

FILED

FEB 19 2019

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Julie C. Watts
FEB 19 2019
Attorney at Law

COURT OF APPEALS DIVISION III OF THE STATE OF
WASHINGTON

In re

AMY O'CONNELL
Respondent/Appellant
and
KEVIN O'CONNELL
Petitioner/Respondent

No. 362213

RESPONSIVE BRIEF

MATTHEW DUDLEY
Attorney for Respondent
WSBA #24088
104 S. Freya, Ste 120A
White Flag Building
SPOKANE, WA 99223
509-534-9180

7/11/2019

TABLE OF CONTENTS

	Page
A. STATEMENT OF THE CASE	1-4
B. ARGUMENT	5-7
C. CONCLUSION	8

TABLE OF AUTHORITIES

Table of Cases: Page
In re Parentage of C.M.F., <u>179 Wn.2d 411, 419, 314 P.3d 1109</u> (2013).....	6
Marriage of Hansen, 81 Wash.App. 494, 498, 914 P.2d 799 (1996).....	5
Marriage of McDole, 122 Wash.2d 604, 610, 859 P.2d 239 (1993).	5
Marriage of Roorda, 25 Wash.App. 849, 853, 611 P.2d 794 (1980).....	5
Statutes	
RCW 26.09.260	2,5,6
RCW 26.09.270.....	5

The Appellant has submitted various complaints regarding the rulings of Commissioner Jacquelyn-High Edward and Judge Ellen Kalama Clark, all of which fail.

The Court Commissioner and the Superior Court both properly denied adequate cause and dismissed the petition for modification of parenting plan. The Court also denied the motion to clarify and motion to finalize minor modification.

Statement of Case

The parties entered into an agreed parenting plan where the children reside equally with both parents. This order was entered July 29, 2016. CP 7

There is no right of refusal in the parenting plan and no provision for the Appellant to provide child care for the children during the Respondent's shared time. CP 7

The parties did not agree to Appellant providing care for the children when Respondent was unavailable.

Respondent disputed the claim that the final parenting plan was predicated on Appellant having a right of first refusal.

In September 2017, after allowing Appellant to come into his home for periods of time, Respondent arranged for pre-school and private

care for the children. This private care also included the maternal grandfather to the children.

Appellant filed a petition for modification of parenting plan which failed to plead any actual statutory petition.

Page 2 of the petition, section 6, under minor modification, failed to plead any of the statutory factors for a minor modification.

Appellant went and removed the mandatory language regarding the modification. The mandator language reads as follows:

6. Request for minor change (*RCW 26.09.260(5), (7) and (9)*)

- No request.
- I ask the court to adjust the parenting schedule, but not change the person the child lives with most of the time. The situation of the child/ren, a parent, or a non-parent custodian has changed substantially.

Reason for minor change (*check all that apply*):

Note – Your reasons must be based on information that you learned about after the current parenting/custody order was issued, or, if the order was uncontested (issued by default or agreement), your reasons may be based on information that was unknown to the court when the order was issued.

- the current parenting/custody order is difficult to follow because the parent who has less residential time with the children has moved.
- the current parenting/custody order is difficult to follow because one parent's work schedule changed and the change was not by his/her choice.
- the requested change will affect the children's schedule on fewer than 25 full days a year.

the requested change will impact the children's schedule on more than 24 full days, but fewer than 90 overnights a year. This change is needed because the current parenting/custody order does not give the children a reasonable amount of time with one parent and it's in the children's best interest to have more than 24 full days of increased time with that parent.

Are there any limitations on the parent whose time would be increased?

No. The current parenting/custody order does not limit that parent's time with the children because of abandonment, abuse, domestic violence, sex offense, or other serious problems.

Yes. That parent's time with the children is limited because of problems listed in the current parenting/custody order. I ask the court to allow that parent more parenting time with the children because the problems that caused the limitations have changed substantially.

Explain: _____

Has the parent whose time would be increased completed any required evaluations, treatment, or classes?

Does not apply. The current parenting/custody order does not require that parent to complete any evaluations, treatment or classes.

Yes. That parent has completed all court-ordered evaluations, treatment, or classes.

List completed evaluations, treatment, or classes here: .

In section 6 of the petition filed by Appellant, there are none of the statutory bases pleaded.

Appellant tried to obtain a modification by calling the right of first refusal "non-residential aspects". The right of first refusal is a

“residential” aspect of the parenting plan as it would be affording the other parent “residential” time.

Appellant sought language to require her to provide care for the minor children during day time hours when Mr. O’Connell was at work. Appellant further sought an order authorizing her to pick up the children from school and drive them to activities when Respondent was unavailable to do so.

Appellant filed a motion to finalize minor modification of parenting plan and motion to clarify. Appellant filed a memorandum in support of the motion to clarify.

On May 18, 2018, Commissioner Jacquelyn High Edward denied the motion for adequate cause and dismissed the petition. She also denied the motion to clarify.

On June 14, 2018, Judge Ellen Kalama Clark denied the motion to revise the order denying adequate cause, motion to clarify and motion to finalize minor modification.

Both Commissioner High Edward and Judge Clark denied adequate cause and dismissed the petition.

The thrust of the petition appears to be not 26.09.260 (5)(7) or (9) but (10).

Legal Argument

Trial court decisions relating to custody changes are reviewed using an abuse of discretion standard, whether the "court exercised its discretion in an untenable or manifestly unreasonable way." *In re Marriage of McDole*, 122 Wash.2d 604, 610, 859 P.2d 239 (1993). RCW 26.09.260 provides standards for modification of a custody decree. RCW 26.09.270 provides in part "[t]he court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted." Statutory construction is a matter of law reviewed de novo. *Marriage of Hansen*, 81 Wash.App. 494, 498, 914 P.2d 799 (1996). When the trial court's decision is decided on the affidavits of the parties, we are in the same position as the trial court and decide the question as a matter of law. *In re Marriage of Roorda*, 25 Wash.App. 849, 853, 611 P.2d 794 (1980).

Under RCW 26.09.260(10), the court may adjust any of the non-residential aspects of a parenting plan (1) upon a showing of a substantial change of circumstances of either parent or the child and (2) where the adjustment is in the best interest of the child. RCW 26.09.260(10). The

court may make this adjustment without considering the factors in RCW 26.09.260(2).

RCW 26.09.260 sets out the procedures and criteria to modify a parenting plan and limits the court's range of discretion. *See In re Parentage of C.M.F.*, 179 Wn.2d 411, 419, 314 P.3d 1109 (2013). Under RCW 26.09.260(10), the court may adjust any nonresidential aspects of a parenting plan "upon a showing of a substantial change of circumstances of either parent or of a child, and the adjustment is in the best interest of the child."

Non residential aspects of the parenting plan would be dispute resolution changes, changes to decision making and changes to transportation arrangements. A right of first refusal is not a "non-residential" aspect but a residential aspect.

Appellant contends that the Court erred by ruling on the merits without conducting an evidentiary hearing.

The flaw with this is the Court first has to determine whether adequate cause exists for an evidentiary hearing to even be held.

More problematic is the disingenuousness of Appellant. By this Appellant claims an evidentiary hearing should have been ordered when Appellant filed a motion to finalize the matter on the merits.

The Court found adequate cause did not exist and the petition was dismissed. Once adequate cause is denied, the case does not proceed forward and there is no basis to conduct an evidentiary hearing as suggested by Appellant.

Appellant's position is further undermined by her having filed a motion to clarify and motion to finalize minor modification of parenting plan.

Once again, Appellant claims she was entitled to an evidentiary hearing when she herself never sought such.

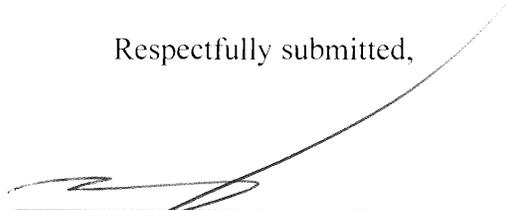
Appellant throughout her brief discusses the failure of an evidentiary being ordered. She repeats this mantra however continues to fail to acknowledge she never requested such and even if she had, that once adequate cause is denied, no such hearing is to occur.

Appellant seeks attorney fees for filing a meritless action. One should not be able to produce litigation that has no merit and then seek to be financially compensated for such.

In summary, the Court should affirm the denial of adequate cause, the denial of the motion to finalize on the merits and affirm the denial of the motion to clarify. The Court should deny the request for attorney fees.

February 19, 2019

Respectfully submitted,



Matthew Dudley, #24088
104 S. Freya, Ste 120A
White Flag Building
Spokane, WA 99202
509-5349180