

FILED

SEP 17 2010

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DIVISION III
STATE OF WASHINGTON
By _____

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DIVISION III
OF THE STATE OF WASHINGTON**

IN RE THE MARRIAGE OF:

**DENISE WILKIE
Appellant**

V.

**GREGORY WILKIE
Respondent**

NO. 289761-III

APPELLANT'S BRIEF

DAVID J. CROUSE
Attorney for Appellant
W. 422 Riverside, Suite 920
Spokane, WA. 99201
(509) 624-1380
WSBA #22978

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ASSIGNMENT OF ERROR

- I. The Court erred by conducting the revision hearing on an abuse of discretion standard rather than a de novo review.
- II. The Court erred by refusing to consider the revision memorandum filed by the Petitioner.
- III. The Court erred by ruling that “principles of contract law” do not apply to family law proceedings and that there was not an enforceable settlement agreement between the parties.
- IV. The Court erred by ordering sanctions against the Petitioner’s counsel for requesting a continuance of the revision hearing.

STATEMENT OF THE CASE

The final parenting plan was entered in this matter on April 23, 2009. CP 1-10. In an attempt to address the possibility of either party moving out of the Harrington area, the transportation arrangement provision in the final parenting plan allowed for transportation arrangements to be addressed by motion of the family law docket. CP 1-10.

The Respondent in fact moved out of Harrington and currently lives in Davenport. CP 25-34. On November 4, 2009 the Respondent's attorney sent a letter to the Appellant's attorney indicating the Respondent had moved and that transportation arrangements needed to be addressed. CP 11-24. In response, on November 30, 2009, the Appellant sent a counter-offer to revise the transportation details and further requested that exchange times be changed. CP 11-24.

In response to the Appellant's counter-offer, the Respondent counter-offered, by listing two different options as to a change in the residential schedule during the school year in a December 7, 2010 letter. CP 11-24. Option two states, "In the alternative, Mr. Wilkie would suggest that his weekend visitation during the school year be extended to Monday morning rather than Sunday evening and he will bring the children directly to school. If this schedule is adopted, it would take place of the current

Sunday and Wednesday evening visitation during the school year.” CP 11-24.

In the letter dated January 12, 2010 the Appellant accepted the Respondent’s offer of option number 2. CP 11-24. In a letter sent via fax on January 15, 2010 (dated December 7, 2009), the Respondent was aware that an agreement was made, and requested that the new schedule not begin until the January 22nd weekend. CP 11-24. In paragraph two of the letter it states specifically that “He will not have the children that following Wednesday, January 27, but will keep them over until Monday morning February 1 when he receives them on Friday the 29th”. CP 11-24. Further the last sentence of paragraph two states “the Wednesday visitation will not start again until the school year has ended.” CP 11-24. This language is consistent with option two of the December 7, 2009 letter which was accepted by the January 12, 2010 letter which clearly stated that the offer was to entirely forego Wednesday visits for an extended weekend. CP 11-24.

Then a few days later, another letter was received from the Respondent claiming that a mistake was made and the Respondent never meant to offer a visitation schedule which gave up his Wednesday visitation. CP 11-24. The letter then makes another offer of two visitation schedule options, even though an agreement had already been reached. CP

11-24.

Again on January 21, 2010 a letter was received from the Respondent's attorney's assistant attempting to take the blame for the mistake. CP 11-24. However, all letters were signed by an attorney. CP 11-24. In addition, all letters indicate that a copy of the letter was provided to the Respondent, including the December 15, 2009 letter which specifically addresses not taking Wednesday visitation. CP 11-24.

The Appellant filed a motion to enforce the settlement agreement reached on February 9, 2010. CP 11-24. A hearing was held before Commissioner James Triplett on February 23, 2010. CP 50-50. Commissioner Triplett denied the motion to enforce the settlement agreement by order entered February 23, 2010. CP 48-49. The Appellant timely moved to revise the order of Commissioner Triplett on February 25, 2010. CP 51-52.

The revision hearing was originally set for March 18, 2010. CP 51-52. Prior to hearing, the attorney for appellant attempted to obtain an agreed continuance from Respondent's counsel as he was obligated to be in mediation on another matter that day. CP 84-85. The Respondent's counsel opposed the continuance. CP 86-91. Judge Linda G. Tompkins entered an order rescheduling the hearing from March 18, 2010 to March 25, 2010. CP 92-93.

On March 25, 2010, the Appellant filed a supplemental memorandum of authority in support of her motion to revise. CP 94-98. The revision hearing was held March 25, 2010. CP 101-101. The motion to revise was denied by order of March 25, 2010. CP 99-100.

ARGUMENT

I. THE COURT ERRED BY CONDUCTING THE REVISION HEARING ON AN ABUSE OF DISCRETION STANDARD RATHER THAN AS A DE NOVO REVIEW.

The extent of a trial court's review of a commissioner's ruling was addressed in State ex rel. Biddinger v. Griffiths, 137 Wn. 448 (1926). The Biddinger court "required trial court judge to `undertake an appellate court review of the certified record.'" In re Marriage of Moody, 137 Wn.2d 979, 992 (1999). This means that the superior court's review of the record is de novo where the evidence before the commissioner does not include live testimony. Moody, 137 Wn.2d at 993. A de novo review is defined as "An appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court." Black's Law Dictionary, 74 (7th edition 2000).

On revision, "[t]he superior court's review is not limited to whether substantial evidence supports the commissioner's finding, but it is `authorized to determine its own facts based on the record before the commissioner.'" In re Marriage of Goodell, 130 Wn. App. 381, 388 (2005) (emphasis omitted) (quoting In re Marriage of Dodd, 120 Wn. App. 638, 644 (2004)); see RCW 2.24.050; RCW 26.12.215. The requirement for a de novo review is longstanding in Washington case law.

In the instant case, there is no debate that the lower court conducted a revision hearing on an abuse of discretion standard. While the Court notes in passing during oral argument that a revision hearing is a de novo review (RP 9, line 23), the lower court ultimately makes the written finding that the revision is denied on an abuse of discretion basis. In the order denying motion for revision, the lower court's findings expressly state "The requested revision should be denied for lack of abuse of discretion by the Commissioner's original decision." CP 99-100.

This is not a harmless error. A commissioner's ruling is always subject to review by the superior court judges. 14 Tegland, Washington Practice: Civil Procedure, 3.13, 29 (1st edition 2003). Revision of a commissioner's ruling is governed by Washington Constitution article IV, section 23 and RCW 2.24.050. Washington Constitution article IV, section 23 reads as follows:

There may be appointed in each county, by the judge of the superior court having jurisdiction therein, one or more court commissioners, not exceeding three in number, who shall have authority to perform like duties as a judge of the superior court at chambers, subject to revision by such judge, to take depositions and to perform such other business connected with the administration of justice as may be prescribed by law.

RCW 2.24.050 provides:

All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court. Any party in interest may have such revision upon demand made by written motion, filed with the clerk of the superior court, within ten days after the entry of any order or judgment of the court commissioner. Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner, and unless a demand revision is made within ten days from the entry of the order or judgment of the court commissioner, the orders and judgments shall be and become the orders and judgments of the superior court, and appellate review thereof may be sought in the same fashion as review of like orders and judgments entered by the judge.

Washington law, in providing for the appointment of a non-elected court commissioner guarantees every litigant the absolute right to a de novo review by a Superior Court judge. This unequivocally did not occur here. There is clear error requiring reversal.

II. THE COURT ERRED BY REFUSING TO CONSIDER
THE REVISION MEMORANDUM.

Black's Law Dictionary defines memorandum as "A party's written statement of its legal argument presented to the court, usually in the form of a brief." Black's Law Dictionary, 799 (7th edition 2000). A brief is further defined as "A written statement setting out the legal contentions of a party in litigation, especially on appeal." Id. at 152.

In any litigation, a party is entitled to present relevant law for the Court's consideration. The submission of a memorandum of authority by both parties in a summary judgment motion was deemed appropriate. Geppert v. State, 31 Wn.App. 33, 39 (1982). Certainly, it cannot be argued that a motion to revise is so different from a summary judgment motion that a memorandum should not be submitted and should not be considered by the Court.

This is especially true in Spokane County family law motions. By local rule, family law matters are limited to 10 minutes of legal argument. LSPR 94.04(8). In fact, the lower court reminded counsel of this 10 minute rule. RP 5, line 17. Thus, given the limitations, little time is allowed for citation to legal authority. Legal argument is best presented as a memorandum.

Here, counsel for the appellant presented the case presuming that the lower court had read the memorandum of authority that had been presented in advance of hearing. There were no scheduling orders that dictated the timing of filing a memorandum. Near the conclusion of argument, appellant's counsel was informed that the lower court had not considered the brief. RP 21, line 23. Objection to this was duly noted by appellant's counsel on the record. RP 22, line 1. The lower court further indicated that she did not have the time to look at the memorandum, even if she was inclined to do so. RP 22, line 25.

Of particular problem is that Respondent's counsel cited law during their presentation. RP 14, lines 14-25. These "claims" to citations were not briefed nor the appellant given any chance to review or respond to the claimed citations. RP 22, line 7. Yet, counsel for the Respondent had the appellant's brief and citations to authority in advance of the hearing. RP 14, line 9.

In sum, the Respondent successfully argued that "Neither the statute nor the court rule, the local rule 0.07, permit additional briefing on revision." RP 14, line 13. This is a significant issue requiring the attention of the Appellate Court. Is the status of the law such that applicable case law cannot be provided to a Superior Court Judge on revision? The appellant submits that this is not the state of the law and

that case law and the statutes are devoid of such holdings. A revising party must be allowed to provide case law to show where the Court Commissioner erred in his or her analysis.

The lower court's failure to consider the citations to authority is error. If the lower court did not have time to read the memorandum prior to hearing, the hearing could be continued. More typically, the lower courts will issue a decision after reading the memorandum where time is limited.

The issue here is actually fairly obvious and permeates all arguments presented in this matter. The Superior Court judge simply did not want to consider application of contract law in a family law matter. She felt that such analysis was a waste of the Court's resources and that the matter could have been more quickly resolved if a parenting plan motion (rather than a motion to enforce the settlement contract under (CR 2A) had been filed on the family law docket. See RP 22, line 19 where the lower court found that "The circumstances here, unfortunately, are getting mired in the principles of contract law and the best interests of the children, somehow seem to be muddied." See also RP 23, line 15: "I somewhat think that had the parties gotten into a brief hearing in front of a Commissioner that the whole question may have been resolved in half the time."

III. THE COURT ERRED BY RULING THAT “PRINCIPLES OF CONTRACT LAW” DO NOT APPLY TO FAMILY LAW PROCEEDINGS AND THAT THERE WAS NOT AN ENFORCEABLE SETTLEMENT AGREEMENT BETWEEN THE PARTIES.

Superior Court Rule 2A states the following:

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and dissented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

A Washington trial court’s authority to enforce a settlement agreement between parties is governed by CR 2A. Morris v. Maks, 69 Wn.App. 865, 868 (1993). The premise behind CR 2A is to preclude enforcement of a disputed settlement agreement not made in writing or put on the record. In re the Marriage of Ferree, 71 Wn.App. 35, 40 (1993). However, courts have held that where an agreement has been reduced to writing, it is enforceable under 2A. Id. In this case, and as set forth in the instant motion, the parties have reduced their complete settlement

agreement to a writing and it is absolutely enforceable as a result.

This tenet has been long standing in Washington law. Stipulations must be read into the record or be in writing and signed by counsel for each side. Mere colloquies between court and counsel will not be treated as stipulations when their context shows that such was not intended. Lasell v. Beck, 34 Wn.2d 211, 213 (1949). Even an oral agreement later reduced to a writing will satisfy the Rule. Thus, where plaintiff expressly admitted in his reply that an oral agreement had been made, the requirements of the Rule were satisfied and the agreement was binding. Hodgson v. Bicknell, 49 Wn.2d 130, 136 (1956). Accordingly, the courts have held that stipulations conforming to statutory requirements are binding unless fraud, mistake, misunderstanding, or lack of jurisdiction is shown. DeLisle v. FMC Corp., 41 Wn. App. 596, 597 (1985).

Under Washington law, settlement agreements are governed by the general principles of contract law. Morris, 69 Wn.App. at 868. To determine whether an informal writing is enforceable and binding, the courts consider three specific aspects. (1) The subject matter has been agreed upon; (2) The terms are all stated in the informal writings; and (3) The parties intended a binding agreement prior to the time of the signing and delivery of a formal contract. Morris at 869. All three factors are clearly met in this case.

It also cannot be argued that the agreement was not signed by the parties. A written stipulation signed by counsel on both sides is binding on the parties and the court. Riordan v. Commercial Travelers Mut. Ins., 11 Wn.App. 707, 715 (1974). In fact, stipulations and agreements of counsel are viewed with good favor unless some good, contrary reason is shown. Smyth v. Worldwide Movers Inc., 6 Wn.App. 176, 178 (1971).

Basic contract law is that an offer "may be revoked by the offeror at any time prior to the creation of a contract by acceptance." 1 Samuel Williston & Richard A. Lord, A Treatise On The Law Of Contracts § 5.8, at 666 (4th ed. 1990); Brown Bros. Lumber Co. v. Preston Mill Co., 83 Wash. 648, 655 (1915). Settlement agreements are considered to be contracts and the legal principles applicable to contracts govern their construction. Stottlemyre v. Reed, 35 Wn. App. 169, 171, *review denied*, 100 Wn.2d 1015 (1983).

Contract law is very clear. An offer may be rescinded or revoked up until the time of acceptance. Once acceptance has been made, a contract exists. 1 Samuel Williston & Richard A. Lord, A Treatise On The Law Of Contracts § 5.8, at 666 (4th ed. 1990); A.A.B. Elec., Inc. v. Stevenson Pub. Sch. Dist. No. 303, 5 Wn. App. 887, 889 (1971) ("There is no contract until the offer is accepted). Once mutual assent is present, offer and acceptance, the contract formed may only be void or voidable due to misrepresentation, fraud or unconscionability. Fire Protection District V. Yakima, 122 Wn.2d 371, 390 (1993).

In his oral opinion, the Court Commissioner reasoned that the Respondent should be allowed to revoke his offer because he did so one business day after acceptance. CP 53-83, verbatim report of proceedings page 26, lines 8-13. More precisely the court commissioner was asked "Do you believe under contract law when there has been full acceptance without reservation it can be withdrawn even after acceptance because that was accepted." CP 53-83 at page 27, line 21. The Commissioner answered, "On the next business day, yeah I think." CP 53.83. The commissioner's ruling is absolutely at odds with established law in this regard. A contract exists in this case and cannot be revoked *at any point* after full acceptance.

Particularly troubling then is the fact that the lower court revision judge reviewed the commissioner's decision on an abuse of discretion basis (CP 99-100), and that the lower court refused to read the memorandum of authority presented. This ties in directly with issue II, presented above. If the court commissioner has made an error of law, is not the revising party allowed to discuss controlling case law in a memorandum of authority to the revision court?

The court commissioner candidly admits in his oral opinion that he was prepared to rule against the Petitioner on the area of ambiguity until he more fully read the letters from the Respondent's attorney as discussed during oral argument. CP 53-83, verbatim report of proceedings page 24, line 10. Although not immediately obvious, a detailed evaluation of the Respondent's "excuses" for attempting to be relieved of his offer

show that they are entirely contradictory and not credible.

The petitioner filed her motion to enforce the settlement agreement on February 9, 2010. CP 11-24. In his responsive declaration, Greg Wilkie argues that the intent of his offer (via counsel) was to only give up his Wednesday overnight visits in exchange for extending his weekend from a Sunday evening return time, to a Monday morning. CP 25-34. He argues that he never intended to give up his Wednesday non-overnight visits. CP 25-34.

However, in his attorney Jane Brown's letter of January 15, 2010, Ms. Brown states that "He requests that the change be made starting with the 22nd, which is Ms. Hoffman's weekend. He will not have the children that following Wednesday, January 27, but will keep them until Monday morning February 1 when he receives them on Friday the 29th. He will deliver them to school that morning and the Wednesday visitation will not start again until the school year has ended." CP 11-24. The Commissioner correctly stated that this Wednesday, January 27, 2010 visit was a Wednesday non-overnight visit and thus directly contradictory of the Respondent Greg Wilkie's declaration. CP 53-83, verbatim report of proceedings page 21, line 23 through page 23, line 7. Thus, the court commissioner admits he was unsure of this position and shifted his position to allowing the revocation in significant part because it was done one business day after acceptance (as his retraction analysis immediately follows the above cited finding).

The court commissioner also discussed that the term Wednesday

evening could be ambiguous, although his decision is not based on such. CP 53-83, verbatim report of proceedings page 17, line 21 through page 18, line 2. However, there is absolutely no legal basis for such a finding. *Evening* is a clearly defined word. Black's Law Dictionary defines evening as "The closing part of the day and beginning of the night; in a strict sense, from sunset till dark. In common speech, the latter part of the day and the earlier part of the night, until bedtime. The period between sunset or the evening meal and ordinary bedtime."

The Respondent already admits that he intended to give up the Wednesday overnight. CP 25-34. If anything, the overnight could be more readily argued to fall outside of the definition of "evening" although it too clearly encompasses such time. However, the father's non-overnight Wednesday visit (the one he claims he did not offer to give up) is from 3:00 p.m. to 8:00 p.m. CP 1-10. This absolutely falls within the times defined as evening. Further, his attorney's January 15, 2010 letter states in pertinent part "the Wednesday visitation will not start again until the school year has ended." CP 11-24. No ambiguity can be reasonably argued and thus the commissioner shifted his focus to revocation one business day after an offer was accepted.

Where there is a written contract, Washington courts have determined intent by focusing on the objective manifestations of agreement. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503 (2005). We give words their ordinary, usual, and popular meaning unless the entirety of the agreement evidences a contrary intent. Id. at 504

If relevant for determining mutual intent, surrounding circumstances and other extrinsic evidence may be used to determine the meaning of specific words and terms used, but not to show an intention independent of the instrument or to vary, contradict, or modify the written word. *Id.* at 503 (emphasis added). As the offer and acceptance were in writing and formed a valid contract, Mr. Wilkie is estopped from arguing after the fact that he had a different understanding of the terms of the agreement.

Further, Mr. Wilkie is estopped from arguing that his attorney made a mistake and he should be relieved from the contract. Mr. Wilkie argues that his attorney's letter(s) constituted a mistake, and his attorney explicitly admits to such. CP 53-83, verbatim report of proceedings page 23, line 1-7. Once a party has designated an attorney to represent him or her, the court and the other parties to an action are entitled to rely upon that authority. Haller v. Wallis, 89 Wn.2d 539, 547 (1978). "[A] party who signs an instrument manifests assent to it and may not later complain about not reading or not understanding." John D. Calamari & Joseph M. Perillo, *The Law Of Contracts*, 376 (4th ed. 1998); see also Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc., 96 Wn.2d 939, 943-44 (1982).

Here, an offer was made in writing and expressing the essential terms. CP 11-24. Full acceptance was given in writing, re-outlining the same terms of the agreement. CP 11-24. The fact that Mr. Wilkie later changed his mind or otherwise wanted to rescind the offer does not make the contract any less binding. Mr. Wilkie has designated his attorney to

act on his behalf. The offer was signed by his attorney. CP 11-24. Ms. Hoffman had every right to rely on the terms outlined in the offer. Her acceptance, prior to revocation, made the agreement absolutely binding on all parties.

IV. THE COURT ERRED BY ORDERING SANCTIONS AGAINST THE PETITIONER'S COUNSEL FOR REQUESTING A CONTINUANCE OF HEARING.

Local Spokane County Superior Court Rule 0.7 governs revisions of court commissioner's order or judgment. LAR 0.7. LAR 0.7(d) requires the moving party to confer with the other party whether they are ready for hearing or whether a continuance may be requested. Pursuant to this requirement to confer, the appellant's counsel, prior to hearing, attempted to obtain an agreed continuance from Respondent's counsel as he was obligated to be in mediation on another matter that day and that said mediation had been affected by a prior trial, thus causing scheduling conflicts. CP 84-85. The Respondent's counsel opposed the continuance. CP 86-91. Judge Linda G. Tompkins entered an order rescheduling the hearing from March 18, 2010 to March 25, 2010. CP 92-93. Certainly, there was no violation of the local rule in conferring and requesting a continuance due to unavoidable scheduling conflicts.

LAR 0.7(d) provides that sanctions may be issued if the non-moving party is forced to appear at a hearing and the hearing is stricken due to non-compliance with this rule. However, this did not occur here. The non-moving party was forced to appear and argue **the continuance request** that they refused to agree to. There is no basis under the rule for entry of sanctions.

In sum, the appellant was assessed sanctions because the Court was required to get the file for the continuance request (RP 24, line 17) and because the judicial assistant was required to explain what happened. RP 24, line 24. The appellant does not deny the judicial time is taken when parties cannot agree to a continuance and court time is required to resolve the dispute. While this may be frustrating to a busy court, it is not the basis for sanctions. Certainly, no intransigence was shown or found.

V. REQUEST FOR ATTORNEY FEES

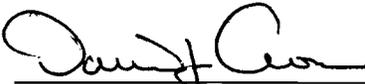
The Appellant request the court for an award of attorney fees as a prevailing party.

VI. CONCLUSION

An enforceable settlement agreement was reached. The lower court erred in ruling that the Respondent could void the agreement by rescinding his offer one day after acceptance. This Court should reverse the decision of the lower court and find that the agreement was enforceable and direct the lower court to enter an order in accord with the settlement agreement. The lower court must also be reversed on the basis that a de novo review was not conducted and that the memorandum of authority submitted by Appellant was not considered.

Finally, the \$300.00 in sanctions must be reversed as there is no statutory, case law or local rule basis for entry of such.

Respectfully Submitted:

By:  9-17-10
DAVID J. CROUSE, #22978
Attorney for Petitioner

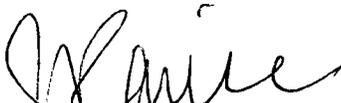
CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is a person of such age and discretion to be competent to serve papers.

That on the 17th day of September, 2010, she served a copy of the Appellant's Brief to the persons hereinafter named at the places of address stated below which is the last known address.

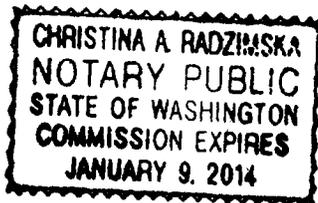
ATTORNEY FOR RESPONDENT

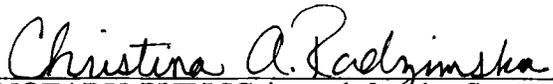
Jane Brown
Attorney at Law
717 W. Sprague, Ste. 1200
Spokane, WA 99201



SARA ROMINE

SUBSCRIBED AND SWORN to before me this 17th day of September, 2010.





NOTARY PUBLIC in and for the State of
Washington, residing in Spokane.
My Commission Expires: 1-9-14