

COA No. 34668-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of:

CAMILLA EKSTROM (now HEATH),

Respondent,

v.

TODD A. EKSTROM,

Appellant.

REPLY BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

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I. ARGUMENT

A. The court erred by modifying the parenting plan when it ordered a major modification without adequate cause.

Ms. Heath mistakenly characterizes the elimination of Wednesday overnights during the school year as a minor modification. The facts are most important and show that it was indeed a major modification. Accordingly, her argument fails.

Ms. Heath asked the court to modify the parenting plan to terminate all Wednesday overnights with Mr. Ekstrom. (CP 75). At the May 3, 2016 hearing, the court stated only a minor modification was involved so it was going to treat the hearing as one on adequate cause on minor modification issues and found “adequate cause as a minor modification only.” (CP 456-57). The court further noted the proceeding was not a major modification. (CP 457). Ms. Heath’s counsel said they would limit themselves to a minor modification. (*Id.*).

The court must find the statutory requirements are met before it can modify a parenting plan for, as here, a major modification. *In re Custody of Halls*, 126 Wn. App. 599, 607, 109 P.3d 15 (2005). Mr. Ekstrom’s Wednesday overnights clearly exceeded the 24 full days in a calendar year for a minor

modification based on a showing of a substantial change in circumstances. RCW 26.09.260(5). In her reply to his motion for reconsideration, Ms. Heath did not dispute there was a loss of 52 Wednesdays per year. (CP 465). This modification was major and exceeded the minor limit of 24 full days in a calendar year. *See In re Marriage of Hansen*, 81 Wn. App. 494, 499, 914 P.2d 799 (1996) (“full day” means changes in the residential schedule totaling 24 hours).

Contrary to Ms. Heath’s argument, whether Mr. Ekstrom had the children on some Wednesdays due to school breaks is immaterial because they only total 8. Taking away those 8 Wednesdays, he still lost 44 overnights, which would total 27.95 days even using Ms. Heath’s figure of 15.25 hours per Wednesday overnight. *See Hansen*, at 499. Thus, the court was faced with a major modification. *Id.* And a major modification requires a finding of adequate cause. RCW 26.09.260, .270.

Although the 2010 parenting plan contained a provision stating the parties agreed that in spring 2013, either party could revisit the issue of the summer schedule and Wednesday overnights without a showing of adequate cause, this provision was inapplicable by its very terms to Ms. Heath’s 2016 motion and the

court recognized that. (CP 457, 497). Nonetheless, the court only found “adequate cause” for a minor modification and there was no show cause hearing as mandated by RCW 26.09.270. Mr. Ekstrom was thus denied the right to be meaningfully heard at a show cause and address a major modification, which the court mistakenly treated as minor. *In re Welfare of Myricks*, 85 Wn.2d 252, 254, 533 P.2d 841 (1975).

The court’s decision on modification of a parenting plan is reviewed for an abuse of discretion. *In re Marriage of Drlik*, 121 Wn. App. 269, 274, 87 P.3d 1192 (2004). If the decision was based on a legal error, the court necessarily abused its discretion. *Spreen v. Spreen*, 107 Wn. App. 341, 349-50, 28 P.3d 769 (2001). Here, the court misapplied the law and treated this major modification as a minor one. This was an error of law. *Id.* In its order denying reconsideration, the court made the same mistake in calculating the 24 full days affected in a calendar year. (CP 472). The court abused its discretion and remand is necessary. *Spreen*, 107 Wn. App. at 349-50.

Ms. Heath also argues the modification was justified under RCW 26.09.260(5)(b) because Mr. Ekstrom had moved to Spokane. But the issue here is that he did not have the opportunity

to be heard on whether he had indeed relocated to Spokane. The trial court cited as a supporting factor for a change in circumstances that the parties contemplated Ms. Heath moving from Davenport to Creston, but did not contemplate Mr. Ekstrom's "relocating to Spokane." (CP 401-02). Since the court mistakenly found the Wednesday nights were only a minor and not a major modification, Mr. Ekstrom was, over objection, denied the right to be heard on the issue of his actual residence, which was Davenport – not Spokane. (CP 372-73, 421-22, 456-57).

When the hearing changed its character to address a major, rather than a minor, modification, he was not given a meaningful opportunity to present evidence to the court he was still living in Davenport even though his business was in Spokane. A show cause should have been held to determine the issue, but it was not. *Myricks, supra*. In its order denying reconsideration, the court again used the change of residence as another basis to find a minor modification. (CP 471). But the proceeding had by then evolved into a major modification and the court made a legal error requiring remand so evidence on the residence issue can be considered. *Spreen, supra*.

B. The court abused its discretion by making child support retroactive to January 2016.

The court applied child support retroactively based on Mr. Ekstrom's purchase of his business in 2014 and his failure to tell Ms. Heath about the specific nature of his employment, income, and benefits until 2016. (CP 405). This was an abuse of discretion as these reasons do not support such a retroactive application. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 28, 482 P.2d 775 (1971).

In December 2013, the court's order on temporary child support found Mr. Ekstrom to be unemployed and required him to provide notice of employment within 48 hours. (CP 74). Two days after he signed the final paperwork with Allstate Insurance, Mr. Ekstrom verbally told Ms. Heath that he was working again when he picked up the children for their regular Wednesday overnight. (CP 173). He complied with the order requiring him to advise her of his employment within 48 hours. There was no provision ordering him to provide in any specific way any more information than a notice he was employed again. (CP 74, 173).

Other than argument, the record reflects nothing to show Ms. Heath was required to subpoena the information on his insurance

agency purchase and his business records. (CP 417-18). Mr. Ekstrom provided all necessary financial information. (CP 418).

The court abused its discretion by applying the modified child support retroactively and awarding \$500 attorney fees to Ms. Heath for Mr. Ekstrom's purported failure to inform her of employment. Her filing of the motion to determine child support two years later was her choice and was not attributable to any failure to give notice of employment or intransigence by Mr. Ekstrom. (CP 365-66).

The court's decisions to apply modified child support retroactively and award attorney fees for a purported failure to give notice of employment are unsupported by the record. Decisions on child support and attorney fees are reviewed for an abuse of discretion. *In re Marriage of Bell*, 101 Wn. App. 366, 4 P.3d 849 (2000); *In re Marriage of Rideout*, 150 Wn.2d 337, 357, 77 P.3d 1174 (2003). The court based its decision on untenable grounds and reasons, thus abusing its discretion. *Id.* Furthermore, substantial evidence does not support its factual findings. *In re McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993). The court erred.

C. An award of attorney fees to Ms. Heath is unwarranted.

Claiming this appeal is frivolous, Ms. Heath asks for an award of fees. A case must be frivolous in its entirety before fees can be awarded under RCW 4.84.185. *Biggs v. Vail*, 119 Wn.2d 129, 830 P.2d 350 (1992); *Jeckle v. Crotty*, 120 Wn. App. 374, 388, 85 P.3d 931, *review denied*, 152 Wn.2d 1029 (2004). That is not this case. As reflected in his opening and reply brief, Mr. Ekstrom's appeal raises substantive and debatable issues rationally supported by arguments on the law and facts. *In re Marriage of Zier*, 136 Wn. App. 40, 48, 147 P.3d 624 (2006), *review denied*, 162 Wn.2d 1008 (2007). This court should deny an award of fees under RAP 18.9(a) as well.

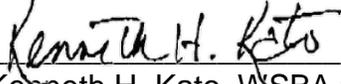
Furthermore, Ms. Heath should not be awarded her fees for defending against this appeal because she does not have the need. *In re Marriage of King*, 66 Wn. App. 134, 139, 831 P.2d 1094 (1992). As required by RAP 18.1(c), Mr. Ekstrom will timely submit a financial affidavit pursuant to the requirements of RAP 18.1(c).

III. CONCLUSION

Based on the foregoing facts and authorities, Mr. Ekstrom urges this court to reverse the modification of the parenting plan, the retroactive application of modified child support, the award of \$500 attorney fees to Ms. Heath, and to remand for further

proceedings. He also asks this court to deny an award of fees to Ms. Heath as she does not have the need and the appeal is not frivolous.

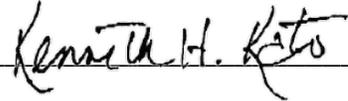
DATED this 4th day of October, 2017.



Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on October 4, 2017, I served the reply brief of appellant through the eFiling portal on Bevan Maxey at hollye@maxeylaw.com.



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