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MARCH 22, 2017  
Court of Appeals  
Division III  
State of Washington

COA No. 34668-4-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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In re the Marriage of:

CAMILLA EKSTROM (now HEATH),

Respondent,

v.

TODD A. EKSTROM,

Appellant.

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BRIEF OF APPELLANT

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## I. ASSIGNMENTS OF ERROR

1. The court erred by modifying the parenting plan when there was no adequate cause for a major modification as required by statute.

2. The court erred by modifying child support effective January 1, 2016, rather than June 9, 2016.

3. The court erred by awarding \$500 attorney fees to Camilla Heath on the basis that Todd Ekstrom's orally advising her he had obtained employment was insufficient notice to apprise her of his employment.

### *Issues Pertaining to Assignments of Error*

A. Did the court err by modifying the parenting plan when there was no adequate cause for a major modification under RCW 26.09.260 and .270? (Assignment of Error 1).

B. Did the court err by granting a major modification when Mr. Ekstrom did not have the opportunity to be heard on that issue because the court erroneously proceeded as if it were a minor modification? (Assignment of Error 1).

C. Did the court err by modifying the parenting plan when it determined only a minor modification was involved by terminating Mr. Ekstrom's Wednesday overnights? (Assignment of Error 2).

D. Did the court err by awarding \$500 attorney fees to Ms. Heath for his orally advising her of his employment when he complied with the December 10, 2013 order re temporary child support, which only required that “[f]ather shall provide notice of employment within 48 hours?” (Assignment of Error 3).

## II. STATEMENT OF THE CASE

In the dissolution of the marriage between Mr. Ekstrom and Ms. Heath, the court entered a parenting plan. (CP 492). On April 22, 2016, Ms. Heath filed a motion to determine child support and other relief. (CP 75). In addition to asking for a determination of child support based on her Washington State Child Support Worksheets and to do so retroactively, she asked “to terminate [Mr. Ekstrom’s] Wednesday overnight visit and change the ending time of weekend visits to Sundays at 7 p.m.” (CP 75). As for the Wednesday overnights, Ms. Heath’s declaration stated:

Again, the parenting plan states that either party can bring the issue of summer or Wednesday overnight visits to the Court, after mediation, without a showing of adequate cause. It was only when I moved from Davenport to Creston in 2011 that Wednesday night visits turned into overnights. (CP 82).

In response, Mr. Ekstrom declared:

I have not responded to Ms. Heath’s requests

regarding the parenting plan as she has not filed a Petition to Modify the Parenting Plan. There has been no hearing on adequate cause. The requests she is making regarding the Wednesday visits and the boy's healthcare provider were before the Court and decided in July of 2013. (CP 173).

The October 12, 2010 parenting plan stated as to adequate cause:

3. The parties agree that in the spring of 2013, either party can revisit the issue of summer schedules and the Wednesday overnight schedule. This may be revisited via mediation and/or placed on the motion docket without a showing of adequate cause. (CP 497)

At the initial hearing on May 3, 2016, the court held in abeyance a petition for adequate cause as to a major modification because only a minor modification was involved. (CP 457). Mr. Ekstrom pointed out that doing away with his Wednesday overnights would be a major modification as Ms. Heath was asking to take away 50 days. (*Id.*). His counsel also argued:

[I]f the court is going to entertain any of these issues, and I'm sure my client has his issues in terms of some minor adjustments, is that it be properly brought before the court with a petition filed giving my client an opportunity to respond. Like I said, there's plenty of time between now and when the kids get out of school to address these minor adjustments, and we're talking about something that's December for Christmas, that's a long way

away, that that's the way it needs to go, because it's not before the court. The court doesn't even have jurisdiction to address that. We're telling the court we don't agree to have it addressed today. They need to follow the proper process and procedure, the same thing that they would hold us to. And that's what we're asking the court to do. There's plenty of time to do that and that's what I would ask the court to do today. (CP 455-56).

The court responded it was going to treat the hearing as one on adequate cause on minor modification issues. (CP 456). It then found "adequate cause as a minor modification only." (CP 457).

The court further stated:

I'm not going to treat this as a major modification at this time. If you want to file later on that then I guess you can do so and we will stop right now or it's just a minor modification. . .

[Counsel], what do you want to do on that? Because I believe the order does restrict me about reviewing this up to 2013 summer. After 2000 [sic], I think we're back to the normal statutory requirements. (*Id.*).

Counsel responded that "we'll limit ourselves to a minor mod." (*Id.*).

With that said, the court set the petition for a final hearing to be held June 1, 2016. (CP 458-61).

At the final hearing, much of the discussion was on the financials of Mr. Ekstrom. (CP 504-44). When the subject of

Wednesday overnights came up, the court reiterated that it found adequate cause only as to a minor modification. (CP 547). Mr. Ekstrom pointed out if Wednesday overnights were to be considered, that would be a major modification and should not be part of the hearing:

[T]his shouldn't even be part of today's hearing because that is a major modification. Even if you take out summer schedule, which is just a wash because he gets his time in the summer, she gets her time, you're still looking at more than 45 days, nine months of the school year, okay, nine months, where he has six overnights that she's asking to take away. Okay? So it's four Wednesdays in a month and two Sundays in a month that are his, okay, so that's six overnights that she's attempting to take away from his time from this very actively involved parent who has no issues of getting the children to school on time. That shouldn't be even addressed today but that's what I'm going to say on that matter. And that's a major modification and that should be under a new petition and for another date. (CP 560-61).

The court took the issues under advisement. (CP 580).

On June 9, 2016, the court filed a memorandum opinion addressing child support and certain relief, including Ms. Heath's request to terminate Mr. Ekstrom's Wednesday overnights. (CP 400). It had found adequate cause existed for a minor modification to the parenting plan. (*Id.*). As to the parenting plan and Wednesday overnights, the court determined:

Parenting plan. As per RCW 26.09.260(5), the court may order adjustments to the residential aspects of a parenting plan upon a substantial change in circumstances of either parent; and the applicable provisions in this case to allow for such adjustments are: (a) it does not exceed 24 days in the calendar year and/or (b) based on a change to the father's residence. In this case, the father's primary residence is in Spokane and he lives there the majority of the time; his new insurance business is there; it is assumed that most of the existing insurance agency's clients are there; his wife lives there, works there, and her two children attend schools in Spokane; the father has enrolled the children in sporting activities in Spokane; and the Bald Ridge Road residence does not have TV or the internet. . .

Wednesday overnights. The travel from the mother's home north of Creston to the father's home in Spokane is reported to be approximately 59 miles. The court will take judicial notice that his business address is 3919 N. Division to the mother's home is approximately 67 miles. The initial Parenting Plan had contemplated that the mother may be relocating out of Davenport to her work in Creston and provided for Wednesday overnights if she did relocate; however, it did not contemplate the father's relocating to Spokane. The children are reported to be often tired both in school and afterwards when coming back to school on Monday and Thursday mornings from Spokane. When the children stay at the Bald Ridge Road residence, they would travel approximately 36 miles to the Creston schools. As the children become older, it is anticipated that they will be involved in more school related activities and will generally require more study time. It simply is not in the best interest of the children at this time to require that they spend every Wednesday overnights with their father during the school year. The Monday mornings return to Creston on alternating weekends should be manageable and will remain the

same at this time.

The loss of the father's every Wednesday overnights during the school year is estimated to consist of approximately 36 overnights. The additional time gained during the summer months is estimated to be approximately 9 to 10 days. Also in an effort to offset the father's lost time, as contemplated in the initial mediated Parenting Plan, he is to have the children every Spring Break with only the alternating weekend that is already his. (CP 401-02).

With respect to notifying Ms. Heath of his employment, the court found:

(1) [Mr. Ekstrom] was required to apprise [Ms. Heath] of his employment within 48 hours. Simply orally advising [her] during a brief conversation during an exchange of visits was insufficient. He should have provided more information for her to make an informed decision of whether to seek a final child support order. It is quite likely that she would have known generally about his new job from the two boys or other family or friends, but the intent of the temporary order should have been clear – to allow her an opportunity to review his new employment including his salary/wage, benefits, etc., to determine whether a new child support worksheet should be prepared. This was not done and [she] should be awarded \$500 in attorney's fees for being required to subpoena the information on his recent insurance agency purchase and his business records. (CP 403).

The court also decided the new child support obligation of \$954/month should be retroactive to January 1, 2016:

In conclusion, the Child Support Schedule Worksheet shows a child support obligation

of \$954/mo. Based on his purchased of this business in 2014 and his failing to apprise [her] of the specific nature of his employment or of his income and benefits until 2016, child support should be retroactive to January 1, 2016. (CP 405).

The memorandum opinion was the court's order.

Mr. Ekstrom filed a motion for reconsideration on June 30, 2016. (CP 411). Without further argument or proceedings, the court denied the motion. (CP 471). This appeal follows. (CP 473).

### III. ARGUMENT

A. The court erred by modifying the parenting plan when there was no adequate cause for a major modification.

RCW 26.09.260 provides in relevant part:

(1) Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child. . .

(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan . . .

(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 of 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;

(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 26.09.270 states:

A party seeking a temporary custody order or a temporary parenting plan or modification of a custody decree or parenting plan shall submit together with his or her motion, an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his or her affidavit, to other parties to the proceedings, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.

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.*). Indeed, 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).

The proposed modification terminating 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 the 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). Whether some Wednesdays fell where Mr. Ekstrom had the children 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.*

A major modification requires a finding of adequate cause. RCW 26.09.260, .270. 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. (CP 497). This provision, however, was inapplicable by its very terms to Ms. Heath's 2016 motion and the court recognized that. (CP 457). 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. Accordingly, Mr. Ekstrom was 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 adhered to its erroneous characterization of a minor modification in its order denying reconsideration. This is a violation of due process. (CP 472).

Moreover, 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 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 legal error was repeated on reconsideration as well and remand is necessary. *Cf. Tarabochia v. Johnson Line, Inc.*, 73 Wn.2d 751, 757, 440 P.2d 187 (1968) (no discretion involved when error predicated on question of law).

The court also cited a factor supporting a change in circumstances based on the fact that the parties contemplated Ms. Heath moving from Davenport to Creston, but did not contemplate Mr. Ekstrom's "relocating to Spokane." (CP 401-02). Because Wednesday overnights were not to be addressed except as a major modification, Mr. Ekstrom was denied the right to be heard as to his actual residence, which was in Davenport and not Spokane. (CP 372-73, 421-22, 456-57). When the hearing was changed to

address a major, rather than a minor, modification, he was denied the opportunity to present evidence to the court he was still living in Davenport even though his business was in Spokane. At the very least, a show cause should have been held to determine the issue. It was not and this was error. *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 involved a major modification and the court made a legal error requiring remand. *Spreen, supra*.

B. The court erred by modifying child support effective January 1, 2016, rather than June 9, 2016, and awarding \$500 attorney fees to Ms. Heath .

The court applied child support retroactively based on Mr. Ekstrom's purchase of his business in 2014 and his failing to tell Ms. Heath about the specific nature of his employment, income, and benefits until 2016. (CP 405). The court abused its discretion because these reasons do not support the retroactive application of the child support modification. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 27, 482 P.2d 775 (1971).

In a December 10, 2013 order re temporary child support, Mr. Ekstrom was found to be unemployed and was required to

provide notice of employment within 48 hours. (CP 74). He signed his final paperwork with Allstate Insurance on June 2, 2014, and verbally told Ms. Heath that he was working again on June 4, 2014 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. (*Id.*) There was no provision ordering him to provide any more information than a notice he was employed again. (CP 74). There was also nothing in the order requiring him to give notice in a specific way so he complied by orally advising Ms. Heath. (CP 74, 173). There was no evidence 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). Ms. Heath wanted to delve into the details of, among other things, his business expenses and write-offs, which was her choice. She was not “required” to subpoena information. (CP 173-74).

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. He complied with the language, intent, and spirit of

the order requiring notice of employment. As for his purchase of the insurance agency in 2014, the court noted in its memorandum opinion that more than two years had passed since the temporary order and “both parties’ incomes have changed, and the oldest child is now in the 12 and older column.” The passing of those years before she filed the motion to determine child support and other relief, however, was not attributable to any failure to give notice of employment. Rather, Ms. Heath chose to wait while dealing with child support and that was not through any fault or intransigence of Mr. Ekstrom. (CP 365-66).

The court’s decisions to apply modified child support retroactively and award attorney fees for 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, 370-71, 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.* In addition, substantial evidence does not support its factual findings. *In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993). They cannot stand.

In the order denying reconsideration, the court indicated the award of fees “requires no further response.” (CP 472). By doing so, the court clearly based the retroactive application on the alleged failure to give notice of employment as it did not address the retroactivity issue. (CP 471-72). Its order denying reconsideration on these issues was an abuse of discretion for the same reasons applicable to its original memorandum opinion. *Powers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). The court erred.

C. Mr. Ekstrom should be awarded attorney fees on appeal.

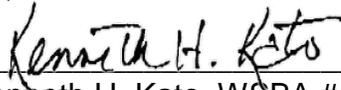
Mr. Ekstrom should be awarded his fees under RCW 26.09.140 for prosecuting this appeal because of the arguable merits of the issues on appeal and the financial needs of the parties. *In re Marriage of King*, 66 Wn. App. 134, 139, 831 P.2d 1094 (1992). As required by RAP 18.1(c), he will timely submit an affidavit of financial need.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Ekstrom urges this court to reverse the modification of the parenting plan, reverse the retroactive application of modified child support,

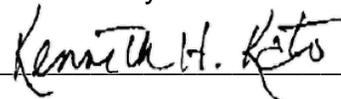
reverse the award of \$500 attorney fees to Ms. Heath, award him attorney fees on appeal, and to remand for further proceedings.

DATED this 21<sup>st</sup> day of March, 2017.

  
\_\_\_\_\_  
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#### CERTIFICATE OF SERVICE

I certify that on March 21, 2017, I served a copy of the brief of appellant by email, as agreed, on Bevan Maxey at hollye@maxeylaw.com.

  
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