

FILED

JAN 25 2018

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 RESPONDENT

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

In re the Marriage of:		
JENNIFER WADLOW,)	CAUSE NO. 352064
)	
Appellant,)	
)	
And)	
)	
ROBERT WADLOW,)	
)	
Respondent.)	
)	
)	
)	

I. LEGAL ARGUMENT

A. The trial court did not commit reversible error when denying Jennifer’s motion for revision

Even assuming *arguendo* that Judge Ekstrom did not decide the motion for revision on the merits, “It is a general rule of appellate practice that the judgment of the trial court will not be reversed when it can be sustained on any theory, although different from that indicated in the

decision of the trial judge.” *Sprague v. Sumitomo Forestry Co., Ltd.*, 104 Wash.2d 751, 758, 709 P.2d 1200 (1985), citing *Cheney v. Mountlake Terrace*, 87 Wash.2d 338, 552 P.2d 184 (1976). Here, Judge Ekstrom’s should not be reversed where the declarations and arguments before the Court support a finding that each party had the ability to pay their own attorney fees.

Jennifer’s financial declaration showed \$1,500 in cash on hand. CP 77-80. She had historically received a sizable federal tax refund which she would have received not long after the Court’s ruling. See CP at 97-129. In 2015 for example, she received a refund of \$6,176. Further, the Court had ordered an increase in child support. The record therefore provides sufficient grounds to support the denial of revision.

B. The trial court did not commit error when ordering a November 2016 start date for child support

Jennifer’s second assignment of error states: “The trial court erred in denying a motion for a revision of a ruling on the effective date of new child support amount.”

Jennifer’s petition to modify support requested an effective date of September 1, 2016, the filing date of the petition. Robert requested an effective date of January 31, 2017 when the modification order was entered. The court commissioner ordered an effective date of November

1, 2016. Jennifer moved for revision, which was denied by the Honorable Judge Alex Ekstrom.

Jennifer presently argues that the Court on revision committed reversible error by failing to conduct *de novo* review. However, Judge Ekstrom clearly stated that the matter was being reviewed *de novo*: “When considering the motion, the Court reviews the Commissioner’s rulings *de novo*, based on the evidence and issues presented to the Commissioner.” citing *Williams v. Williams*, 156 Wn.App. 22, 27, 232 P.3d 573, 575 (Div. 3, 2010). Despite this unambiguous statement of the law under which Judge Ekstrom made his decision, Jennifer relies on the Court’s expression that the commissioner’s decision was “not in conflict with the clear wording of the applicable statute.” Judge Ekstrom’s representation of the law controlling his decision should be given considerable deference, and certainly prevail over Jennifer’s argument that it “appears” he acted otherwise.

Further, and related to Jennifer’s argument on the merits of the effective date, even if Judge Ekstrom did apply the incorrect legal standard, “It is a general rule of appellate practice that the judgment of the trial court will not be reversed when it can be sustained on any theory, although different from that indicated in the decision of the trial judge.” *Sprague v. Sumitomo Forestry Co., Ltd.*, 104 Wash.2d 751, 758, 709 P.2d

1200 (1985), citing *Cheney v. Mountlake Terrace*, 87 Wash.2d 338, 552 P.2d 184 (1976).

Significantly, it is “within [the trial court’s] authority and discretion” to order an effective date *anytime* after the petition is filed. *Oblizalo v. Oblizalo*, 54 Wash.App. 800, 803-04, 776 P.2d 166 (1989), see also *In re Marriage of Pollard*, 99 Wash.App. 48, 55, 991 P.2d 1201 (2000) (“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.”) and *Chase v. Chase*, 74 Wash.2d 253, 259, 444 P.2d 145 (1968) (“In a situation warranting modification of child support or alimony, the court may make the modification effective either as of the time of filing the petition or as of the date of the decree of modification, or as of a time in between, but it may not modify the decree retroactively.”).

In the present case, it was clearly within Judge Ekstrom’s “authority and discretion” to order an effective date of November 1, 2016. The present motion should be granted with respect to this assignment of error.

C. The trial court did not commit error when entering an order granting a modification of the parenting plan

Jennifer’s third assignment of error states: “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.” Referring to the adequate cause hearing in November of 2016, Jennifer states: “The Court Commissioner *repeatedly* stated that no modification was ordered, whether minor or major. And that only a “clarification” of beginning and ending times of the holidays visited was ordered.” (emphasis original). She concludes her argument asserting that “[t]he final order falsifies the actual ruling following the November 2016 adequate cause hearing.” Apparently, Jennifer is arguing that the trial court’s oral decision on adequate cause differs from the order and findings in support of the agreed amended parenting plan. Her argument is confused for several reasons.

First, the trial court was not in a position to modify the parenting plan in any fashion at the November 2016 hearing. The court was simply deciding whether there was adequate cause to move forward with the petition to modify. 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 provisions. 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.

Second, Jennifer's assertion that the trial court's order and findings on the agreed amended parenting plan "falsifies" its oral ruling on adequate cause is a non sequitur. The trial court found adequate cause to move forward with the petition and ordered that the parties attend mediation; a written order was never entered. After the parties reached an agreement at mediation, Mr. Wadlow filed a motion to enter the agreed amended parenting plan. By virtue of the mandatory forms, this equally required entry of an order granting his petition to change the original plan. At this hearing, there was nothing to "falsify" regarding the trial court's oral decision on adequate cause. The parties were not asking the trial court to enter an order on adequate cause, but rather to enter their agreed amended plan. There is no legally significant nexus between the trial court's oral ruling on adequate cause and the terms of the order and findings which approved of their agreed amended plan.

Third, even if there were some conceivably relevant nexus, a trial court's oral judgment has no binding effect until it is formally incorporated into findings of fact, conclusions of law, and the judgment. *Ferree v. Doric Co.*, 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963). Until the written judgment is entered, the trial court is free to alter, modify, or completely

abandon the oral decision. *Id.* at 567. In any event, then, Jennifer has no legal basis to rely on the trial court’s prior oral ruling for whatever purpose.

Fourth, the trial court’s order and findings were legally correct when it “approve[d] a minor change” to the original plan based on the parties’ agreed amended plan. An agreement between the parties is an explicit statutory basis for modification under RCW 26.09.260(2)(a). The legal effect of the agreed amended plan re-defined the parties’ respective rights under multiple provisions; there was a change. Whether the changes related the residential or nonresidential aspects of the plan is immaterial because they would fall under either RCW 26.09.260(5) or RCW 26.09.260(10), respectively. Under RCW 26.09.260(1), both provisions constitute a “modification” for the purposes of the statute: “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 parenting plan...”).

Finally, Jennifer fails to show how this alleged err rises to the level of reversible err.

D. The trial court did not commit error when refusing to award CR 11 sanctions

Jennifer's fourth assignment of error states: "The trial court erred in making no ruling on a request for CR 11 sanctions." This assignment of error is frivolous because Jennifer failed to file a motion for sanctions under CR 11. In relevant part, the rules provides:

If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, *upon motion* or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

CR 11(a).

Jennifer claims that a request for CR 11 sanctions was included in her petition, memorandum filed in opposition to adequate cause, and that the court failed to rule on her request. First, the rule plainly requires a motion by the party seeking sanctions. Jennifer never filed such a motion as evidenced by the present record on appeal. Second, the petition does not make any mention of a request for sanctions under CR 11. Third, the record on appeal does not include the referenced memorandum, which explains why Jennifer's citation to the document is left blank as "CP___". Fourth, Jennifer never raised the issue at the hearing for entry of final orders. In fact, even her proposed final order is silent on the issues of sanctions or fees.

Under these circumstances, Jennifer failed to present a proper request for sanctions under CR 11. There was nothing for the trial court to rule on. The present appeal should be denied with respect to this assignment of error.

E. Robert should be awarded attorney fees for having to respond to the present appeal

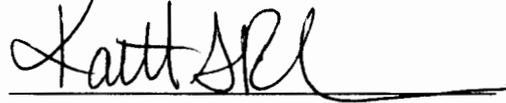
Robert requests attorney fees pursuant to RAP 18.9(a), on grounds that each of Jennifer's assignments of error are frivolous. "An appeal is frivolous if it presents no debatable issues upon which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal." *Eagle Sys., Inc. v. Emp't Sec. Dep't*, 181 Wn.App. 455, 462, 326 P.3d 764 (2014). This is particularly true with respect to Jennifer's assignment of error regarding CR 11 sanctions, where she did not even file a motion with the court.

Dated this 19 day of January, 2018.


Benjamin W. Dow, WSBA #39126
Attorney for Respondent

Motion for Extension to Date of Receipt and Brief of Respondent

Dated this 24th day of January, 2018.

A handwritten signature in black ink, appearing to read "Kaitlin S. Richman", written over a horizontal line.

Kaitlin S. Richman
Legal Assistant to Benjamin W. Dow