

FILED

SEP 29 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 352064

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

JENNIFER WADLOW,

Appellant,

and

ROBERT WADLOW

Respondent.

BRIEF OF APPELLANT

William Edelblute

Attorney for Appellant WSBA 13808

1030 N Center Parkway

Kennewick WA 99336

Ph. 509-737-0073

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A. ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred in denying a motion for revision of a ruling on fees made under RCW 26.09.140, without considering the merits.
2. The trial court erred in denying a motion for a revision of a ruling on the effective date of new child support amount
3. The trial court erred in entering a final order on a petition for modification of a parenting plan that found a minor modification was entered instead of a clarification, to tailor the order to avoid a CR 11 fee issue, and without findings to support a modification.
4. The trial court erred in making no ruling on a request for CR 11 fees

Issues pertaining to Assignments of Error

1. Appellant moved for revision of an order by a Commissioner which denied a request fees made under RCW 26.09.140. The Superior Court Judge denied the revision on the basis that Appellant conceded not having brought the issue up with the Commissioner. In fact Appellant made no such concession and had

clearly brought the issue up with the Commissioner. Did the Superior Court err in denying Appellant her constitutional and statutory rights to move for revision? (Assignment of Error No. 1)

2. Was there substantial evidence for the Superior Court to “find” that Appellant conceded having not brought up the RCW 26.09.140 fees issue with the Commissioner? (Assignment of Error No. 1)

3. Did the Superior Court err in deciding a revision on the basis that the Commissioner’s decision did not conflict with RCW 26.09.170(1)(a), instead of exercising his own discretion? Or, did the Superior Court err in failing to apply *de novo* review on revision? (Assignment of Error No. 2)

4. Did the trial court, after orally ruling there were no bases for major or minor modification of a parenting plan, err in entering a final order that authorized a minor modification, after Respondent’s attorney falsely claimed a CR 11 fee issue was pending, and with no findings in support of modification? (Assignment of Error No. 3)

5. Did the trial court err if failing to rule on Appellant’s request for CR 11 fees made at the time of an adequate cause hearing? (Assignment of Error No. 4)

B. STATEMENT OF THE CASE

The parties were the subject of a dissolution entered in Lincoln County, Washington, which included a final parenting plan, CP 8-18, and order of child support.

The parties resided in Benton County, Washington. In the summer of 2016, Mr. Wadlow left on Ms. Wadlow's door a motion to modify child support and a proposed new parenting plan. CP 35. The caption was for the original case in Lincoln County.

Ms. Wadlow retained an attorney, who began to check for anything new filed in the Lincoln County case, and sent a letter to Mr. Wadlow requesting his tax returns and year to date paystub. CP 161.

Ms. Wadlow, on September 1st, 2016 filed in Benton County a petition for modification of child support, paying a fee of \$260 to seek modification of an out of county support order. CP 89-94. Her tax return and paystub were filed September 9th, 2016. CP 97-129.

Mr. Wadlow subsequently filed a petition to modify the parenting plan, filed under the new cause number opened by Ms. Wadlow in Benton County. He sought substantially more time with the youngest child of the parties. The petition said that he asked for a major change of more than 24 days. CP 5.

The parties had been to mediation twice, once without attorneys, and once with the attorneys post-filing. RP 9, lines 15-23.

Mr. Wadlow's declaration made a number of statements that did not correspond with the existing parenting plan. He stated that time in the summers was at Ms. Wadlow's discretion, when in fact it said that time was solely at this discretion. CP 11, CP 22, lines 16-17.

Ms. Wadlow, in her responsive declaration, pointed out that he offered no specifics about any problems caused by the current plan, and that the plan said the opposite of what Mr. Wadlow claimed in certain respects. CP 25, 30, 32.

The current plan did have not a beginning and ending time for holidays. CP 11-12.

An adequate cause hearing was held November 20th, 2016. Mr. Wadlow's attorney stated he sought a major modification, but if not

granted, he sought a minor modification, because of “the deficiencies in this other parenting plan” RP 3. She argued that the parties’ daughter was now 14 and he would like to spend more time with her, and that was something that had “substantially changed.” RP 5. And that the parties had once agreed to additional time for the father with his daughter, beyond what was in the parenting plan, but that the mother no longer allowed this so that was also a substantial change. RP 6. And that holidays and vacations needed to be “defined” as Mr. Wadlow had re-married and one of his step-children had a significant relationship with the child of these parties. RP 7. And that because more than 24 additional days were requested, the petition was for a major modification, but in the alternative for a minor modification. RP 7-8.

Ms. Wadlow’s attorney argued, that Mr. Wadlow in argument claimed he was denied requested vacations, but his declaration did not identify a single such instance. He claimed he needed the Court to grant him vacations, when in fact the existing parenting plan provided for him to have scheduled vacations upon request. RP 10. And that regardless, Mr. Wadlow had not even alleged facts to support a change in circumstances. RP 10. And that he had not requested a clarification in his petition. RP 14, lines 15-17.

Following argument, the Superior Court Commissioner stated that she was not finding any ground to modify the time Mr. Wadlow had with the child. The Commissioner did provide that the beginning and ending times of the holidays could be clarified.

“The Court finds there is no basis for a major modification here.”

RP 17, lines 8-10.

The Court, however, is concerned with respect to the issue of a minor modification, **and it's not even really the finding of a minor modification; it's basically a clarification** and narrowing down of timeframes for these holidays because the, the Court sees an ongoing problem if these holidays are not going to be defined.

RP 17, lines 15-21. (Emphasis added.)

And the Court would also say **as part of a clarification** of this parenting plan that the schedule for the holidays needs to be defined appropriately and that I guess I'll be clearer even more, that the schedule for the winter vacation can also be addressed for how to make that work for a 14-year-old girl. But with respect to the summer schedule, with respect to the school schedule, the Court does not find that there is a basis to modify those, those provisions at this time, **that there's not a basis for a minor modification.**

RP 18, lines 2-13. (Emphasis added.)

The primary problem is the parties aren't communicating and this parenting plan isn't going to help with that, so we need to **clarify** the winter vacation and the holidays, ...

RP 18, lines 14-17. (Emphasis added.)

But the Court is going to order that paragraph 3.7 and 3.3 need to get **clarified**. The Court's denying major modification and the Court's going to **deny a minor modification at this time**.

RP 19, lines 6-9. (Emphasis added.)

The Court also held that paragraph 3.8, on special occasions, also needed the beginning and end times defined. RP 19, lines 19-21.

At a hearing later on other issues, Ms. Ellerd, attorney for Mr. Wadlow, referring to the Commissioner's earlier ruling on adequate cause, stated: "You said, 'There's no adequate cause or (sic) a minor or a major modification,'" RP 29, lines 21-22.

The Court ordered the parties to go to mediation for a third time, before the Court would rule on the clarifications. RP 19, lines 21-23.

Ms. Wadlow, in her response to the petition, in her memorandum opposing adequate cause, Supp. CP ____, and in oral argument on adequate cause, requested fees under CR 11, for the petition being unsupported in fact and law. CP 166. RP 10, line 23 to RP 11, line 15. The Court Commissioner made no ruling on the request.

The parties entered into a new parenting plan following mediation. RP 30, lines 10-14.

With the petition for modification of child support pending, Ms. Wadlow's attorney noted a motion to compel production of Mr. Wadlow's tax returns as required by local rule. CP 37-38, 59-63. Ms. Wadlow's attorney had sent a letter to Mr. Wadlow's attorney asking that he supply the returns, to no avail. CP 162. Mr. Wadlow had supplied only a single paystub. CP 162. The tax returns were provided the day before the hearing on the motion. CP 139.

The petition for modification for child support was argued at hearing on January 31st, 2017. Also noted for hearing on the same date was a motion by Ms. Wadlow requesting award of fees from Mr. Wadlow, based on his ability to pay and her need, and intransigence. RP 21, lines 4-11. CP 137-39.

At the hearing Ms. Wadlow's attorney specified, as he had in his written motion, that the request for attorney fees was pursuant to RCW 26.09.140, "based on consideration of the financial resources of each party. In other words, based on my client's need and based on Mr. Wadlow's ability to pay." RP 22, lines 4-9.

Mr. Wadlow's financial declaration, which had finally been supplied about the third week in January of 2017, at the urging of Appellant's counsel, CP 140, revealed that he and his wife were able to afford a \$400,000 mortgage. RP 22, lines 9-12.

Ms. Wadlow had net income of under \$2,000 per month, CP 153, and Mr. Wadlow had net income of about \$3,700 per month. RP 22, line 15-19. CP 147. His wife's income was \$8,166 gross per month. CP 149. Mr. Wadlow claimed monthly expenses of \$10,628.74. CP 147. His mortgage was \$409,048.22. CP 151.

Ms. Wadlow had been able to pay only \$1,000 towards her fees and costs, which included a \$260 filing fee. RP 22, lines 19-23. CP 143, 158. Her fees and costs totaled about \$4,701 up to the hearing, and she had to pay mediator's fees of several hundred dollars as well. CP 158. RP 25, lines 3-7. She had \$640 in trust to apply to the balance. CP 142-46. Mr. Wadlow had paid Ms. Ellerd \$4,200, some of which was still in trust as of his last billing in November, some two months prior to the hearing, with the total through "finalization" "yet to be determined." CP 151. RP 24, lines 20-23.

Ms. Wadlow's counsel contended that Mr. Wadlow's intransigence in supplying his tax returns only four months after they were requested, and only after a motion to compel was filed, should be considered. RP 23, lines 1-12. A letter had been sent to Mr. Wadlow in August of 2016, requesting the returns, then Mr. Wadlow's attorney, CP 86, Ms. Ellerd, ignored a letter to her in early December of 2016, CP 87, finally furnishing them only the day before a motion to compel docketed for December 20th, 2016. CP 139. That entered into the attorney time charged to Ms. Wadlow. RP 23, lines 1-11. CP

Ms. Wadlow argued the foot dragging on supplying the tax returns had been done in part to then support Mr. Wadlow's argument that the child support increase should not start with the date of filing of the petition, supposedly because the parties had been in the process of exchanging financial information. RP 23, lines 13-21. Mr. Wadlow had only supplied a single paystub, on November 9th, 2016, before supplying the tax returns in late December and his financial declaration in late January of 2017. RP 23, lines 21-23.

Ms. Wadlow's counsel argued for "leveling of the playing field" for someone who was barely able to get by financially. RP 24, lines 9-10. And that without RCW 26.09.140, Ms. Wadlow could not afford to litigate the case, and that Mr. Wadlow should have to pay something fair towards her fees. RP 25, lines 7-10.

In response, Ms. Ellerd, Mr. Wadlow's attorney, represented to the Court that "you dealt with the issue of attorney's fees" at the adequate causing hearing. "So now we're back before you again asking for attorney fees a second time on the same thing." RP 30, lines 19-23.

The record is void of any request under RCW 26.09.140 for fees at the time of the adequate cause hearing in November. Mr. Wadlow had furnished no financial information of any kind to the Court at that time. Counsel for Ms. Wadlow pointed that out to the Court. RP 34, lines 2-7.

Ms. Ellerd represented that Ms. Wadlow did not disclose on her financial declaration that the son of the parties, Caleb, was 18, had a job, and contributing to the household income. RP 31, lines 19-22. The record discloses that Caleb was not in fact 18 at the time of the hearing. CP 21, 25, 50, 58.

The Court Commissioner felt Mr. Wadlow's ability to afford a home with a \$400,000 mortgage worked in his favor, "Well, that's just it, it's a \$400,000.00 mortgaged housed -- (sic)." ... "It's a \$400,000 mortgage, so" RP 34, lines 15-19.

The Court ruled, as to the fees issue:

With respect to the request for attorney's fees, the Court is not going to order attorney's fees in this case. The Court believes that each party has the resources available to pay their own attorney fees.

RP 35, lines 20-23.

An order denying fees was entered. CP 135-36.

At the January 31st, 2017 hearing, Ms. Wadlow argued that the new child support amount should commence September 1st, 2017, the date of filing of her petition. And that Mr. Wadlow should not profit, in terms of a later start date, from his own failure to promptly supply financial information needed to determine the new amount of child support. RP 25, lines 11-23. Ms. Wadlow had filed her tax returns and paystubs with the Court in September, within a few weeks of filing her petition to modify the support. RP 33, lines 20-23.

Mr. Wadlow argued it should commence later because the parties had been in the process of exchanging income information. "It should be after these incomes were exchanged." RP 31, lines 15-17. Mr. Wadlow's attorney did not explain why it took three months for her to supply tax returns, or four months for her client from the August letter to him, and provide them only the day before a December 20th, 2016 motion to compel the same.

The Court Commissioner held the newly computed amount of child support would commence November 1st, 2016. RP 35, lines 14-15. CP 45. The increase was to \$1010.69 per month, until Caleb turned 18, then it would be \$653.77. CP 45.

A hearing was held in March of 2017 to enter a findings, conclusions and a final order on the petition for modification. Ms. Wadlow presented an order that fit the oral ruling in November of 2016 that no modification, major or minor, was being granted, only a clarification. CP 176-80.

Mr. Wadlow's attorney presented an order which said a minor modification had been granted, which was signed by the Commissioner. CP 172-75. In argument in support of her proposed order, Ms. Ellerd, Mr. Wadlow's attorney, represented to the Court

that Ms. Wadlow had a motion for revision pending, *on the issue of the petition being brought in bad faith*. RP 42, lines 5-22. She also mis-represented that the Court had “asked us to make *modifications* to it” RP 42, lines 22-23. (Emphasis added.) Ms. Wadlow’s attorney stated that was not accurate, that the pending revision was from the ruling on fees requested based on need and ability to pay. RP 44, lines 7-19. There was never a motion for revision based on a CR 11 fees issue.

The Court Commissioner signed the order presented by Mr. Wadlow’s attorney, for a minor modification. CP 172-75. Ms. Ellerd, Mr. Wadlow’s attorney, then promptly sent a copy of the order to the presiding Superior Court Judge, representing in her letter that there was a pending “motion for reconsideration” on fees and that she was thus providing a copy of the order finding a minor modification was granted. CP 183-85. There was no “motion for reconsideration.”

Ms. Wadlow timely had filed for revision of the Court Commissioner’ ruling on the motion for fees under RCW 26.09.140, based on need versus ability to pay. CP 130-67. The Superior Court Judge denied the motion, stating in his ruling that Ms.

Wadlow conceded she had never brought the issue before the Court Commissioner. CP 181-82. The record contains no such concession, nor was there such a concession. The motion for revision cites RCW 26.09.140 and states: "That statute is one basis specified in the motion for attorney fees denied January 31st, 2017." CP 130-31.

The motion for fees heard January 31st, 2017 clearly stated it was based on RCW 26.09.140, need versus ability to pay, and intransigence. CP 137-39.

The motion for revision merely pointed out that for fees based on need versus ability to pay had not been made at the adequate cause hearing in November of 2016, to distinguish it. CP 131, lines 8-13. The line right above that makes it clear that RCW 26.09.140 was a basis for the motion denied January 31st, 2017. CP 131, line 7-8.

As part of the revision process, Ms. Wadlow followed the local Court rule, LCR 53.2(1) which required that the materials presented to the Court Commissioner be attached to the motion, and a copy provided to the Superior Court Judge. Those materials included the motion which specified the basis for the motion as being RCW

26.09.140, and the related financial materials of both parties, and the order of the Court Commissioner that the motion was denied based on the financial resources of the parties. CP 130-67.

Ms. Wadlow had timely filed a motion for revision of the order on the start date for the child support. CP 39-129. The Superior Court Judge denied the motion, holding the Court Commissioner's ruling did not conflict with the relevant statute. CP 194-95.

C. ARGUMENT

1. The trial court denied Appellant's right to a motion for revision of a ruling on fees made under RCW 26.09.140, without considering the merits

Article 4, section 23 of the Constitution of the State of Washington provides as follows:

There may be appointed in each county, by the judge of the superior court having jurisdiction therein, one or more court commissioners, not exceeding three in number, who shall have authority to perform like duties as a judge of the superior court at chambers, subject to revision by such judge, to take depositions and to perform such other business connected with the administration of justice as may be prescribed by law.

RCW 2.24.050. Revision by court

All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court. Any party in interest may have such revision upon demand made by written motion, filed with the clerk of the superior court, within ten days after the entry of any order or judgment of the court commissioner. Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner, and unless a demand for revision is made within ten days from the entry of the order or judgment of the court commissioner, the orders and judgments shall be and become the orders and judgments of the superior court, and appellate review thereof may be sought in the same fashion as review of like orders and judgments entered by the judge.

On appeal, the Court reviews the trial court's ruling, not the Commissioner's. *In re Estate of Bernard*, 182 Wn. App. 692, 728, 332 P.3d 480, review denied, 181 Wn.2d 1027 (2014).

It would be too generous to argue that the trial court erred in denying the motion for revision of the ruling on the fee request made under RCW 26.09.140. Because the Superior Court judge simply altogether denied Ms. Wadlow her constitutional right to revision by erroneously holding that she had failed to meet a prerequisite for revision, by failing to bring the issue to the attention of the Commissioner. CP 182. The record is crystal clear that the request for fees under RCW 26.09.140 was made in a written motion to the Commissioner, was orally argued to the Commissioner, and a specific order referencing the financial

resources of the parties was entered denying the motion. And that record was attached to the motion for revision. CP 130-67.

The Appellant's motion for revision made no suggestion that she conceded not having brought the issue up "below," which would have been irrational. The motion did merely mention that it did not involve a prior request for fees under CR 11. CP 131, lines 8-13 (Which was mentioned because Ms. Ellerd falsely told the Commissioner that a request for fees had been denied already, when the prior request had not been under RCW 26.09.140, but under CR 11. RP 42-44.)

The Superior Court Judge never considered the merits of the motion for revision, though technically the ruling states he is denying the motion, he never considered the merits of the motion, which were properly before him.

The record does not support that and supports only one conclusion – that the very issue was brought before the Court Commissioner, --, the Commissioner ruled on that issue, and Ms. Wadlow properly brought a motion for revision. CP 135-36, CP 137-146, RP 21-25, RP 34, RP 35, lines 20-23.

The issue was the sole issue brought up in a motion separate from another motion heard the same date, was the subject of oral argument devoted to that issue, and was the subject of an order that addressed only that motion and that issue.

(Because Ms. Ellerd, attorney for Mr. Wadlow, mis-represented to the Court Commissioner at the January 31st, 2017 hearing that this issue had been brought up before, when it had not, the attorney for Mr. Wadow, in anticipation that Ms. Ellerd may make the same mis-representation, in the motion for revision was careful to point out that the issue before the Court on revision was distinct from a prior request under CR 11. That does not constitute a concession the issue of fees based on need was not brought up before the Court Commissioner on January 31st, 2017.)

It is unknown how the Superior Court Judge could review the materials before the Court on January 31st, 2017, which were a motion that specified it was based on the need versus ability to pay test of RCW 26.09.140, materials that showed the finances of the parties such as financial declarations and billing records, all of which were supplied in copies of said records attached to the motion for revision pursuant to local rule, as well as the order

entered on the motion which referred to the financial resources of the parties, and then conclude the issue was never brought before the Court Commissioner.

So it is not a matter of the Superior Court Judge having erred or abused his discretion in denying fees under RCW 26.09.140, it is a matter of never having afforded Ms. Wadlow her right to a motion for revision. She had a motion for revision properly before a Superior Court Judge in all respects, who erroneously concluded the motion was not properly before him.

Ms. Wadlow had a right to have any ruling of a Court Commissioner revised by a Superior Court Judge. That right had not been afforded to her and it has been affirmatively denied to her.

The right had constitutional underpinnings, in that Court Commissioners are not elected by the people. The statutes creating their office and granting their powers are valid only if their acts are subject to a meaningful review by Superior Court Judges. They have the right, once they follow the proper process to move for revision to have the merits considered de novo by the Superior Court Judge.

This Court should hold the Superior Court violated Ms. Wadlow's right to have a motion for revision considered on the merits, de novo, and remand to require the Superior Court to make a decision on the motion for revision, under RCW 26.09.140, after review of the material that were submitted to the Court Commissioner on the issue, which were attached to the motion for revision.

Should the Court find a remand would be futile, the Court should find that Ms. Wadlow demonstrated a need to for fees to defend Mr. Wadlow's largely unsuccessful petition for modification and to bring her petition for modification of child support. Mr. Wadlow incurred about \$4,200 in attorney fees, and had not updated his financial declaration, which is required to reveal such fees, since November, 2016, when the motion was heard at the end of January, 2017.

Mr. Wadlow made around \$60,000 per year and his new wife made around \$80,000 per year. They can afford a house with a \$400,000 mortgage.

Mr. Wadlow's petition for modification resulted only in specifying the beginning and ending times of holidays already allocated in the existing parenting plan. But he sought much more, and Ms. Wadlow had to pay to respond to all of it, and was ordered to a third

mediation without the Court Commissioner saying why or considering her ability to pay for a third mediation as well as an attorney.

The petition for modification of child support was drug out by Mr. Wadlow not supplying tax returns or a timely financial declaration.

Ms. Wadlow has gross pay of \$27,000 per year. She had provided \$1,300 to her attorney, about \$1,000 of which had gone to her attorney and the rest to costs, against total fees and costs of nearly \$5,000. It was favoritism to the wealthy to deny her a fees award from Mr. Wadlow. The intent of the statute is to level the playing field and that did not happen here. It needs to happen, or at least her right to ask should be considered.

2. The “finding” that Ms. Wadlow conceded not having brought the issue up is not supported by substantial evidence

To the extent the Superior Court’s holding that Ms. Wadlow conceded not having brought the RCW 26.09.140 issue before the Commissioner is a “finding” then it is not supported by any evidence at all, and it directly contrary to the mountain of evidence that it was brought up to the Commissioner. Findings of fact must be supported by substantial evidence, i.e., evidence sufficient to

persuade a rational person of the truth of the premise," *State ex rel. J.V.G. v. Van Guilder*, 137 Wn. App. 417, 423, 154 P.3d 243 (2007).

3. The trial court erred in failing to conduct de novo review in denying a motion for a revision of a ruling on the effective date of new child support amount

RCW 26.09.170 Modification of decree for maintenance or support, property disposition—Termination of maintenance obligation and child support—Grounds.

(1) Except as otherwise provided in RCW 26.09.070(7), the provisions of any decree respecting maintenance or support may be modified: (a) Only as to installments accruing subsequent to the petition for modification ...

The trial court has discretion to make the modification effective upon the filing of the petition, upon the date of the order of modification, or any time in between. *Chase v. Chase*, 74 Wn.2d 253, 259, 444 P.2d 145 (1968), cited in *In re Marriage of Oblizalo*, 54 Wn. App. 800, 803 n. 3, 776 P.2d 166 (1989).

In re Marriage of Pollard, 99 Wn. App. 48, 55, 991 P.2d 1201

(2000).

The Commissioner ruled that the new amount of child support would commence November 1st, 2016, despite the petition for modification having been filed September 1st, 2016. RP 35, lines

14-15. CP 45. CP 89. The difference to Ms. Wadlow is \$721. CP 42.

For a ruling on a motion for revision, the superior court reviews the commissioner's decision *de novo*. *In re Estate of Bernard*, 182 Wn. App. at 727. But it appears here that the Superior Court in reality merely reviewed the Commissioner's ruling for any error, despite citing the standard on revision, the Superior Court Judge then seemed to say the Commissioner had not erred. The Order on Revision is at CP 194-95. The Order states the review is *de novo*. CP 194. But the Superior Court Judge's reasoning is as follows:

... the Court concludes that Commissioner Stam's ruling was not in conflict with the clear wording of the applicable statute. In the absence of additional authority, this Court declines to revise the discretionary decision as to the commencement date of the new support amount.

CP 195.

It is not an issue of whether the Commissioner's ruling was "in conflict" with the statute. Appellant did not have to show the Commissioner's ruling conflicted with a statute to seek and potentially be granted revision. That was not the question. The question is what the Superior Court Judge would have done, not whether he would find error with what the Commissioner had done.

He mentions is it “discretionary,” meaning he won’t interfere with the Commissioner’s discretion, when he was to have exercised his own.

If the Commissioner’s ruling had conflicted with the statute, then certainly there would be a strong case for revision, but it had nothing to do with whether the Superior Court, had it actually exercised its own independent discretion, would have reached a different decision. Had the Superior Court actually conducted *de novo* review, then it could have exercised its discretion to agree with Appellant; that there is no real reason to do anything other than start the new support amount September 1st, 2016.

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).

While the Superior Court judge could have ruled either way, because he didn’t consider “what is right under the circumstances,” instead he merely found no legal error by the Commissioner, then he did not afford the right of revision to Appellant. Based on this

record, a judge exercising discretion could have said Ms. Wadlow filed for modification of support on September 1st, 2016, and there is no reason to do anything but commence the new amount on that date.

Ms. Wadlow had the right to move for revision which included the Superior Court judge exercising his own discretion on this issue, which did not happen. With all due respect, Appellant did not ask the Superior Court judge what he thought of the Commissioner's ruling, he was asked to make his own *de novo* determination.

Ms. Wadlow had filed her financial documents during September. CP 97. Mr. Wadlow was asked in writing in August of 2016 to supply tax returns and paystubs. CP 86. He first supplied a single paystub in November, CP 87, and supplied tax returns only after Ms. Wadlow had to move to compel production of the same, providing them the day before the hearing on the motion to compel set for December 20th, 2016. CP 139. Such tactics are explained by his attorney's argument that well, new child support should not commence September 1st, these parties supposedly had been busily exchanging needed information all these months. RP 31, lines 14-17. Such conduct should not be rewarded.

Even if there is a delay in exchanging documents, the Court can still start the new support amount as of the filing of the petition to modify. In *Pollard*, the trial court ruled a downward modification for Ms. Brookins would commence when she filed the petition, a year earlier. Mr. Pollard contended on appeal that since Ms. Brookins did not file her worksheets for a year after her petition, then she should not be able to have the new amount go back to the filing of the petition. *Pollard*, 99 Wn. App. at 55. The Court in *Pollard* held “the trial court did not abuse its discretion in setting the effective date of the modification on the date the petition was filed, even though the worksheets were filed a year later.” *Pollard*, 99 Wn. App. at 56.

There is no logic to delay the start date based on when the petition was served, when the response was due, etc. Had there been some increase in income that did not start until November, there might be some logic to the delay, but that is not what we have here. At best, the late commencement was to give Mr. Wadlow “a break” at the expense of Ms. Wadlow. There is no showing that Ms. Wadlow did anything but proceed in good faith with a petition to modify child support. Why should she lose \$721 in increased child support?

Because the Superior Court did not apply the proper standard for revision, then he erred and the Court should reverse and remand for the Superior Court to decide the motion de novo.

Alternatively, this Court should hold the Superior Court abused its discretion in determining that the new amount of child support should not commence until November 1st, 2016, and hold that it commences September 1st, 2016.

4. The trial court erred in entering a final order concluding that a minor modification of the parenting plan was granted

The adequate cause hearing was in November of 2016. The Court Commissioner **repeatedly** stated that no modification was ordered, whether minor or major. RP 17-19. And that only a “clarification” of beginning and ending times of holidays visited was ordered. Id. Mr. Wadlow’s own counsel at a later hearing stated the Court did not grant any modification. RP 29, lines 21-22.

“A clarification defines the rights and obligations already given to the parties in the decree; a modification extends or reduces those rights and duties. An ambiguous decree may be clarified, but not modified.” *In Re Marriage of Thompson*, 97 Wn. App. 873, at 878 (1999).

Why did the Commissioner depart from her prior oral ruling? Because Ms. Ellerd mis-represented to the Court that a revision on the issue of CR 11 fees was pending, which was not true, a revision on fees under RCW 26.09.140 was pending, and Ms. Ellerd sought an advantage in changing the prior ruling believing this would assist her and her client on the fees issue.

Ms. Ellerd's motive was shown in her conduct in supplying the order to the revision judge to attempt to influence his decision, and telling the Judge there was a "reconsideration" pending, equally improper. Revision is in on the record before the Commissioner at the time of the ruling under revision. A superior court considering a motion to revise a commissioner's order is limited to reviewing the record that was before the commissioner. It is error to consider new evidence. *In re Marriage of Balcom*, 101 Wn. App. 56, 59, 1 P.3d 1174 (2000); RCW 2.24.050.

It is inappropriate to "tailor" findings to avoid issues under review. "The defendant may show prejudice by establishing that the belated findings were tailored to meet the issues raised in the appellant's opening brief." *State v. Pruitt*, 145 Wn. App. 784, 187 P.3d 326, (2008).

There are no findings to support a conclusion for a minor modification because there is no showing of a change in circumstances required by RCW 26.09.260 (5), for even a minor modification, as orally stated by the Commissioner. The order refers only to there being a need for clarification, so there are no findings to support the relief of a “modification.” CP 173, part. 3.

It prejudices the Appellant because she is raising the issue of CR 11 fees on this appeal, because the Commissioner never made a ruling on that request made at the November adequate cause hearing. And on the issue of fees under RCW 26.09.140, she argued that her “need” was based in part on defending a petition that was largely groundless, that a modification was unsuccessful. The final order falsifies the actual ruling following the November 2016 adequate cause hearing.

5. The Superior Court erred in failing to make a ruling on the request for fees under CR 11

The response to the Petition for modification states that fees were requested in part, because there were no grounds for modification. CP 166. And the memorandum filed in opposition to the motion for

adequate cause specified that fees were sought under CR 11 Supp. CP ____.

And Ms. Wadlow's counsel argued at the adequate cause hearing for fees based on the petition being groundless, and on no other basis at that time. RP 10, line 23 to RP 11, line 15.

The Commissioner made no ruling at the time of the adequate cause hearing on the CR 11 fee request, nor does the order entered on modification address that fee request. CP 172-75.

"Barry Scanlon appeals an order on modification of child support that ... failed to address his request for attorney fees. We reverse." *In re Marriage of Scanlon and Witrak*, 109 Wn. App. 167, 170, 34 P.3d 877 (2001). Although in that case the fee request was under RCW 26.09.140 and this issue is under CR 11, as far as the request argued at the adequate cause hearing on November 29th, 2016, the principle is the same.

6. Request for fees on appeal

Pursuant to RAP 18.1 (a) and (b), Appellant requests an award of fees on appeal. The substantive basis is RCW 26.09.140, which as argued above, provides for a request for fees based on need

versus the ability of the other party to pay. Ms. Wadlow raised legitimate issues below, and essentially her right to even be heard was denied to her, one revision was never considered on its merits, another was decided on the wrong standard of review and all of this was set in motion by Mr. Wadlow's petition for modification was mostly groundless. Ms. Wadlow needed to bring this appeal to even be heard on her fee requests made below.

D. CONCLUSION

This Court should 1) reverse the Superior Court's denial of revision on the RCW 26.09.140 fee issue and remand for proper consideration of the issue, or alternatively, hold the Appellant is entitled to a fee award, 2) reverse the Superior Court's denial of revision on the issue of the commencement date of the modified support amount and remand, or alternatively, hold the commencement date is September 1st, 2016, 3) reverse the order on modification of the parenting plan and hold there were no grounds for "modification" and remand for entry of the order proposed by Appellant, 4) remand for consideration of and a ruling by the Commissioner on the CR 11 fee request made at the time of

the adequate cause hearing, and 5) grant Appellant fees on review pursuant to RAP 18.1 and RCW 26.09.140.

Respectfully submitted,

Dated September 26th, 2017



William Edelblute

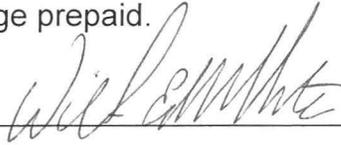
Attorney for Appellant WSBA 13808

Certificate of Mailing

I hereby certify that on the 26th day of September, 2017, I mailed a true and correct copy of the foregoing Brief of Appellant to Robert

Blaine Wadlow, Respondent at 4771 Corvina, Richland WA 99352,

US First Class Mail, postage prepaid.



William Edelblute

Attorney for the Petitioner WSBA 13808