

NO. 45273-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

In re the Marriage of:

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

vs.

NICHOLAS DAVID STALKER
Appellant

FILED
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COURT OF APPEALS
DIVISION TWO
TACOMA, WA

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Brian Tollefson, Judge

OPENING BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. Statement of the Issues.....1

B. Statement of Facts.....1

C. Argument.....2

I. The Standard of Review is Abuse of Discretion2

II. The Evidence Introduced at Trial Supports the Lower Court’s Ruling on a Minor Modification of a Parenting Plan3

III. Attorney’s Fees5

D. Conclusion.....6

TABLE OF AUTHORITIES

WASHINGTON CASES

In re Marriage of Kattare, 175 Wn.2d. 23, 283 P.3d 546 (2012).....2

In re Marriage of Pape, 139 Wn.2d 694, 989 P.2d 1120 (1999).....4

Tiffany Family Trust Corp. v. City of Kent, 155 Wn.2d 225, 119 P.3d 325 (2005).....6

RULES, STATUTES, & OTHER AUTHORITIES

RCW 26.09.260(5)(a)(b)3

RAP 18.95

RAP 18.1.....6

A. STATEMENT OF ISSUES

1. Has the trial court abused its discretion in granting the Petitioner's (Respondent herein) Petition for Modification of Parenting Plan?

B. STATEMENT OF FACTS

The Petitioner's (Respondent herein) modification of the parenting plan was for a minor modification of the parenting plan. (CP 15-20) The Appellant herein did not file his response to the petition until virtually the "eve of trial." (CP 34-36) The lower court found adequate cause to support this request. (CP 32-33) The Petitioner (Respondent herein) based her petition on her obtaining full time employment working 5 days a week (CP 15-20; RP 31), having remarried (CP 15-20; RP 21, 22, 35), and having given birth to another child. (CP 18; RP 21, 22, 35) The Petitioner (Respondent herein) testified that the parenting plan from 2009 was not working, was resulting in minimal to know quality time with the children (based upon the changes of circumstances), and that there were periods where the children would be denied any quality time with her or their sibling for significant periods of time. (RP 25-29) She further testified that her change of employment from full time to part time was involuntary

and that if she declined to go to full time status she risked losing her job. (RP 36) She further testified that she filed her petition as-soon-as her contract for employment was changed to full time status. (RP 37) At trial, after hearing all the evidence presented (including testimony of the parties), entered a final parenting plan. (CP 41-53) This plan was, in essence, the plan proposed by the Petitioner (Respondent herein) at the inception of this matter and had been the temporary parenting plan followed by the parties since September of 2012. (CP 21-31; RP 41)

C. ARGUMENT

I. The Standard of Review is Abuse of Discretion.

In order for the Court to reverse the lower court's order modifying the parenting plan, this Court must find that the lower court abused its discretion. The burden rests on the shoulders of the appellant.

A trial court's parenting plan is reviewed for an abuse of discretion. An abuse of discretion occurs when a decision is manifestly unreasonable or based on untenable grounds or untenable reasons. The trial court's findings of fact will be accepted as verities by the reviewing court so long as they are supported by substantial evidence. Substantial evidence is that which is sufficient to persuade a fair-minded person of the truth of the matter asserted.

In re Marriage of Kattare, 175 Wn.2d 23, 35, 283 P.3d 546 (2012), *citing*,

In re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362; Ferree v.

Doric Co., 62 Wn.2d 561, 568, 383 P.2d 900; King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd., 142 Wn.2d 543, 561, 14 P.3d 133.

II. The Evidence Introduced at Trial Supports the Lower Court's Ruling on a Minor Modification of a Parenting Plan.

The Petition for modification sought a minor modification of the parenting plan. The statutory factors applicable to such a petition are as follows:

(5) The court may order adjustments to the residential aspects of a parenting plan upon a showing of a substantial change in circumstances of either parent or of the child, and without consideration of the factors set forth in subsection (2) of this section, if the proposed modification is only a minor modification in the residential schedule that does not change the residence the child is scheduled to reside in the majority of the time and:

(a) Does not exceed twenty-four full days in a calendar year; or

(b) Is based on a change of residence of the parent with whom the child does not reside the majority of the time or an involuntary change in work schedule by a parent which makes the residential schedule in the parenting plan impractical to follow[.]

RCW 26.09.260(5)(a) and (b).

The underlying petition is for a minor modification of the parenting plan and the trial court merely “adjusted” the days the children

are with the parents. The entered parenting plan is not a deprivation of overnights with the appellant herein.

The burden placed upon the petitioning party regarding a modification of a parenting plan has been long settled:

Where the petitioning parent is the primary residential parent, that parent must show a substantial change in the circumstances of the mother, the father or the child. This change must be a bona fide change in circumstances, such as a change in employment or a new employment or educational opportunity.

In re the Marriage of Pape, 139 Wn.2d 694, 716; 989 P.2d 1120, 1132 (1999). (Emphasis added.)

This is precisely the facts herein (in addition to the substantial other changes in the life of the Petitioner such as remarrying and giving birth to another child). The mother was a part time teacher at the time of entry of the original parenting plan – working three days a week – when the original parenting plan was entered. She has since begun working full time. She has also remarried and given birth to a sibling of the children at issue here. Under the original parenting plan the mother was scheduled to only have one weekend a month, and, as often was the case when holidays or special occasions would apply, she would go extended periods of time with no weekend visitation with the children at all. This residential plan was no longer in the best interest of the children as the mother, who was

no longer, in effect, a “stay home parent,” had begun working full time, remarried, had given birth to another sibling of the children at issue, and had virtually no quality time and the children. In addition, the children had minimal opportunity to bond with their sibling.

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.

III. Attorney’s Fees.

It is respectfully submitted that this appeal is frivolous and that the Respondent herein should be awarded attorney’s fees pursuant to RAP 18.9.

An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal. All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant.

Tiffany Family Trust Corp. v. City of Kent, 155 Wn.2d 225, 241, 119 P.3d 325 (2005).

In the alternative, attorney's fees are requested pursuant to RAP 18.1 and RCW 26.09.140. The Petitioner (Respondent herein) is in financial need and, by way of information and belief, the Respondent (Appellant herein) has the ability to pay.

D. CONCLUSION

This court should affirm the trial judge's orders. The Appellant has failed to meet the high burden of demonstrating that the trial court's decision to enter an order granting the minor modification of the parenting plan is manifestly unreasonable or untenable.

In addition, the Petitioner (Respondent herein) should be granted reasonable attorney's fees as requested.

DATED this 27th day of February 2014.

RESPECTFULLY SUBMITTED,



Kevin G. Rundle, WSBA # 28341
Attorney for Respondent

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington that I, in the manner indicated below, caused the following document(s):

Opening Brief of Respondent

along with this Certificate to be served upon:

Mr. Clayton R. Dickinson
6314 19th St. W., #20
Fircrest, WA 98466

by hand delivery.

SIGNED AND DATED THIS 27th DAY OF FEBRUARY, 2014, AT
TACOMA, WA.



Kevin G. Rundle

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STATE OF WASHINGTON
COUNTY OF TACOMA