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#352064

COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

JENNIFER WADLOW, Appellant,

v.

ROBERT WADLOW, Respondent

REPLY BRIEF OF APPELLANT

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A. REPLY TO ARGUMENT THAT THE TRIAL COURT SHOULD
BE AFFIRMED ON THE RCW 26.09.140 ISSUE ON ANY
THEORY SUPPORTED BY THE RECORD

Respondent did not address Appellant's argument that the Superior Court judge erred in believing Ms. Wadlow somehow conceded in her motion for revision that she had never brought up the RCW 26.09.140 issue to the Commissioner when it was abundantly clear that she had done so. And thus has conceded that point.

Under a heading that "The trial court did not commit reversible error," Respondent, apparently addressing the issue of the Appellant's request for attorney fees on the basis of need versus ability to pay, RCW 26.09.140, asserts that the judgment of the trial court can be sustained on "any theory." Without citation to RCW 26.09.140 or any cases decided thereunder.

1. It is inappropriate to "affirm on any theory" where the constitutional right to revision has been denied.

It is questionable whether the rule for affirming on any ground in the record could even apply where Ms. Wadlow has been denied her right to revision outright. She is supposed to have revision as a

matter of right, and then there could be appeal to this Court. Revision has in effect, simply been skipped. Affirming on any theory would give a green light to the Superior Court to not give meaningful thought to a motion for revision, and say good luck on appeal, the Court of Appeals can do the work for the elected Superior Court judge, when the task has never been done in the first instance. Ms. Wadlow should first be afforded her right to revision.

In *State v. Wicker*, 105 Wn. App. 428, 20 P.3d 1007 (2001), the State argued that Wicker was not denied effective assistance of counsel by counsel's failure to file a notice of revision, because Wicker still retained her right of appeal to the Court of Appeals. 105 Wn. App. at 432.

The State is incorrect. The right to seek revision of a commissioner's order is of constitutional magnitude and failure to file the notice of revision resulted in a denial of a right so important as to be prejudicial per se. In *State v. Smith* [117 Wn.2d 263, 276, 814 P.2d 652 (1991)], the Supreme Court recognized that "[t]he ability to seek revision of a juvenile court commissioner's order is rooted in the state constitution." The Supreme Court also recognized that the "right to move for revision of the commissioner's ruling allows a juvenile who appears before a commissioner to be treated more similarly to a juvenile who appears before a superior court judge."

The superior court judge's review of a commissioner's ruling on revision is **broader** than this Court's review. ... More importantly, the standard of review on revision is de novo and the superior court judge may remand the case to

the commissioner for further proceedings, including taking further evidence. The superior court judge need not find that error occurred before remanding for further proceedings. ... On appeal, this Court's review is far more deferential to the commissioner's ruling. Moreover, once the judge makes a decision on revision, it is the judge's decision, not the commissioner's. The right to revision, therefore, is different from the ability to appeal to this court.

Wicker, 105 Wn. App. at 432-33. (Footnotes omitted.) (Emphasis added.)

Here the Superior Court found Appellant failed to fulfill a prerequisite for revision, i.e., first raising the issue with the Commissioner. That was wholly without basis, the RCW 26.09.140 issue was raised in a written motion, devoted to that issue, noted for hearing and argued, and the Superior Court judge was provided with all the materials so demonstrating. The Superior Court's ruling was akin to finding that Appellant never properly moved for revision. As far as Appellant is concerned the right to revision, of constitutional magnitude, has never been afforded to her on this issue. Or even if it was mere "error" for the Superior Court to deny the revision on that basis, still, given his reason, he was not considering the merits of the motion, so it would not make sense for the Court of Appeals to proceed to determine whether it can "affirm on any theory" when the issue has never been actually decided on its merits on revision. Such

an approach would effectively destroy the right to revision. Revision involves the Superior Court judge either adopting the commissioner's findings of fact or making his own, he has done neither, another reason this Court cannot affirm. Failure of the revision court to enter findings of fact and conclusions of law requires reversal and remand. *In re Marriage of Scanlon and Witrak*, 109 Wn. App. 167, 174, 34 P.3d 877 (2001).

2. The record does not support denial of fees to Ms. Wadlow under RCW 26.09.140.

Respondent argues that the record shows "each party had the ability to pay their own attorney fees." Respondent does not cite the statute under which the request was made, nor any case law in this section of Respondent's brief.

Respondent's argument assumes all of Ms. Wadlow's financial resources are available to defend Mr. Wadlow's failed attempt at a major modification. Respondent chides Ms. Wadlow for her entry on a mandatory financial declaration that said she had \$1,500 in cash on hand, as of 12/6/16. That is a snapshot view that does not say if she had to use that the next day, the next week, or the next month for the needs of her children and herself. Respondent effectively

says that money should have been spent on attorney fees. If she did apply that \$1,500 to attorney fees it would put her at about \$2,500 spent on fees and costs, when Mr. Wadlow had revealed having provided \$4,000 to his attorney, as of months before the motion was heard, when he had no doubt incurred much more in fees, but which figure he did not wish to share.

Incredibly, Mr. Wadlow points to her \$1,500, while having \$3,500 himself in cash on hand. CP 71. One of the “expenses” of Mr. Wadlow and his current wife is to put \$1,000 per month into savings. CP 72. Ms. Wadlow has no corresponding ability.

Ms. Wadlow’s financial declaration also indicates she had paid \$900 to her attorney, inclusive of a \$260 filing fee, for a net of \$640 in attorney fees paid at the time of the motion. She owed her attorney \$2,216. CP 80. She had to take a loan for repairs to her home and for her legal fees. CP 79.

So she wasn’t exactly flush with liquid assets by having \$1,500 on hand 19 days before Christmas of 2016. Most people probably needed some savings just to pay their heating bills for the record-breaking, bitter winter of 2016-17. Kids like to have heat in their home.

Her net income was \$1,995.35, with no other adults in the home for income. CP 75-77. Her monthly household and debt expenses are \$3,243. CP 75, 79. In other words, Ms. Wadlow is “working poor.”

Mr. Wadlow’s net income was \$,3720, CP 55, CP 77, his wife has gross income of \$8,166 per month, CP 71, and they can afford to enjoy living in a home with a \$409K mortgage. CP 73.

Ms. Wadlow has a 12th grade education, perhaps being unable to go further while raising Mr. Wadlow’s children, while Mr. Wadlow earned a master’s degree. CP 69.

Respondent states Ms. Wadlow had “historically” received a “sizable federal tax refund” which meant that Respondent could bring litigation against her to his heart’s content without regard to the cost to Ms. Wadlow. In fact, there was no record of what Ms. Wadlow’s refund would be for the year 2016, as the parties were before the Superior Court on the fees issue in January of 2017. Her refunds for 2015 and 2014 were based on being able to claim two children, Noelle and Victoria, CP 100, CP 113, as exemptions and on the Earned Income Credit. And for 2015 for daughter Noelle having college expense. CP 99-125. Those tax provisions are for the benefit of children, not Respondent. It is unlikely that Ms. Wadlow would

have the same refund in 2016, as eldest daughter Noelle had turned 19. CP 21.

Interesting that Respondent focuses on Ms. Wadlow's tax return, he hid his own, and had not provided them as of the date of Ms. Wadlow's financial declaration, upon which he seizes, and from which he selectively gleans any information favorable to himself. CP 77, part 5. CP 37-38, CP 59-63, CP 139, CP 162.

So the record does not support finding that Ms. Wadlow had the ability to pay her own attorney fees for Mr. Wadlow's failed petition for a major modification, and in his dragging out what should have been a routine modification of child support. The Court should reject Respondent's self-serving pleas to ignore Ms. Wadlow's ability to get fees from her opponent RCW 26.09.140, when she has a need, and he has the ability.

B. REPLY TO ARGUMENT THAT THE COURT DID NOT ERR ON THE START DATE FOR THE NEW CHILD SUPPORT PAYMENT

Respondent argues that the Superior Court judge upon revision did conduct de novo review, because the decision sets for the test that the Superior Court is to conduct revision de novo. But the same boilerplate recitation of the standard appears word for word in both

rulings on revision in this case. CP 181-82, CP 194-95. And, the remainder of the Superior Court's decision reveals it did not conduct revision on a de novo basis. Respondent says Appellant relies upon Judge Ekstrom's comment that the decision of the commissioner was "not in conflict" with the applicable statute, but that is true only in part. Appellant also has pointed to Judge Ekstrom's reference to the commissioner's decision as "discretionary." CP 195. The judge may have set forth a boilerplate test, he then clearly said Ms. Wadlow needed to meet a burden of showing the commissioner's ruling conflicted with a statute to prevail on revision. And then found it fit to point out the commissioner had discretion. Presumably the judge did not say what he did not mean to say. Deferring to the commissioner on the basis that she had discretion is not de novo. It is unlikely that the Judge's comments both suggesting that Appellant had to overcome a burden of showing that somehow the commissioner's decision was "not in conflict" with a statute and that he was deferring to the discretion of the Commissioner on revision were merely a poor choice of words. The Judge, in reality, effectively denied Ms. Wadlow her right to revision, which is worse than merely providing her with an argument that the Superior Court erred in its analysis of the substantive issues.

Respondent argues that the decision could be affirmed on another basis. For the same reasons as set forth in part A. 1, above, that doctrine should not be applied where there has been a complete failure of the process of revision. There has yet to be a decision made by the Superior Court on the proper standard of review. There has been no proper revision process. That should take place before Respondent should be heard to avail itself of the “affirm on any theory” argument.

The Court of Appeals should not affirm the non-decision of the Superior Court even were that possibility properly before the Court of Appeals. There was an abuse of discretion. There simply was no reason to have the new payment amount commence at any time other than September 1st, 2016, the date of filing of the petition. To simply give away two months of increase because Mr. Wadlow delayed providing his tax returns is not based on any rational reason.

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously.

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971),

C. REPLY ON COURT COMMISSIONER'S SIGNING
ERRONEOUS ORDER ON MODIFICATION

Respondent argues a trial court can change its oral decision any time before its final written decision. The Court Commissioner did not say she was changing her decision, she claimed she was following her original decision, RP 48, which was clearly to deny any modification, minor or major. RP 17-19, Brief of Appellant, pp. 6-7. But then did the opposite, either by being tricked by misrepresentations as to the Court's prior ruling, or to "tailor" the order to respond to Ms. Ellerd's pleas that revision on a fee issue was pending. RP 42, lines 16-19.

Respondent argues that an oral ruling can be changed any time before reduced to a written decision. The oral ruling was put into writing, via a parenting plan entered in January 31st, 2017, CP 213, carrying out the ruling that there would be a "clarification." The order entered in March was just supposed to be so the clerk had a final order.

Respondent's counsel, in a hearing well after the adequate cause hearing and before the presentment of the final order, repeated her understanding that the Commissioner had denied any modification,

and had allowed only a clarification. RP 29, lines 21-22. For the purpose of explaining the orders that were being presented, in January to carry out the court's oral ruling allowing only clarification.

Under Respondent's argument that this is merely a change of decision from oral ruling to final decision by the Commissioner, then there would never be any protection from tailoring of rulings to avoid issues pending on review. Here, Respondent's counsel found it expedient to inform the Commissioner that Ms. Wadlow had a revision pending on the issue of fees, although inaccurately representing that it was over a bad faith issue versus the RCW 26.09.140 issue. And low, and behold, we have a final order that favors Mr. Wadlow as to the strength of his petition. And Mr. Wadlow's attorney then hurriedly provided a copy of the order to the Superior Court presiding judge in the hopes of influencing the revision on the fees issues, falsely stating there was a motion for "reconsideration" pending, because of course, new information cannot be presented on revision, only on "reconsideration."

The practice of Mr. Wadlow's attorneys not being accurate with the facts and procedure is unfortunately being carried out currently, before this Court. Respondent, at p. 5 of his brief, ***without citation***

to the record, in reference to the November 2016 hearing on adequate cause, states:

While the court did not find adequate cause to modify the summer or school schedules, it did find adequate cause to modify the holiday and vacation procedures.

That is *not* what the record says. RP 17-19. That is not what Mr. Wadlow's attorney told the Superior Court, when she did not have a motive to misrepresent the Commissioner's ruling, instead on January 31st, 2017, the same date as entry of the parenting plan and the child support order, she told the Superior Court:

You said, 'There's no adequate cause or (sic) a minor or a major modification,'"

RP 29, lines 21-22.

... we went and had to have these things *clarified*, this was both of them who entered into a pro se parenting plan that needed to be fixed period.

RP 30, lines 2-5. (Emphasis added.)

What changed between the day the parenting plan was entered, and the presentment of the final order? Ms. Ellerd received the motion for revision on the RCW 26.09.140 fees issue, on February 10th, 2017. CP 130-33. The truth remained the same between

November 29th, 2016 and January 31st, 2017. But then the truth magically changed after Ms. Ellerd had a motive to urge the trial court to believe it had orally ruled differently than it had.

So Respondent's statement on adequate cause to this Court is not factually true and clearly that is a legal distinction between modification and clarification. These tactics are getting old. At some point Ms. Wadlow is entitled to play on a level field, and that does not include Mr. Wadlow's counsel admitting on the record in January of 2017 that the court would not allow modification, telling the court in March of 2017 something different, and now appellate counsel, with benefit of a transcript, telling this Court that at the November hearing, that the Superior Court "did find adequate cause to modify the holiday and vacations provisions." Little wonder that no citation to the record is provided for this assertion as there is none, and the record shows it is not accurate at all.

Respondent is estopped from making inconsistent statements of fact. "Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position."

Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 160 P.3d 13 (2007).

After asserting that the Superior Court did find adequate cause to modify, then Respondent states “Jennifer’s assertion that the trial court did not order a modification is technically correct, but legally irrelevant; a trial court never has authority to order a modification at an adequate cause hearing.” P. 6, Brief of Respondent. But the converse is true, it has power to stop a modification by holding there is no adequate cause, which is exactly what happened, and should have been the final result, but for false representations by Mr. Wadlow’s trial counsel.

Respondent, at p. 7 of his brief, states that “Jennifer has no legal basis to rely on the trial court’s prior oral ruling for whatever purpose.” That is interesting, because the Commissioner at the same time adequate cause was denied for any modification, ordered the parties to attend a **third mediation**. RP 9, lines 13-23, RP 19, lines 19-23. The parties would not have gone to mediation regarding a “modification” but only on “clarification.” So there was reliance. At the adequate cause hearing, the Commissioner asked if the parties has been to mediation. It was reported the parties had been twice, once pro se, and once with attorneys. The parties would have attended

the first two mediations to discuss Mr. Wadlow's desire for what his own attorney described as major modification. That failed just as his petition for modification failed, because no basis for modification existed. The commissioner, no doubt realizing the prior mediations were based on an assumption by Mr. Wadlow that he might be granted modification, then wanted mediation based on the actual issues remaining, clarification of the beginning and end of holiday times with the children. So as a practical matter, the oral decision was being relied upon.

Respondent argues that well the parties later agreed to a **modification**. That is not so, clarification was allowed, so the parties were either going to trial on that issue, or reaching an agreed parenting plan with the clarifications. Even the clarification in general was not agreed to, it was ordered by the court, the terms were then agreed to by the parties, that is not agreeing to a modification. This argument is no more accurate than the self-serving, highly inaccurate and irresponsible statements made by Mr. Wadlow's attorney at the presentment in March. If there was an agreement to modification, why, at the presentment of the final parenting plan, did Respondent's trial counsel remind the Commissioner that she had refused a modification?

The parties did not agree to a modification, the Commissioner *ordered* a clarification, and *ordered* the parties to mediation, and they agreed to clarifications, which Mr. Wadlow potentially could have had by asking short of litigation, but he had never before limited his requests to that, he was asking for a major modification until the ruling that he could have a clarification of beginning and ending times on holidays.

The final order, which should not have been signed, does not say it was by merely by agreement, it says it was based on the "Court's decision," the parents agreement, and "the court hearing on January 31st, 2017." CP 172. January 31st, 2017 was the hearing where Mr. Wadlow's counsel accurately stated that the Court had denied adequate cause for a modification! And the parenting plan was entered January 31st, 2017! RP 29, lines 21-22. CP 214.

The order does not bear the signature of Ms. Wadlow or her counsel, so it was not an agreed order. CP 175.

According to Respondent, there had to be an order finding adequate cause to modify. Not so, because only clarification had been ordered. Ms. Wadlow presented a proper proposed order that

accurately reflected the ruling denying adequate cause to modify and the remainder of the proceedings. CP 176-80.

To the extent that the Commissioner decided to re-determine adequate cause after the fact, under these circumstances, adequate cause is reviewed on an abuse of discretion basis, and if his was not an abuse, it is difficult to know what is. *In re Parentage of Jannot*, 149 Wn.2d 123, 126, 65 P.3d 664, (2003).

D. REPLY ON CR 11 SANCTION ISSUE

Respondent, citing no authority other than quoting CR 11, complains there was no formal motion for CR 11 sanctions. Appellant disagrees, or at least there was sufficient informal notice.

Mr. Wadlow claims there was no request for CR 11 sanctions in “her petition.” Brief of Respondent, p. 8. Ms. Wadlow was not the petitioner for modification of the parenting plan. The response to Mr. Wadlow’s petition notified Mr. Wadlow that not only was Ms. Wadlow seeking fees based on her need and his ability to pay, but also on the basis that his filing was “not a proper petition,” and that there “were no statutory grounds factually alleged, by his own admission.” CP 166.

Ms. Wadlow's memorandum opposing adequate cause clearly requests fees under CR 11. CP 200, lines 1-3, CP 201, lines 17-24, CP 202. Her counsel orally argued for the fees at the adequate cause hearing. RP 10, line 23 to RP 11, line 15.

Ms. Wadlow's declaration for the adequate cause hearing stated she had net income of less than \$2,000 per month and could not afford to defend "a petition without legal basis." CP 35, para. 20.

Respondent did not cite any authority besides CR 11 on the issue of the requirement of a separate formal motion, besides making it part of the formal response to Mr. Wadlow's petition and motion for adequate cause, because the authority is against him.

In Re Marriage of Rich, 80 Wn. App. 252, 907 P.2d 1234 (1996) supports that no formal notice is needed. *Biggs v. Vail*, 124 Wn.2d 193, 198 n.2, 876 P2d 448 (1994) states only that "at least some sort of informal notice" is needed to let the other party know they are at risk of CR 11 fees. Citing RCW 4.84.185, not even CR 11, was sufficient to put a party on notice, 124 Wn.2d at 199, so the fact that response to the petition here said fees were requested on lack of legal basis for the petition meets the requirement.

In *City of Kennewick v. Vandergriff*, 109 Wn.2d 99, 743 P.2d 811 (1987), the Court held “the sufficiency of a motion is determined not by its technical format or language but by its contents” 109 Wn.2d at 102. In that case, a letter to a court objecting to a trial date on speedy trial grounds was sufficient to constitute a motion to dismiss the charge.

CR 7(b)(1) states a motion must be in writing unless made “during a hearing or trial.” So if the requests in the response to the petition, in the memorandum opposing adequate cause, in Ms. Wadlow’s declaration, were somehow not a “motion” for relief, then the oral request by Ms. Wadlow’s counsel during the adequate cause hearing constitutes a “motion” for the purposes of satisfying the requirement of CR 11 for a motion.

Mr. Wadlow’s trial counsel did not claim there had been no “motion.” In fact, at the January 31st, 2017 hearing on the fees motion brought pursuant to RCW 26.09.140, Ms. Ellerd claimed the court had previously denied fees to Ms. Wadlow. “At that adequate cause hearing Mr. Edelblute asked for attorney’s fees then and you did not award them.” RP 30, lines 19-21. Once again, Mr. Wadlow wants to make inconsistent factual statements. His position is there was no

motion, *and* the court previously denied the non-existent motion. He has no dog, *and* his dog does not bite people. He is estopped from doing so.

E. THE APPEAL IS NOT FRIVOLOUS

Respondent asks for fees on the basis that the appeal is frivolous. On two issues, he asks that the Court affirm on any theory other than the trial court's reasoning. This would require that an Appellant who can argue error by the trial court in good faith must then also search the record to rule out any alternate theory before proceeding, or be in bad faith. Respondent does not even challenge that the Superior Court judge erred in ruling that Appellant had not preserved the RCW 26.09.140 issue for revision. He has not demonstrated how the appeal is frivolous.

Respectfully submitted,

Dated February 26th, 2018



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