with a change that she had proposed which gave her one weekend a month and a change imposed by a court commissioner in exchange for that weekend which gave the father an overnight every Tuesday evening. That parenting plan had been the temporary parenting plan prior to it becoming the final parenting plan. In short, the respondent was very experienced with this parenting plan and its potential drawbacks before she agreed to it and it was ordered by the court in 2009. Hence, this problem that she identified was not something that was unanticipated as she was quite aware of it at the time the plan was entered in 2009.

The respondent states that “the trial court merely ‘adjusted’ the days the children are with the parents.” (Respondent’s Brief pages 3-4)

Her concluding paragraph states:

The parenting plan entered by the lower court is in essence a “standard parenting plan” which gives each parent visitation every other weekend. The father will have Thursdays added to his normally scheduled weekends thereby resulting in what is, in essence, a zero or minimal net change in the amount of overnights each parent has over the course of the year. As such, there is a factual and legal basis for the lower court to adopt the parenting plan entered in this matter as a final order. (Respondent’s Brief page 5)

This is basically what was argued to the trial court below, however, this is not the legal standard. There is nothing in the statute; case law; or anywhere else in the law that allows for a modification of a parenting plan based upon it being a “mere ‘adjustment’”. The fact that the number of overnights are ultimately the same as they were before does not allow for a lesser standard for modifying the parenting plan.

The reality in this case is that it did impact Nick’s time with the children. He lost all day on Saturday and Sunday from 8:00 a.m. when they got up in the morning until 7:00 p.m. (The father’s every other weekend time was from 7:00 p.m. on Thursday through Sunday at 7:00 p.m. Therefore he has lost all the time between 8:00 a.m. and 7:00 p.m. that he previously had on weekends.) Basically 11 hours a day for a total

of 22 hours a month lost time. This is not a zero net change. If it were, why would the respondent have even bothered to pursue the modification? Also, if it were a zero net change, how would with there have been adequate cause for a modification action, as it would have been a change that basically did nothing.

In each and every case there must be a substantial change of circumstances and in this case there was not. There is nothing in the law that allows for a substitute for a substantial change of circumstances based upon a zero net change in the parenting plan, even if a true zero net change were obtained. There is nothing that allows for deviation from a substantial change of circumstances if the parenting plan is merely adjusted. As the respondent's brief clearly demonstrates by its lack of any clarification as to what the substantial change of circumstances was and how the record demonstrated that; in this case there was no evidence to demonstrate a substantial change of circumstances. Evidence of a mere change of circumstances is insufficient. As a result, it was an abuse of discretion for the court to find a substantial change of circumstances and the trial court must be reversed.

2.

**THIS APPEAL IS NOT FRIVOLOUS WHEN IT IS
BASED UPON AN ABUSE OF DISCRETION DUE TO
A FINDING OF A SUBSTANTIAL CHANGE OF**

CIRCUMSTANCES WHEN EVIDENCE WAS INSUFFICIENT TO SHOW ANYTHING EXCEPT A MERE CHANGE OF CIRCUMSTANCES AND THERE IS INSUFFICIENT EVIDENCE TO SUPPORT AN AWARD OF FEES BASED UPON NEED AND ABILITY TO PAY, THEREFORE, THE FEE REQUEST SHOULD BE DENIED

The standard for determining if an appeal is frivolous was outlined in the Division II case of *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wash. App. 201, 304 P.3d 914, review denied, 178 Wash. 2d 1022, 312 P.3d 651 (2013). In that case the court stated:

Citing RAP 18.9(a), the Cities request an award of their attorney fees and costs for defending a frivolous appeal. In determining whether an appeal is frivolous, five considerations guide us: (1) a civil appellant has a right to appeal, (2) we resolve any doubts about whether an appeal is frivolous in the appellant's favor, (3) we consider the record as a whole, (4) an unsuccessful appeal is not necessarily frivolous, and (5) an appeal is frivolous if it raises no debatable issues on which reasonable minds might differ and it is so totally devoid of merit that no reasonable possibility of reversal exists. *Carrillo v. City of Ocean Shores*, 122 Wash.App. 592, 619, 94 P.3d 961 (2004) (citing *Streater v. White*, 26 Wash.App. 430, 434–35, 613 P.2d 187 (1980)). (at 220)

These factors clearly indicate that this appeal is not frivolous.

First of all, Mr. Stalker does have a right of appeal which he had appropriately exercised in this case. Next, any doubts are always resolved in favor of the appellant.

The third element deals with the record as a whole. As discussed above, this record makes it clear that an abuse of discretion occurred in that the trial judge found there was a substantial change in circumstances when the evidence in the case did not support anything other than a change in circumstances without any evidence from which the court could find that those changes were substantial. Although there was testimony of changes that had occurred since the parenting plan was entered, there was no testimony from which the court could determine that those changes made any difference to the problems stated by the respondent to exist in the parenting plan. She said that the parenting plan did not work because it did not give her and the children quality time together. However, she did not state how, if at all, the changes that she stated had occurred made any difference to that and in fact she stated that the problem had existed from the time the plan was put into effect in 2009. That basically shows that if the problem was present at the time the parenting plan was originally ordered, the changes specified did not make any difference. It also shows that the problem was not unanticipated, which also must be presented in order to show a substantial change in circumstances. As a result, the record as a whole makes it clear that this is not a frivolous appeal.

The fourth element is unknown at this time because the court has not decided the appeal. However, even if the court were to deny the appeal that would not mean that the appeal was frivolous.

The fifth element deals with whether or not the appeal has raised a debatable issue upon which reasonable minds could differ. This case does raise a clearly debatable issue upon which reasonable minds could differ, but the facts and law would seem to support the debate more favorably toward the appellant in this case. Based upon all of the above there should be no serious question but that this is not a frivolous appeal.

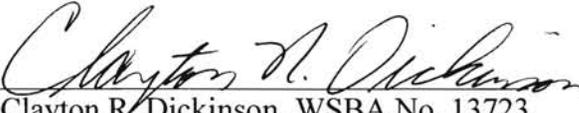
Also, the standard of need and ability to pay requires evidence. The moving party is required to provide that evidence. The evidence that was presented at the trial was that Jessica had gone from part-time to full-time employment which would imply that her income has increased. Also her husband is working considerable hours for Chase Bank and it would seem reasonable to assume that he is also making a reasonable income. There was no testimony at the trial regarding Nick's income, only that he was employed full time. There was also no evidence presented in the respondent's brief regarding her need and Nick's ability to pay. Therefore, there is no basis upon which this court should order attorney fees to the respondent.

CONCLUSION

The trial court in this case committed an abuse of discretion by finding that there was a substantial change of circumstances without there being evidence of a change that was substantial. As a result of the court committed error in modifying the parenting plan and must be reversed.

This appeal is not frivolous and the evidence presented was insufficient for an award of attorney fees based upon need and ability to pay. As a result, the request for attorney fees must be denied.

Respectfully submitted on March 26, 2014.


Clayton R. Dickinson, WSBA No. 13723
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

Kevin G. Rundle
YWCA Pierce County
405 Broadway
Tacoma, WA, 98402

All postage prepaid, on March 26, 2014.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE
AND CORRECT.

Signed at Fircrest, Washington on March 26, 2014.


Clayton R. Dickinson, WSBA No. 13723
Attorney for Appellant

