

COA No. 30352-7-III

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of:

RICHARD T. WIXOM,

Appellant,

v.

LINDA B. WIXOM,

Respondent.

BRIEF OF RESPONDENT

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I. COUNTER-STATEMENT OF ASSIGNMENTS OF ERROR

A. Except for the declaratory relief issues, the rest of this appeal should be dismissed as moot.

B. The only issues on appeal are the propriety of the dismissal of the motion for declaratory relief and the award of attorney fees under RCW 7.24 *et seq.* because Richard T. Wixom did not move to revise the August 5, 2011 Commissioner's Ruling and did not file a notice of appeal/discretionary review of that ruling.

II. COUNTER-STATEMENT OF THE CASE

The trial judge succinctly summarized the proceedings at the September 23, 2011 hearing:

There are several issues before the court today, and let me outline procedurally a little history of the case, outline what I think the issues are, what I have read, and then I just need to disclose something so that we can move forward. But a decree, final parenting plan, entered March 3 of '09. The mother filed a petition to modify the parenting plan alleging integration and detriment 2-28 of '11. The father filed a counterpetition for modification alleging detriment March 23rd of '11. A hearing on April 22nd of '11, adequate cause was established . . . for both petitions.

All right. . . And a GAL was ordered to be appointed. May 31st of '11, Heather Lund was appointed as a guardian ad litem. July 8 of '11, there was an order entered regarding the home and some child support. August 1st, an ex parte restraining order was entered. I had a hearing on August 4th, and I continued discovery. Trial was set for November 7th. August 5th, Commissioner

Ressa had an order that addressed some summer contacts.

The first issue that is before the Court today, August 25th of '11 Mr. Wixom filed a motion for declaratory Relief. August 31st I had a hearing regarding Mr. Wixom answering interrogatories by September the 8th. September the 1st – second issue before me Today – Ms. Wixom filed a motion for protection order for Group Health Hospital and Colonial Clinic records. There was a contempt order on September 6th; I don't think that's before me. September 9 of '11, Commissioner Anderson stayed the discovery and set the protection order issues over to this court; and then on September 12, there was a motion to reconsider filed by Mr. Wixom and counsel, I think pertaining to my August 31st ruling and that was set for today. Reconsiderations are usually done on written responses, but I saw a note for hearing. But I believe that those are the competing issues, and people have counter-motions and motions for fees and sanctions; but the declaratory relief, the protection order, and then that reconsideration, those are the issues before the Court today. (RP 2-4).

After hearing extensive argument, the court made its oral ruling:

There's a motion to reconsider a discovery motion or order that I entered on August 31st. . . So we had a discussion about the consultation of counsel . . .

What happened in this case, though, is that there was an argument that the answers were not complete, and part of the reason that I just reserved the fee issue was this question in my mind as to whether it's appropriate in a motion to compel when you say, "I didn't get any interrogatories", to then use that motion with that issue framed to say, "Okay, now I've got the answers but they're not complete." So I'm glad the

answers were given. I am not going to reconsider my decision that I reserved the issue of fees for [Ms. Wixom's lawyer] asking to completely answer Those questions, but I'm not ordering any additional fees because I'm not finding that there's bad faith in getting them answered. . .

And I'm going to close the door on that, so I'm denying the reconsideration. I'm not ordering fees.

The motion for declaratory relief, that's to me the unique issue. . .

The reason, I guess, it was a little unusual is that I think there's two pieces to Mr. Wixom's argument. Number one, he's arguing that Commissioner Ressa violated his constitutional rights to parent his child; and constitutional violations, especially a statute that violates the constitution, is absolutely a declaratory relief type of an action. But I have looked back through the transcript. I've looked at the order. and Commissioner Ressa, in my opinion, did not grant any rights to a third person. She did not give the grandparents custody or even the way she framed the order did not create those rights in the grandparents.

I think what she did was recognized that the child had a history of visiting grandparents, that there was this five-week provision for Mr. Wixom that had not, as far as I can find in the evidence, had not been exercised in the past. I think I saw somewhere that Mr. Wixom had told the guardian ad litem that he didn't know that he could just have five weeks. He thought he had to have a vacation or some special trip.

But in any event, the parenting plan from '09 does not clearly say Mr. Wixom gets, you know, the first five weeks of the summer or the last five weeks. It says he may have that additional five weeks but he's got to submit a proposed agenda by May 15th, and then the parties have to have discussions before they

reach a final agreement. . .

Both parties said this parenting plan needs to be changed, the '09 parenting plan. The Court found adequate cause. The Court then has the right to enter a new parenting plan. Yes, it's called a modified parenting plan, but she didn't modify the parenting plan and create rights in third persons. She designated the rights between parents, and during mom's time she allowed the child to go on a visit, and it would be kind of like allowing a child to go to a camp over the summer during one parent's time. That's not creating rights in the camp that would violate a parent's constitutional rights. I think that was within the discretion of the Court. I don't think it created rights in the grandparents so I don't think there was a constitutional violation.

The other piece – and I could cite, I suppose – since I'm covering it, why don't I – Commissioner Ressa, Page 18 of the transcript of the August 5th hearing starting at Line 4. This is Commissioner Ressa speaking. “So this summer for Jordan is going to look like every other summer when he has been under this parenting plan; and whether things happen in spring break or not, those were agreements to be made, but this summer schedule for 2011 as a temporary order is going to look like all the summers for Jordan that have occurred prior to litigation, so that there has never been an exercise of the five weeks. It's not going to happen this summer, either, given that the whole parenting plan is open for modification. Jordan will go on his Portland trip, his Silverwood birthday party trip. The last weekend in August will be with Ms. Wixom and this weekend will be with Ms. Wixom to make up for withholding the child for last weekend.” So she was focusing on Jordan, making sure that he got to do some things that he wanted to, not focusing on other people's rights; that's pretty clear to me.

The second piece of this motion was that both Mr. Wixom and [his lawyer] feel that Commissioner Ressa questioned their veracity and called Mr. Wixom sneaky. . . But

I went and looked at what Commissioner Ressa had said, and she didn't say that counsel or Mr. Wixom had lied. She said that someone was lying, in her opinion. She said it could be Jordan lying to the guardian ad litem, could be dad, could be other things. Here it is. . .

"Either your client or his wife have lied to this court or the child is lying, and your office is either lying or not lying. I don't know how you want to proceed right now." So she didn't say who was lying. What she was saying was that the stories were mutually incompatible, that it couldn't be that both sides were being completely accurate. . .

But that's, I think, the second big piece of this motion for declaratory relief, that offense was taken to that; and let me just also quote the transcript on August 1st, Page 8. This was Commissioner Jolicoeur's hearing. Let me just go ahead and start on Line 19:

"I expect counsel to treat other with professional respect and I don't like personal attacks on other attorneys when they're in open court, so that having been said, let's stick with clients' issues, and that is where this child will be between now and Friday, what we have here.

[Mr. Wixom's lawyer]: Well, my client has the child, and he is vacationing with the child as we speak here and he is moving down toward Oregon, and last I spoke with him he was going to take the child to Disneyland. He was going to work his way down, and the child would be with him on a daily see-what-dad-does-to-make-a-living type of situation for a couple hours a day while he works his way down towards Disneyland."

Now, I could see how that makes it sound like he is in Oregon and on his way to Disneyland. . . The word "sneaky", I guess that's one way of looking at some of these issues, but the bottom line is that Commissioner

Ressa was laying out before [Mr. Wixom's lawyer] started his argument that here's some things that are worrying me, and I can see why she would be worried.

She didn't make a finding of misrepresentation or dishonesty. She expressed a concern about it, and that's within her discretion. That's within the scope of the things a judicial officer does, so I cannot declare that Commissioner Ressa made an unconstitutional order or that she was predisposed before beginning work on a case to be prejudiced against a party, so I don't see any legal basis to grant any declaratory judgment to void ab initio her order or to prohibit her from handling cases. Now I don't know how much more opportunity she's going to have because I have trial coming up in six weeks, seven weeks maybe, but the motion for declaratory relief is denied.

RCW 7.24.100 says that in a proceeding under this chapter, declaratory judgments, the Court may make such award of costs as may seem equitable and just. I'm going to order \$500 in attorney's fees for responding to the motion. It's not CR 11 sanctions because I have a pretty broad interpretation of people being – make arguments, but the statute allows for the award of costs and I'm awarding a couple hours of legal fees for researching it, giving me some cases, and responding to this motion.

So let me summarize: denied the reconsideration, denied the fees for the discovery, granted the protection order on the Group Health records subpoenaed by Mr. Wixom through [his lawyer], allowed the guardian ad litem some leeway to get it with notice, and I denied the request for declaratory judgment and have awarded fees as just on that issue. . . .

I would suggest . . . that we enter an order that denies your request. We adopt the findings that I made as part of the oral transcript, incorporate that as part

of the order. That way we don't incur more fees to set up another hearing to argue over specific findings and conclusions. . .

I will say that Commissioner Ressa – that it's my holding that Commissioner Ressa did not violate your client's constitutional rights to parent his child when she allowed the child to go on a pre-planned trip during the mom's residential time to Portland, so I'm ordering that. And what was the other part you wanted me to order? . . .

All right. So you're wanting me to make the decision to deny your declaratory relief as a final order. . .

I'm considering that to be my final order on this issue, end of story, period. . .

And I guess then we reduce the attorney's fees to a judgment. . .

Okay. Reduce it to a judgment, statutory interest. . .

Let's get a handwritten order. As far as I'm concerned, I have made a final decision on the request for declaratory judgment; and the ability to appeal that decision, as far as I'm concerned, is ripened. . .

This order says the protection order re Group Health and Colonia Clinic is granted. Motion for reconsideration is denied. Fees denied on this – I'm going to say on the discovery motion so that it's clear what the motion was. Motion for declaratory relief is denied. 500 in fees granted to [Ms. Wixom] per RCW 7.24. Order for declaratory relief is final and appealable after judgment signed. So I've clarified that the fees – which is plural, which to me means both of your requests for fees – on the discovery motion were denied. (RP 36-50, 55-56, 74-75).

The subject of Mr. Wixom's motion for declaratory relief was the visitation with Jordan's grandparents in Portland and stemmed from Commissioner Ressa's August 5, 2011 order. (CP 54). On September 23, 2011, following its comprehensive oral ruling, the court entered an Order on Motions Heard 9/23/11:

Protection order re: Group Health and Colonial Clinic is granted; Motion for Reconsideration is denied, fees denied on the discovery motion; Motion for Declaratory Relief is denied, \$500 in fees granted to [Ms. Wixom] per RCW 7.24 et seq.; Order for Declaratory Relief is final and appealable after judgment signed. . . (CP 145).

A judgment for \$500 in attorney fees against Mr. Wixom in favor of Ms. Wixom was also entered on September 23, 2011. (CP 150).

Mr. Wixom appealed the \$500 judgment and the Order on Motions Heard 9/23/11. (CP 148).

III. ARGUMENT

A. Mr. Wixom cannot now challenge the August 5, 2011 order by Commissioner Ressa because he did not seek revision of the ruling and it is not appealable in any event.

In his brief, Mr. Wixom's first four assignments of error are directed to certain of the Commissioner's decisions in her August 5, 2011 Order on Return of Ex Parte Restraining Order. (App.'s brief, pp. 1, 2). Mr. Wixom, however, failed to seek revision of the

Commissioner's Order under RCW 2.24.050. His counsel acknowledged to the trial court at the September 23, 2011 hearing that he did not pursue revision. (RP 25).

When revision is not timely sought, appellate review of a commissioner's decision is the same as review of like orders and judgments entered by a judge. RCW 2.24.050; see *In re Dependency of B.S.S.*, 56 Wn. App. 169, 782 P.2d 1100 (1989), *review denied*, 114 Wn.2d 1018 (1990). Since the August 5, 2011 order was not final, it was only subject to discretionary review under RAP 2.3. No such review was sought by Mr. Wixom. Accordingly, he cannot challenge the August 5, 2011 order in this appeal from the denial of his motion for declaratory relief. Indeed, the issues raised regarding the Commissioner's order are moot in any event.

B. Except for the declaratory relief issues, the rest of the appeal should be dismissed as moot.

The notice of appeal is from the September 23, 2011 Order on Motions Heard 9/23/11 that stated in relevant part:

IT IS ORDERED that Protection Order re: Group Health and Colonial Clinic is granted; Motion for Reconsideration is denied, fees denied on the discovery motion, Motion for Declaratory Relief is denied, \$500 in fees granted to Respondent [Linda Wixom] per RCW 7.24 et seq. Order for Declaratory Relief is final and appealable after

Judgment signed. (CP 145).

In his brief, however, Mr. Wixom focuses his assignments of error on the Commissioner's August 5, 2011 Order on Return of Ex Parte Restraining Order. (CP 53-54). The Commissioner found:

Good cause exists to enter this order. Mr. Wixom's behavior on July 29, 2011 was unreasonable. Jordan's summer schedule shall look like his previous summer schedules prior to litigation where Mr. Wixom did not exercise any extra summer time under section 3.5. The court's oral ruling/findings are incorporated into this order by reference. (CP 53).

From those findings, the Commissioner ordered:

Summer 2011 is modified as follows and the summer schedule in the Final Parenting Plan from 2009 is suspended. Summer 2011 – Jordan shall go to the Portland visit with his grandparents, go to Silverwood w/mom for his birthday, exercise last weekend in August w/mom for camping trip and shall remain w/mom this weekend (Aug. 5-7) as makeup for last weekend.

Mr. Wixom shall pay Ms. Wixom attorney fees in the amount of \$750.00 for the necessity of an ex parte hearing on 8/1.

Phone contact at 6 p.m. (as ordered on 8/1/11) remains in effect. (CP 54).

But the complained-of events ordered in the summer 2011 modification, that is, the visit with the grandparents, the trip to Silverwood for Jordan's birthday, the camping trip, and the

weekend with his mother, have already taken place. This Court clearly cannot provide any relief from that order.

A case is moot if a court can no longer provide effective relief. *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984). The general rule is that when only moot questions or abstract propositions are involved, the appeal should be dismissed. *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). Furthermore, this appeal does not fit the exception for reviewing a moot case involving "matters of continuing and substantial public interest." *Id.* The issues here are not continuing in nature and involve a summer 2011 schedule that has long past.

Mr. Wixom claims the Commissioner erred by finding his behavior was unreasonable, allowing a visit with Jordan's grandparents in summer 2011, awarding makeup time to Ms. Wixom in summer 2011, and awarding fees to Ms. Wixom's lawyer. Except for the award of fees, the Commissioner's order relates to the summer 2011 schedule. (CP 53-54). Summer 2011 has come and gone. This Court cannot provide effective relief. *Orwick*, 103 Wn.2d at 253. The complaints against the Commissioner's August 5, 2011 order are moot and the appeal should be dismissed as to those issues. *Sorenson*, 80 Wn.2d at 558.

As for the award of attorney fees by the Commissioner, Mr. Wixom neither sought revision of the award nor discretionary review in the Court of Appeals. His challenge is untimely and not before this Court. RAP 2.3; see also RAP 2.4(b), RAP 5.2(b). Even so, he has failed to show the court abused its discretion in awarding the fees for having to bring an ex parte motion on August 1, 2011. *In re Marriage of Goodell*, 130 Wn. App. 381, 393, 122 P.3d 929 (2005).

C. The trial court properly denied the motion for declaratory relief.

Mr. Wixom did not seek revision of the August 5, 2011 Commissioner's order. Rather, he used the motion for declaratory relief as a way to get that order reviewed even though there was no revision motion. But declaratory relief is neither proper under RCW 7.24 nor effective in seeking relief from the Commissioner's order as it is moot.

The purpose of the Uniform Declaratory Judgments Act, RCW 7.24, is to facilitate the socially desirable objective of providing remedies not previously countenanced by law. *Sorenson*, 80 Wn.2d at 559. Here, however, RCW 26.09 clearly provides adequate relief and there is no need for declaratory relief. *Ronken*

v. Board of County Comm'rs of Snohomish County, 89 Wn.2d 304, 310, 572 P.2d 1 (1977).

Elements to be considered in determining whether to invoke the court's declaratory power are set forth in *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973):

(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

As recognized by the trial court, there is no actual, present, and existing dispute. (RP 39). The Commissioner did not grant any rights to a third person, *i.e.*, the grandparents, did not give custody to them, and did not create those rights in the grandparents by allowing Jordan to visit them in Portland during Ms. Wixom's time. (*Id.*). The court further noted that what the Commissioner did was to recognize Jordan had a history of visiting grandparents and there was a five-week provision for Mr. Wixom that had not been exercised in the past. (RP 40). It found the Commissioner did not modify the parenting plan to create rights in third persons:

She designated the rights between parents, and during mom's time she allowed the child to go on

a visit, and it would be kind of like allowing a child to go to a camp over the summer during one parent's time. That's not creating rights in the camp that would violate a parent's constitutional rights. I think that was within the discretion of the Court. I don't think it created rights in the grandparents so I don't think there was a constitutional violation. (RP 40-41).

The trial judge was absolutely correct. The record clearly shows that no rights were granted or created in the grandparents. Thus, Mr. Wixom's constitutional rights were not violated. His reliance on *In re Custody of Smith*, 137 Wn.2d 1, 969 P.2d 21 (1998), and *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 109 P.3d 405 (2005), is misplaced as they have no application to here. No matter how he characterizes the visitation with Jordan's grandparents during Ms. Wixom's time, the record supports the trial court's conclusion that no rights were granted or created in them.

The granting of declaratory relief is discretionary with the trial court. *Ronken*, 89 Wn.2d at 310. An abuse of discretion occurs when a decision is manifestly unreasonable or is based on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971). In other words, the trial court abuses its discretion when it takes a view that no reasonable person would take. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010). There is no indication in the record that

the trial court abused its discretion under the circumstances here.

Id. Moreover, the issue of grandparent visitation in summer 2011 is moot. The court did not err by denying declaratory relief.

D. The trial court award of \$500 attorney fees to Ms. Wixom under RCW 7.24.100 should be modified to award statutory attorney fees only.

RCW 7.24.100 provides:

In any proceeding under this chapter, the court may make such award of costs as may seem equitable and just.

The court awarded Ms. Wixom \$500 attorney fees for responding to the motion for declaratory relief. (RP 46). But under RCW 7.24.100, the term “costs” does not include “attorney fees”, other than statutory attorney fees. *Am. States Ins. Co. v. Hurd Bros.*, 8 Wn. App. 867, 871, 509 P.2d 1015 (1973); *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 776-77, 871 P.2d 1050, *cert. denied*, 513 U.S. 1056 (1994). This Court should therefore modify the award of \$500 attorney fees to Ms. Wixom to reflect just statutory attorney fees. *Id.*

E. Ms. Wixom is entitled to attorney fees on appeal, not Mr. Wixom, under RCW 26.09.140, RAP 18.1, and for his intransigence.

Ms. Wixom should be awarded her fees for defending against this appeal because she has the need and Mr. Wixom has the ability to pay. *In re Marriage of King*, 66 Wn. App. 134, 139, 831 P.2d 1094 (1992); RCW 26.09.140. As required by RAP 18.1(c), Ms. Wixom will timely submit an affidavit of financial need.

Furthermore, contrary to his contention for which there is no support whatsoever in the record, Mr. Wixom is not entitled to attorney fees because of intransigence. Rather, the record is replete with his court filings that show he is the party engaged in litigious behavior, excessive motions, and discovery abuses that have escalated Ms. Wixom's legal costs. *Bay v. Jensen*, 147 Wn. App. 641, 660, 196 P.3d 753 (2008); *In re Marriage of Bobbitt*, 135 Wn. App. 8, 30, 144 P.3d 306 (2006). Because of his intransigence, Ms. Wixom seeks attorney fees on that basis as well.

IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. Wixom respectfully urges this Court to dismiss the appeal as moot or to affirm the decision of the trial court along with an award of her attorney fees on appeal.

DATED this 23rd day of July, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 23, 2012, I served a true and correct copy of the Brief of Respondent by first class mail, postage prepaid, on Robert E Caruso, 1426 W. Francis Ave., Spokane, WA 99205, and Matthew F. Pfefer, 10417 E. 4th Ave. # 10, Spokane Valley, WA 99206-3638.

Kenneth H. Kato