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Court of Appeals
Division III
State of Washington
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Appellate Court No. 37531-5

WASHINGTON STATE COURT OF APPEALS
DIVISION III

PAUL CARDWELL,

Respondent

v.

REGAN CARDWELL,

Appellant

Appeal from the Washington Superior Court
County of Grant
Case No. 10-3-00479-3
Commissioner Thomas W. Middleton

BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES

- 1) Did the Superior Court commissioner abuse his discretion in denying a finding of adequate cause to modify the parenting plan?
No.
- 2) Should Appellant's interpretation of the statutory language in RCW 26.09.260(5)(b) regarding modification of a parenting plan be accepted over the commonly accepted use of that language, and the one which was used by the court commissioner? No.
- 2) Even if Appellant's version of the statutory language was applied, would it necessarily change or have any effect on the court's discretionary decision of lack of finding of adequate cause to change the existing plan? No.

STATEMENT OF THE CASE

This case was brought by Appellant, Regan Cardwell ("mother"), on an "alternative" petition for a major modification of the Final Parenting Plan dated March 15, 2013, seeking to change the primary placement of the parties two (2) girls, Courtlynn (13) and Laurelynn (11) from Respondent, Paul Cardwell's ("father") home to her home based upon

allegations of detriment to the children in the father's home pursuant to RCW 26.09.260(b). Alternatively, she also sought what she deemed was a "minor" modification to increase her residential time from an alternating weekend residential schedule to a 50/50 residential schedule, based solely upon her move from Spokane to Moses Lake, where the girls reside primarily with their father. (CP 4-14). However, the additional time sought exceeds the parameters of a minor modification.

At the hearing on Adequate Cause, the court found no adequate cause and denied the Petition for Major Modification. It took only the issue of Minor Modification under advisement. (CP 157-60). The mother had argued that the statutory language did not require a finding that the current plan was "impractical" to follow after her move in order to allow modification, only that there had been a move (by her), which alone qualified her to modify the plan. The court commissioner set forth his findings in a simplified written decision, which was well-researched. It clearly explained his reasoning and findings of the statutory language meaning, and finding the mother had failed to provide any proof the existing plan was impractical to follow, he denied a finding of adequate

cause on a Minor Modification as well, and dismissed the petition. (CP 327-29; 330-33.)

This appeal followed.

STANDARD OF REVIEW

Threshold determinations for modifications of parenting plans (adequate cause) are reviewed under an abuse of discretion standard.

ARGUMENT

- I. The language contained in RCW 26.09.260(5)(b) sets forth the application of the standard required in order to make any modifications to the existing parenting plan.**

RCW 26.09.260(5) states the court may order adjustments to the residential aspects of a parenting plan upon a showing of substantial change of circumstances of either parent or of the child, without consideration of the factors set forth in subsection (2) of this section, if the proposed modification is only a minor modification in the residential schedule that does not change the residence the child is scheduled to reside in the majority of the time and:

(a) Does not exceed twenty-four full days in a calendar year; or

(b) is based on a change of residence of the parent with whom the child does not reside the majority of the time or an involuntary change in

the work schedule by a parent which makes the residential schedule in the parenting plan impractical to follow; or

(c) Does not result in a schedule that exceeds ninety overnights per year in total, if the court finds that, at the time the petition for modification is filed, the decree of dissolution or parenting plan does not provide reasonable time with the parent with whom the child does not reside a majority of the time, and further, the court finds that it is in the best interests of the child to increase residential time with the parent in excess of the residential time period in (a) of this subsection. However, any motion under this subsection (5)(c) is subject to the factors established in subsection (2) of this section if the party bringing the petition has previously been granted a modification under this same subsection within twenty-four months of the current motion. Relief granted under this section shall not be the sole basis for adjusting or modifying child support.

It is important to note that the Appellant has overlooked subsections (a) and (c) above, because her 50/50 proposed parenting plan does indeed exceed both 24 days in a calendar year, as well as 90 overnights total under those sections, rendering the petition unqualified for a “minor” modification in any event, and making it a major modification, which had already been denied by the court commissioner. RCW 26.09.260(5)(a) and (c).

- II. There is no ambiguity in the statutory language used in RCW 26.09.260(5)(b), and the court has discretion in ruling on the necessity of changes to a current plan based upon the facts of the case before him.

Appellant appeals the commissioner's decision and then invites this Court to conduct a tortured, investigative linguistic journey over the meaning of the words "impossible," "impractical" and "unreasonable," all the while overlooking the very word that resulted in this court's decision, which is *MAY*. *In his discretion*, the court *MAY* order changes.

The statute states:

....

- (5) The court **MAY** order adjustments to the residential aspects of a parenting plan upon a showing of substantial change of circumstances (Emphasis added.)

RCW 26.09.260(5).

The court could find - and did in this case - that the mother's move was a substantial change in circumstances, but not one that required any changes to the existing parenting plan, which already sets forth a very reasonable division of time for the non-custodial parent (mother) in which to exercise her visitation, regardless whether it was from Spokane, or from Moses Lake. The court, in its discretion, simply did not find anything in the parenting plan that needed to be changed even if the mother moved to

the home town of the primary custodian (father). (CP 330-31). The court reviewed and listed the substantial time that the mother had under the plan, shared summer vacation and holiday time, and alternating weekends. The court did not find the existing plan to be unreasonable, impossible, or impractical to follow because the mother provided no support for that. On the contrary, due to the lack of travel involved, it now became easier for both parties to follow the existing schedule.

Using the logic proposed by Appellant, under her interpretation of Section 5(b), the court should interpret only the first sentence to apply;

“(b) Is based on a *change of residence* of the parent with whom the child does not reside the majority of the time”

and that the following sentence

“.. or an *involuntary change in work* schedule by a parent which makes the residential schedule in the parenting plan impractical to follow; ...” (Emphasis added.)

simply does not apply to modify the first half of the sentence with the word “impractical.” It becomes clear that use of this logic would mean that the mother could literally move next door or across the street to qualify for a change to the parenting plan. However, even if the circumstances met a substantial change threshold, it is still up to the discretion of the court to look at the existing plan and decide whether to

make any changes to the existing plan or if any are necessary to effect the best interests of the child. Each case will be uniquely different in this regard. The *Hoseth* case cited by appellant states:

Although he has not established the move made the 1997 plan impractical, we consider the move to Spokane a proper factor for the court to consider in terms of a circumstance that enhances access for the benefit of both the child and the visiting parent. *In re Marriage of Hoseth*, 115 Wash.App. 563, 63 P.3d 164, 169 (2003).

By his acknowledgment in his written decision, the commissioner pointed out that the *Hoseth* court directly stated that the moving party must show both a change in residence and that the current parenting plan is impractical to follow under RCW 26.09.260(5)(b). (CP 332). The commissioner's opinion states "[The mother] provided no information on how the current parenting plan was impractical to follow. Most all of the materials supplied by the mother addressed her request for a major modification." (CP 331.) Appellant has not met her burden.

- III. There is no basis to find the court commissioner abused his discretion in ruling that there was no requirement to modify or change the current plan simply due to mother's move.

Given the strong interest in the finality of marriage dissolution proceedings, we defer to the trial court and will affirm 'unless no reasonable judge would have reached the same conclusion.' *In re Marriage of Rostrum*, 184 Wn.App. 744, 339 P.3d 185 (2014).

Trial court decisions in a dissolution action will seldom be changed upon appeal. The spouse who challenges such decisions bears the heavy burden of **showing a manifest abuse of discretion** on the part of the trial court. *In re Marriage of Bowen*, 168 Wn.App. 581, 279 P.3d 885 (2012). (Emphasis added.) That heavy burden has not been met by Regan Cardwell, who cannot show any manifest abuse of discretion by the trial court.

Trial court findings of fact that are supported by substantial evidence will be upheld. *In re Marriage of Thomas*, 63 Wn.App. 658, 821 P.2d 1227 (1991). Evidence is substantial if it persuades a fair minded, rational person of the truth of the finding. *In re Marriage of Spreen*, 107 Wn.App. 341, 346, 28 P.3d 769 (2001). There is substantial evidence in

this file to support the fact that the existing parenting plan is reasonable and should not be changed based upon mother's move to Moses Lake.

The determination of whether adequate cause exists to proceed in the matter is reviewed under the standard of whether the court commissioner committed an abuse of discretion. If he did not, his determination is not changed. *In re Parentage of Jannot*, 149 Wn.2d 123, 65 P.3d 664 (2003). There is no allegation of just how the commissioner abused his discretion. The court commissioner has not abused his discretion, and this court does not conduct a *de novo* review.

A court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Thomas* at 660. The court commissioner has clearly taken the time to review and set forth his findings in his written decision (CP 330-32). This makes the court's decision fully supportable on tenable grounds and for reasonable bases. His decision is not reviewed *de novo* and should not be changed on appeal.

ATTORNEY FEES

Pursuant to RAP 18.1, Mr. Cardwell moves for an award of his fees and costs in maintaining this appeal. This is Appellant's third appeal

on the same basis in her attempts to change custody in this case, the cumulative effect of which has cost Respondent tens of thousands of dollars, and ensured constant continuing turmoil in the relationship between the parties and especially the children. Respondent believes the entire continuing litigation amounts to bad faith, and has been deliberately and systematically over-litigated in a continuing effort to harass Respondent and drive up his costs and wear him down in his efforts to maintain his defense of Appellant's ongoing attacks. The appeal is not supported in any basis of fact and there is no error of law or abuse of discretion on the part of the court commissioner.

CONCLUSION

For the foregoing reasons, the appeal of the court's discretionary decision to deny a finding of adequate cause for minor modification should be denied, and the court commissioner's decision affirmed, with no findings of any abuse of discretion on its interpretation of statutory language. The court should award Respondent Mr. Cardwell his costs and fees for having to defend this appeal.

Respectfully submitted this 6th day of July, 2020.

Attorney for Respondent
Paul Cardwell

Barbara J. Black

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