

FILED

JUL 21 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

NO. 34668-4-III
COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

In re Marriage of
CAMILLA EKSTROM (now HEATH),
Respondent,
vs.
TODD A. EKSTROM,
Appellant.

BRIEF OF RESPONDENT CAMILLA EKSTROM
(now HEATH)

TABLE OF CONTENTS

A.	ISSUES PRESENTED ON APPEAL	1
B.	STATEMENT OF THE CASE	2
C.	STANDARD OF REVIEW	4
D.	ARGUMENT IN RESPONSE	5
E.	REQUEST FOR AWARD OF ATTORNEY FEES.....	12
F.	CONCLUSION.....	14

TABLE OF AUTHORITIES

Table of Cases

<u>State v. Chapman</u> , 140 Wn.2d 436, 998 P.2d 282, cert. denied, 531 U.S. 984 (2000)	14
<u>In re Marr. of Fiorito</u> , 112 Wn.App. 657, 50 P.3d 298 (2002)	5
<u>In re Marr. of Greenlee</u> , 65 Wn.2d 436, 829 P.2d 1120 (1992)	13
<u>In re Hansen</u> , 81 Wn.App. 494, 498, 914 P.2d 799 (1996).....	4, 9
<u>In re King</u> , 66 Wn.App. 134, 831 P.2d 1094 (1992).....	12
<u>Mattson v. Mattson</u> , 95 Wash. App. 592, 603-605, 976 P.2d 157, 163, (1999)	10, 11, 13
<u>Marr. of McDole</u> , 122 Wn.2d 604, 859 P.2d 1239 (1993)	4
<u>In re Parker</u> , 135 Wn.App. 465, 145 P.3d 383(2006)	4, 9
<u>Robertson v. Robertson</u> , 113 Wn.App. 711, 575 P.3d 1092 (2002).....	12
<u>In re Marr. of Zigler and Sidwell</u> , 154 Wn.App. 803, 226 P.3d 202 (2010).....	4, 9

Statutes

RCW 4.84.185 13
RCW 26.09.260(5)(a) 1,3,5,6,7,8,9
RCW 26.09.260(5)(b)..... 1,3,5,6,8

Court Rules

RAP 12.2 9, 12,14
RAP 18.9(a) 13

A. ISSUES PRESENTED ON APPEAL

The issues raised by the appellant, TODD A. EKSTROM, on this appellate review can be summarized as follows:

1. Whether the Superior Court of Lincoln County, State of Washington, manifestly abused its discretion when finding adequate cause for a minor modification of custody under RCW 26.09.260(5)(a) or (b) and thereby terminating the appellant's Wednesday overnights during the school year, as argued on pages 8 through 13 of appellant's opening brief? [CP 401-02].

2. Whether, in turn, the Superior Court of Lincoln County, State of Washington, manifestly abused its discretion when making child support retroactive to January 1, 2016, as argued on pages 13 through 15 of appellant's opening brief? [CP 403, 405].

3. Also, whether the Superior Court of Lincoln County, State of Washington, manifestly abused its discretion when awarding the respondent, CAMILLA EKSTROM (now HEATH), five hundred dollars [\$500.00] in attorney fees for having been forced to subpoena the information from appellant concerning his recent insurance agency purchase and business records as again argued on pages 13 through 15 of appellant's

opening brief? [CP 403]. [Issue no. 3].

4. Finally, whether the Superior Court of Lincoln County, State of Washington, manifestly abused its discretion when later denying appellant's CR 59(a) motion for reconsideration as he argues on page 16 of his opening brief? [CP 471-72]. [Issue no 4].

B. STATEMENT OF THE CASE

On August 17, 2013, CAMILLA EKSTROM filed a petition to modify child support [CP 1] which was timely and properly served upon the appellant TODD EKSTROM. Mr. EKSTROM appeared by Notice of Appearance by Attorney Gerri Newell on August 30, 2013 [CP 32].

On November 14, 2013, appellant TODD EKSTROM filed his response to the petition [CP 35] as well as a Motion to Adjust Child Support [CP 37] based upon the fact Mr. EKSTROM became unemployed as of October 27, 2013. The matter proceeded to hearing and an Order Re: Temporary Child Support [CP 72] which reduced Mr. EKSTROM's child support until his employment status changed. Mr. EKSTROM was court ordered to inform CAMILLA EKSTROM of any new employment within 48 hours.

On April 22, 2016, the respondent, CAMILLA EKSTROM (now HEATH), filed a motion to determine child support along with seeking other relief including termination of the appellant's Wednesday overnight custody of the couple's minor children during the school year. [CP 75, 464]. At the initial hearing on May 3, 2016, the Superior Court found as to the latter request that there was adequate cause for a minor modification of custody and set a hearing for June 1, 2016. [CP 456-61]. The Superior Court once again reiterated there was adequate cause for a minor modification under either RCW 26.09.260(5)(a) or (5)(b). [CP 547].

Thereafter, on June 9, 2016, the Superior Court filed a "memorandum opinion" which included, inter alia, (1) the reasons and legal basis for termination of appellant's Wednesday overnights during the school year [CP 401-02], (2) the reasons and explanation for making child support payments retroactive to January 1, 2016 in light of Mr. EKSTROM's noted foot-dragging and intransigence in failing to provide Ms. HEATH with the required notice of his new employment and the required financial information necessary for her to make an informed decision as to whether to seek a final child support order in this matter [CP 403, 405] and, finally, (3) the reasons

and justification for awarding Ms. HEATH five hundred dollars [\$500.00] in attorney fees for having been forced to subpoena the necessary information from appellant concerning his recent insurance agency purchase and business records. [CP 403].

On June 30, 2016 appellant filed a motion for reconsideration [CP 411] which was in turn denied by the Superior Court. [CP 471]. This appeal follows wherein the foregoing discretionary decisions of the Superior Court are once more challenged by Mr. EKSTROM. [CP 473].

Additional facts and circumstances are set forth below as they relate to a particular issue or argument thereon.

C. STANDARD OF REVIEW

On appeal, this court reviews a trial court's decision to modify a parenting plan for manifest abuse of discretion. In re Marr. of Zigler and Sidell, 154 Wn.App. 803, 808-09, 226 P.3d 202 (2010); In re Parker, 135 Wn.App. 465, 145 P.3d 383 (2006); In re Hansen, 81 Wn.App. 494, 498, 914 P.2d 799 (1996). A decision concerning modification will not be disturbed unless the court's reasons can be said to be untenable or unwarranted. Marr. of McDole, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993). In this regard, the trial court's decision can

only be characterized as being “manifestly unreasonable” (1) when it is outside the range of acceptable choices, given the facts and the applicable legal standard at issue; (2) when it is based on untenable grounds and the factual findings are unsupported by the record; and (3) when it is based upon untenable reasons and it is based on an incorrect standard or the facts do not satisfy the requirements of the correct standard. In re Marr. of Fiorito, 112 Wn.App. 657, 664, 50 P.3d 298 (2002).

Finally, decisions concerning the setting of child support and award of attorney fees are once more reviewed for manifest abuse of discretion, and will not be overturned otherwise. In re Marr. of Rideout, 150 Wn.2d 337, 357, 77 P.3d 1174 (2003); In re Marr. of Bell, 101 Wn.App. 366, 370-71, 4 P.3d 849 (2000).

D. ARGUMENT IN RESPONSE

1. Contrary to the frivolous claims of the appellant, the Superior Court of Lincoln County, State of Washington, did not manifestly abused its discretion when finding adequate cause for a minor modification of custody under RCW 26.09.260(5)(a) or (b) and thereby terminating the appellant’s Wednesday overnights during the period of the school year.
[Issue no. 1].

Contrary to the meritless claims of the appellant, TODD

A. EKSTROM, the Superior Court did in fact follow the law set forth in the considerations framed in RCW 26.09.260(5)(a) and (b) when deciding to terminate the appellant's Wednesday overnights during the school year for the well-being of the children on the basis of a minor modification. Simply put, Mr. EKSTROM is being totally disingenuous and wastes this court's time in arguing otherwise.

In this vein, the Superior Court was duly aware that section (5)(a) and (b) of the statute are disjunctive and under either subsection of the statute a minor modification will be justified. [CP 401-02]. In this case, the noncustodial parent, Mr. EKSTROM, had moved to Spokane which is approximately fifty-nine [59] miles from the mother's home. [CP 401]. Insofar as this was not contemplated at the time the initial parenting plan was entered, this change of residence alone justified the ending of Wednesday overnights during the children's school section. See, RCW 26.09.260(5)(b). There is

no 24-day limitation under this prong of the statute.

By the same measure, the subject minor modification was fully justified under the alternative subsection (5)(a). As the Superior Court explained, “[t]he children are often tired both in school and afterwards when coming back to school on Monday and Thursday mornings from Spokane.” [CP 402]. In addition the court noted that “[t]he loss of the father’s every Wednesday overnights during the school year [was] estimated to consist of approximately 36 overnights.” [Id.]. Also, “[t]he additional time gained during the summer months [was] estimated to be approximately 9 to 10 days.” [Id.]. Finally, “in an effort to offset the father’s lost time, . . . [was] given every Spring Break with only the alternating weekend that is already his.” [Id.]. Thus, this modification did not exceed “twenty-four full days in a calendar year.” See, RCW 26.09.260(5)(a).

Analyzed differently, and as emphasized in Ms. HEATH’s June 30, 2016 “reply to respondent’s motion for

reconsideration,” there was “a total of only 15.9 full days lost” meaning the court’s modification clearly fell within the parameters of RCW 26.09.260(5)(a), as well as under subsection (b) thereto. [CP 465-66].

To begin with, it could initially be estimated that Mr. EKSTROM lost 52 Wednesdays per year. [CP 465]. But that number does not take into account Wednesdays that are assigned differently to him due to school breaks including 7 during summer vacation, 2 during Christmas break, as well as 2 for spring break and the Thanksgiving holiday; leaving him with a loss totally “40 Wednesdays per year.” [CP 465]. Finally, however, this does not take into account the fact Mr. EKSTROM had the children on Wednesdays from 4:30 p.m. until 7:45 the following day for an amount of 15.25 hours per Wednesday visit, totaling 610 hours or 25.4 full days lost [to wit: 610 divided by 24 hours equals 25.4 days lost]. [CP 465].

To this, Mr. EKSTROM gained 2.5 days during spring

break and 7 full days visitation during the summer for a final total of only 15.9 days of actual time lost because of this minor form of modification as contemplated under RCW 26.09.260(5)(a). [CP 465-66]. Thus, it is clear that the Superior Court did not in any sense abuse its discretion in terms of this minor modification. In re Marr. of Zigler and Sidell, 154 Wn.App. 803, 808-09, 226 P.3d 202(2010); In re Parker, 135 Wn.App. 465, 145 P.3d 383 (2006); In re Hansen, 81 Wn.App. 494, 498, 914 P.2d 799 (1996). Accordingly, this decision of the Superior Court should be affirmed. RAP 12.2.

2. Contrary to the claim of the appellant, TODD A. EKSTROM, the Superior Court of Lincoln County, State of Washington, did not in any sense abuse its discretion when making child support retroactive to January 1, 2016 in light of his noted malfeasance in failing to properly notifying the respondent of his new employment and providing her with the necessary financial records, documentation and information Ms. . [Issue no. 2].

Contrary to the assertions of the appellant, TODD A. EKSTROM, the Superior Court was clearly justified, based

upon his misconduct and malfeasance, when making child support retroactive to January 1, 2016 in light of his noted malfeasance. In this regard, the court noted that Mr. EKSTROM was required to apprise Ms. HEATH of his finding new employment within forty-eight [48] hours. [CP 403]. The court had specifically covered this issue under the prior temporary order contemplating immediate and proper notice of new employment. Mr. Ekstrom would otherwise be rewarded and benefit from his failure to advise Mrs. Ekstrom of newly acquired employment. As the court duly noted, his simply advising her during a brief conversation at the time of a visitation exchange was patently insufficient and did not satisfy the court's tenor of the earlier admonishment to him in the temporary order. [Id.; CP 405]. Accordingly, it cannot be said that the Superior Court's decision in this regard amounted to a manifest abuse of discretion as baldly claimed by the appellant. Mattson v. Mattson, 95 Wash. App. 592, 603-605, 976 P.2d

157, 163, (1999).

3. By the same measure, it is clear under the circumstances presented that the Superior Court of Lincoln County, State of Washington, did not manifestly abuse its discretion when awarding the respondent, CAMILLA EKSTROM (now HEATH), five hundred dollars [\$500.00] in attorney fees for having been unduly forced to subpoena the information from appellant concerning his recent insurance agency purchase and business records. [Issue no. 3].

In turn, there can be no question whatsoever that the Superior Court did not in any sense manifestly abuse its discretion when awarding the respondent, CAMILLA EKSTROM (now HEATH), five hundred dollars [\$500.00] in attorney fees for having been unduly forced to subpoena the information from appellant concerning his recent insurance agency purchase and business records. [CP 403]. Such award was clearly warranted with Mr. EKSTROM having drug his feet in providing Ms. HEATH with his business and other financial information. [CP 403]. Mattson, 95 Wash.App. at 603-605, 976 P.2d at 163.

4. Lastly, and contrary to the baseless claim of appellant, TODD A. EKSTROM, on page 16 of his brief, the Superior Court did not abuse its discretion in denying his motion for reconsideration. [Issue no. 4].

For the reasons set forth above in the foregoing analysis, the decisions of the Superior Court did not in any sense entail an abuse of discretion and should, therefore, be affirmed on this appeal. RAP 12.2.

E. REQUEST FOR AWARD OF ATTORNEY FEES

The respondent, CAMILLA EKSTROM (now HEATH), requests that she be awarded her costs and expenses, including a reasonable attorney fee, in having been needlessly forced once again to defend against this frivolous appeal. Clearly, as demonstrated by Ms. HEATH's financial statement accompanying this responsive brief as required under RAP 18.1(c), she has the financial need for an award of such fees and Mr. EKSTROM is financially capable to provide such a financial award to her. Robertson v. Robertson, 113 Wn.App. 711, 575 P.3d 1092 (2002); In re Marr. of King, 66 Wn.App.

134, 139, 831 P.2d 1094 (1992).

By the same measure, an award of attorney fees should be granted in the situation where one party, i.e. Mr. EKSTROM, is being intransigent, unjustifiable tenacious or engaging in purely obstructionist tactics. See, In re Marr. of Greenlee, 65 Wn.App. 703, 704, 829 P.2d 1120 (1992); Mattson v. Mattson, 95 Wash. App. 592, 603-605, 976 P.2d 157, 163, (1999). Clearly, Mr. EKSTROM's unjustified and continuing misconduct in this regard has now presented itself squarely before this court.

Finally, the factually and legally baseless nature of this appeal warrants the imposition of terms and sanctions against the appellant as contemplated under both RCW 4.84.185 and RAP 18.9(a). An appeal is considered "frivolous" if there are no debatable issues upon which reasonable minds might "differ" and the claims are "so totally devoid of merit" that there is no reasonable possibility of reversal on appeal. State v.

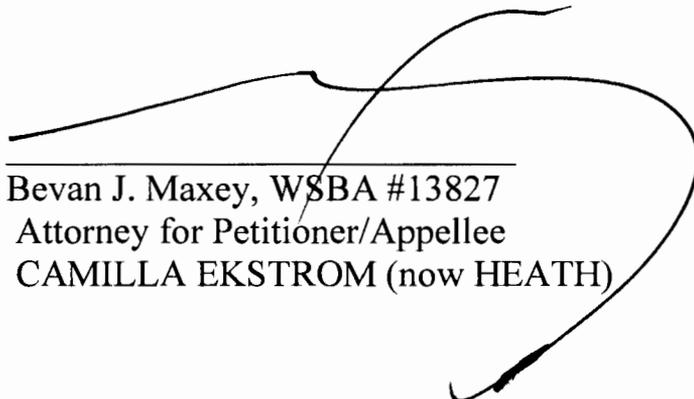
Chapman, 140 Wn.2d 436, 454, 998 P.2d 282, cert. denied, 531 U.S. 984 (2000).

F. CONCLUSION

Based upon the foregoing points and authorities, the respondent, CAMILLA EKSTROM (now HEATH), respectfully requests that the decision of the Superior Court be affirmed and, in turn, this appeal be dismissed with prejudice. RAP 12.2. Furthermore, that she should be awarded against the appellant her costs and legal expenses incurred in this appeal including a reasonable attorney fee.

DATED this 21st day of July 2017.

Respectfully submitted:



Bevan J. Maxey, WSBA #13827
Attorney for Petitioner/Appellee
CAMILLA EKSTROM (now HEATH)