

FILED
COURT OF APPEALS
DIVISION II
2016 AUG -4 PM 5:00
STATE OF WASHINGTON
BY J. Mills
CLERK

No. 48957-1-II

THE COURT OF APPEALS, DIVISION II

State of Washington

ANDREA M. WEAVER, N/K/A WHEELER,

PETITIONER,

AND

BRANDON M. WEAVER,

RESPONDENT.

APPELLANT'S OPENING BRIEF

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ASSIGNMENTS OF ERROR

The Superior Court erred in interpreting CR 54(d)(2) as requiring a denial of Ms. Wheeler's motion for fees if the motion was filed more than ten days after entry of the order denying Mr. Weaver's Petition to Modify the plan.

The Superior Court erred in refusing to entertain the request for fees under RCW 26.09.140, which provides an independent basis for the court to award fees "from time to time."

The Superior Court erred in rejecting without comment Ms. Wheeler's motion to extend the time for a fee application under CR 54(d)(2).

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. After the Superior Court concludes that a Petition to Modify a Parenting Plan was meritless, the prevailing party engages in settlement discussions with the other parent to settle the issue of fees owed; if more than ten days transpires while settlement discussions are pending, is the prevailing party forever foreclosed by CR 54(d)(2) from recovering fees?

2. Does RCW 26.09.140 provide a basis to award fees “from time to time” which is unconstrained by the 10-day limit of CR 54(b)(2)?

3. If delay in applying for fees is occasioned by efforts to settle the issue, and there is no prejudice shown by the party opposing fees, should the trial court extend the time for filing to accommodate the delay?

STATEMENT OF THE CASE

Important Facts

This case is about whether CR 54(d)(2)’s ten-day rule on time for seeking attorney fees should be inflexibly applied when the delay is due to efforts to settle the question of fees in a family law case involving children, meaning that the court’s refusal to award fees results in the primary caregiver being unfairly saddled with the costs of defending a meritless petition to modify the parenting plan.

The case began in 2012 when Andrea Weeler left her husband, Brandon Weaver to escape domestic violence. See paragraph 3 starting on page 3 of the findings at CP 65. She came to Washington state with their two sons – a 1-year old

and an infant, and petitioned to dissolve the marriage. CP 1-9 (Petition for Dissolution).

After the divorce, Brandon, who works for the US Military, arranged a transfer, following his ex-wife to Washington and to their credit, on June 16, 2014 the parties agreed to a new plan given the now closer proximity of Brandon to his ex-wife and children. CP 67 at lines 5-6; CP 68 (findings at paragraph 8). It basically places the children with mother subject to alternate weekends with father.

However, the period of agreement was short-lived and in February of 2015, Mr. Weaver filed a petition to modify the plan, asserting a parade of horrors including “drug abuse in mother’s home,” “neglect of children’s health needs,” “parental alienation,” and other issues. CP 43-62.

The case culminated in a trial at which time, the court denied the petition, making detailed findings that completely reject the assertions underlying the petition. CP 63 – 71. Those findings were entered December 11, 2015.

Five days later, a long email was sent to Mr. Weaver’s counsel addressing the issue of fees and offering to settle that issue on terms allowing payment of a reduced amount over time. CP 90 -91.

No response was received, but believing that the Christmas holidays might have precluded a prompt response, a second email went out January 6, 2016, again calling attention to the fees issue and offer to settle. CP 92.

Again, on January 27th, attention was called to the issue of fees with the statement: “Anyway, just letting you know that we will almost certainly file it all this week, unless you are getting some indication that Brandon might want to settle the issue up. I know that we haven’t got a response, but with the holidays and such and this probably not being something Brandon really wants to focus on, it’s probably not high on his list. If he wants to settle it, he needs to give us some indication that we’re headed in that direction.” CP 93.

To that last email, Mr. Weaver’s counsel responded within a half hour, writing in part: “Were past the time for filing a motion for reconsideration or appeal or anything else. Civil rule 54 requires you to file a motion for fees within 10 days of entry of the judgment and were past that as well.” CP 94.

Ms. Wheeler then filed her motion for fees. CP 72 - 113.

The court denied that motion. CP 132 – 133.

A motion to reconsider and to extend the time for filing a request for fees was timely filed. CP 134 – 137.

That motion was denied without argument. CP 138 – 141. (Technically, the motion to reconsider was denied; no specific ruling on the motion to extend time is in the court file.) CP 138 – 141.

This timely appeal followed. CP 142 – 143.

Standard of Review

Principally, this case calls on the court to review the Superior Court interpretation of CR 54(d)(2). Interpretation of how a court rule applies to facts is a question of law, subject to de novo review." *Gourley v. Gourley*, 158 Wash.2d 460, 466, 145 P.3d 1185 (2006) (citing to *Nevers v. Fireside, Inc.*, 133 Wash.2d 804, 809, 947 P.2d 721 (1997)).

APPLICABLE LAW AND ARGUMENT

Because the court has an independent statutory duty to protect the best interests of the children in this proceeding, the court can't properly deny fees based on a parents' failure to meet the 10-day deadline of CR 54(d)(2).

This case is a family law case governed by RCW 26.09.002, which provides: "In any proceeding between

parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities.”

Family law cases are an odd variation of civil proceeding, at least where children are involved, because of the court’s independent obligation to look after the best interests of the child. Consistent with that obligation, the court can’t impose penalties and sanctions injurious to the child for failings that might be attributable to the adults in other kinds of cases. Here, even if Ms. Wheeler filed late, the court can’t essentially penalize the children by impoverishing their principal caregiver’s home.

Family law cases are different from all other civil cases in that there they haven’t the kind of ordinary finality that come with the judgments in a civil case. That’s so because family law cases end with parenting plans and support orders which are expectations about the future, not truly remedies for past conduct. In that sense, family law cases are subject to the unusual process called “modification,” and this is a case in point arising as it does out of a petition to modify a past decree of the court. Because family law cases are never really “final,” the deadlines of CR 54(d)(2) should not apply inflexibly.

RCW 26.09.140 independently authorizes the court to entertain Ms. Wheeler’s motion for fees even after the 10-day deadline of CR 54(d)(2).

Specifically, as applicable to family law cases, RCW 26.09.040 says: “The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys’ fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.”

This statute allows the court to award fees and costs “from time to time.” Without regard to whether CR 54(d)(2) might limit an application for fees to a 10-day window post judgment in *other kinds of cases*, this court should determine that the rule doesn’t limit the court’s ability to award fees and costs “from time to time” in cases governed by Ch. 26.09 RCW. That’s particularly important because the best interests of the child are necessarily affected by who is left to bear the burden of litigation expenses.

Accordingly, the court should reverse the trial court's interpretation of CR 54(d)(2) as a hard-and-fast limit on the trial court's ability to award fees in this case, instead determining that there is independent authority to award fees "from time to time," which authority is granted by the statute.

Certainly in the absence of some showing of prejudice associated with a fee petition filed outside the CR 54(d)(2) ten-day rule, the court should not approve an interpretation of the law which condemns the children to an impoverished household merely because a parent files late under the rule.

CR 54(d)(2) is not intended to prevent a party from seeking fees if the application is made within a reasonable time.

Setting aside the dictates of the various statutes specially applicable to family law cases, generally the 10-day time limit under CR 54(d)(2) is "intended to prevent parties from raising trial-level attorney fee issues very late in the appellate process, sometimes after one or all appellate briefs have been submitted." 4 Karl B. Tegland, *Washington Practice: Rules Practice* § 54, Supp. 40 (5th ed. 2006 & Supp. 2010) (drafters' comment on 2007 amendment to CR

54(d)(2)). The drafters also note intent to harmonize the language of the applicable civil rules with each other and with the relevant statutes (particularly RCW 4.84.010, .030, .090). *Id.*

It seems unlikely the Supreme Court, when writing the rule, contemplated the 10-day time limit as a means of denying the prevailing party the remedy to which it is entitled if application is made within a reasonable time. See *Mitchell v. Wash. State Inst. of Public Policy*, 153 Wn.App. 803, 823, 225 P.3d 280 (2009) (discussing CR 78(e)).

The trial court abused its discretion in failing to grant Ms. Wheeler's motion to extend the time for seeking an award of fees under CR 54(b)(2) because no prejudice was shown attendant to delay and the delay was occasioned by efforts to settle the issue of fees.

Finally, CR 54(d)(2) gives the court discretion to enlarge the 10 day time limit. The deadline applies "[u]nless otherwise provided by . . . order of the court." CR 6(b), which addresses the court's discretion to extend deadlines, lists rules for which the court may not enlarge a period of time. CR 54(d) is not among them. Here, the trial court at least implicitly denied a motion to enlarge the time for filing Ms.

Weeler's motion for fees, but the record is devoid of reasons why that request should be denied.

Public policy favors settlement of disputes outside of court. *Puget Sound Energy v. Certain Underwriters at Lloyd's, London*, 138 P.3d 1068, 134 Wn.App. 228 (Wash.App. Div. 1 2006). Ms. Wheeler should not be penalized for trying to resolve things outside of court, and if it requires an extension of time to file a petition for fees in order to allow settlement opportunities to be explored, the court should grant that time.

Here, the trial court didn't explain why the request for an extension of time was denied. But, there's no showing of any prejudice to any party attendant to delaying a motion to allow for settlement to be explored. Under the circumstances, the court's decision is an abuse of discretion.

Ms. Wheeler is entitled to Fees on Appeal.

Pursuant to RAP 18.1, Ms. Wheeler requests fees on appeal as authorized by RCW 26.09.140. Because this is an appeal of a trial court decision denying fees, it might make sense to refer the case to the trial court for a comprehensive award if the court determines that the trial court erred.

However, even absent reversal, Ms. Wheeler requests an award of fees under the cited statute.

CONCLUSION

The Superior abused discretion in failing to grant an extension of time to file a request for fees inasmuch as no prejudice to any party occurred, and the delay was a result of efforts to settle the issue between the parents of the children who are the subject of this appeal.

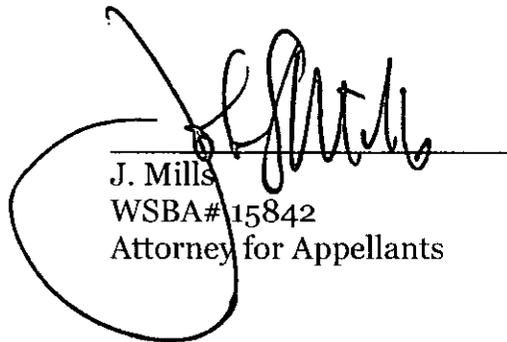
Independent of the question of whether an extension of time should have been granted, RCW 26.09.140 allowing the court to award fees and costs “from time to time” allows the court to entertain a request for fees in a family law case even after the ten days has run under CR 54(d)(2).

In all events, the court’s determination that CR 54(d)(2) represents a hard deadline to file is inaccurate and this court should decide that the rule is, as Tegland says, “intended to prevent parties from raising trial-level attorney fee issues very late in the appellate process.” It is not intended to deny the prevailing party the remedy to which she is entitled if application is made within a reasonable time.

The decision of the trial court should be reversed with instructions to entertain the motion for fees on its merits.

Independent of what the court decides as to the merits of the appeal, Ms. Wheeler is entitled to fees pursuant to RCW 26.09.140.

DATED this 4th day of August, 2016.



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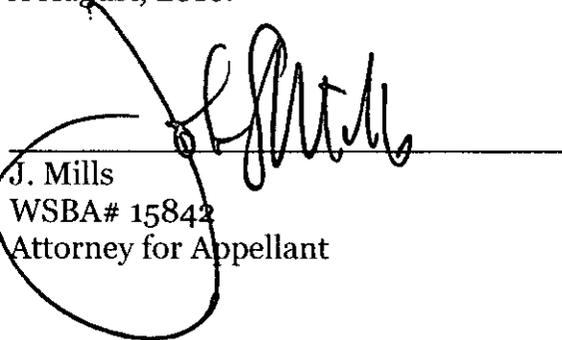
ANDREA WHEELER,
Petitioner-Appellant,
and
BRANDON WEAVER,
Respondent

NO. **48957-1-II**

**DECLARATION OF SERVICE OF
OPENING BRIEF**

THE UNDERSIGNED declares under penalty of perjury of the State of Washington that on today's date I emailed a copy of Appellant's Opening Brief along with this declaration to counsel for Mr. Weaver at her regular email address: barb@hellandlawgroup.com, and that email is our customary means of communication.

DATED this 4th day of August, 2016.



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