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Case No: 70537-7-I

**IN COURT OF APPEALS
OF THE STATE OF WASHINGTON**
Division One, Seattle

Michelle Wilburn-Donahue (n/k/a Baker),

Petitioner - Appellant,

v.

Christopher Scott Dilworth,

Respondent - Appellee.

ORIGINAL

Opening Brief of Appellant Michelle Wilburn-Donahue (Baker)

Appeal from the Superior Court of King County, the Honorable Suzanne
R. Parisien, Case No 09-3-02166-3 KNT

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TABLE OF CONTENTS

Introduction.....4

Assignments of Error.....4

Statement of the Case.....5

Argument.....10

 1) The Court Lacked Subject Matter Jurisdiction Because of Mr.
 Dilworth’s Failure to Bring a Motion..... 10

 2) The Court Lacked Subject Matter Jurisdiction Because of Mr.
 Dilworth’s Failure to Timely Move for Amendment.....14

 3) The Court Erred in Modifying the Parenting Plan Without Making
 Appropriate Findings of Fact..... 15

Conclusion.....17

TABLE OF AUTHORITIES

Cases

Christel v. Blanchard,
 101 Wn.App. 13 (Div I, 2000) 11, 14

Davenport v. Davenport,
 4 Wn.App. 733 (Div III, 1971) 12

Dougherty v. Dep’t. of Labor & Indus. For the State of Washington,
 150 Wn.2d 310 (2003)..... 10

Habitat Watch v. Skagit Cnty,
 155 Wn.2d 397 (2005)..... 11

<u>Henderson v Shinseki,</u> 131 S. Ct. 1197 (2011)	10
<u>In the Matter of Lindquist,</u> 172 Wn.2d 120 (2011).....	11
<u>James v. Cnty of Kitsap,</u> 154 Wn. 2d 574 (2005)	11
<u>Kontrick v. Ryan,</u> 124 S. Ct. 906 (2003)	10
<u>Landmark Dev. Inc. v City of Roy,</u> 138 Wn.2d 561 (1999).....	15
<u>MH2 Co. v. Hwang,</u> 104 Wn. App. 680 (Div III, 2001).....	15
<u>Pamelin Indust., Inc. v. Sheen – U.S.A., Inc.,</u> 95 Wn.2d 398 (1981).....	12
<u>Rivard v. Rivard,</u> 75 Wn.2d 415 (1969).....	14
<u>Scanlon v. Witrak,</u> 110 Wn.App. 682 (Div I, 2002)	10
<u>Shryrock v. Shryrock,,</u> 76 Wn.App. 848 (Div III, 1995)	15
<u>Sullivan v Purvis,</u> 90 Wn.App. 456 (Div III, 1998)	11, 13
<u>ZDI Gaming, Inc. v. State of Washington,</u> 173 Wn.2d 608 (2012).....	13
 Statutes	
Const. art IV, § 6	13
R.C.W. 59.18.....	10

RCW 26.09.260	4, 8, 16
CR 5	4,12,13,18
CR 7.....	4,11,12,13,18
King County LCR 7.....	4
CR 59.....	14,15,18

INTRODUCTION

This appeal concerns an order described by the Court as clarification of final orders issued in a parenting plan modification proceeding. The clarification, which introduced an additional modification to the parenting plan, was issued following a brief telephone conference held roughly two months after the trial, and held without written motion from either party. This appeal raises the question of whether the Court can modify its own rulings after the fact without a motion that observes the requirements of CR 7(b) and King County LCR 7(b), and without regard for the service requirements of CR 5. This appeal also questions whether a court order may be amended without findings of fact to support that amendment, and without observing the requirements of CR 59.

ASSIGNMENTS OF ERROR

- 1) The Superior Court erred in conducting a proceeding without a written motion from either party as required under CR 7 and therefore lacked subject matter jurisdiction to issue an order.
- 2) The Superior Court erred in amending its existing order without observing the requirements of CR 59.
- 3) The Superior Court erred in modifying the parenting plan without making findings of fact in support of the modification as required in RCW 26.09.260(1).

STATEMENT OF THE CASE – FACTS AND PROCEDURAL

POSTURE

The parties in this case, Michelle Baker (formerly Michelle Wilburn-Donahue, and hereinafter “Ms. Baker”) and Christopher Scott Dilworth (hereinafter, “Mr. Dilworth”) are the parents of Katelyn Dilworth. After the parties separated, in 2009, this parentage case was commenced. Ms. Baker subsequently married Charles Baker, who was transferred by his employer, the U.S. Army, to Anchorage, Alaska. (CP 39) Ms. Baker obtained a temporary parenting plan which permitted her to take the child with her to Alaska to join her husband. (CP 39)

The temporary parenting plan entered by the Superior Court provided, “Visits in Alaska: parties will split cost 50/50 father’s air fare w/in 30 days of proof of payment” (CP 39 at page 5)

Following mediation and negotiation, the parties entered a final agreed parenting plan which provided, “The mother and the father shall each pay half of the airfare for the father to visit the child once a month and for the child to visit the father in Washington once a year. The mother shall reimburse the father for her share of air fare within 30 days of receipt of transportation expenses verification.” (CP 92 at page 6). Significantly, no mention is made of hotel or car rental costs. (CP 92)

The military later transferred Mr. Baker to Joint Base Fort Lewis McChord and Mr. and Ms. Baker, together with Kayelyn, returned to Washington, as evidenced by Ms. Baker's subsequent relocation notice announcing intent to move from the area (CP 100). Mr. Dilworth did not move for modification of the parenting plan following the move to the Puget Sound area even though the existing parenting plan allowed him to do so without a threshold showing of adequate cause (CP 92, page 10).

In 2012, the U.S. Army ordered Mr. Baker to move to San Antonio, and Ms. Baker sent Mr. Dilworth the required notice of intent to relocate. (CP 100) Mr. Dilworth objected to Ms. Baker's intention to use the existing parenting plan (CP101), and on April 17, 2013, the question of modification of the parenting plan was tried before the Honorable Suzanne Parisien. The record of proceedings for the trial is referred to as "RP 4-17-2013" to differentiate it from the record of proceedings held June 17, 2013.

During a trial of less than two hours duration (RP 4-17-2013 pages 5 and 62), Ms. Baker presented evidence (Ex 10, 11, 13, 14 and 18) and testimony (RP 4-17-2013 pages 44-46) to show that travel costs to San Antonio, and cost of accommodation and car rental in San Antonio, were either comparable to or less than cost of airfare, hotel rates and car rental in Anchorage. Mr. Dilworth presented evidence to show his actual costs

for recent trips (Ex 106 and 107) and presented testimony (RP 4-17-2013 pages 18-21 and 26-30) objecting to the cost splitting requirements of the existing parenting plan but showing no tangible change in circumstances compared to costs for Anchorage.

Following trial, the Superior Court issued orders (CP 132, 133 and 134) on April 18, 2013 which preserved the status quo as to the details of the parenting plan in question in this appeal, expressly requiring Ms. Baker to share in the cost of airfare, but not expressly requiring that she share in the cost of hotel and car rental.

The Findings of Fact and Conclusions of Law (CP 133) expressly provided at page 3 that, “The Court finds that the prior parenting plan of March, 2010 was entered by agreement and was drafted in circumstances similar to those now applicable. The parties foresaw that relocation was a probability due to the mother’s husband’s military obligations. The Court finds that the cost for the father to travel to San Antonio is not substantially different from the cost to travel to Anchorage, and is in most situations is just slightly less.” On page 4 of the same document (CP 133), the Court ruled, “The fact of the mother residing in San Antonio does not create circumstances that are substantially different from those that applied when the mother resided in Anchorage. The mother’s relocation is not a circumstance that was unforeseen at the time the current parenting

plan was drafted, and was addressed in detail in that plan. There is therefore no basis under RCW 26.09.260 to modify the plan.” The Superior Court made somewhat confusing findings in Section 2.4 of the Order on Objection to Relocation (CP 134), indicating, “The petition for modification should be denied. The modified parenting plan of April 18, 2013 is effective immediately.”

The Parenting Plan itself (CP 132) provides at Section 3.11 that the parties are each to pay half of the airfare but also includes admittedly confusing language as follows: “The mother and the father shall each pay half of the airfare for the father to visit the child once per month and for the child to visit the father in Washington once a year. The mother shall reimburse the father for her share of air fare within 30 days of receipt of transportation expense verification, provided that the father books flights at least three weeks in advance and takes advantage of the best available rates for airfare, hotel accommodations, and car rentals. If the father elects to book a more expensive transportation or accommodation, the mother shall be obligated only to pay 50% of what the father would have paid had he booked his reservations at least three weeks in advance and made reasonable effort to take advantage of available savings.”

The next entry in the court record after the entry of the final orders on April 18, 2013, is CP 135, Clerk’s Minutes, indicating that a motion

hearing took place on June 17, 2013, the Honorable Suzanne Parisien presiding. The Audio Log has been transcribed and is referred to as RP 6-17-2013.

On RP 6-17-2013, page 2, line 14, the Court acknowledges that Ms. Baker's attorney was never notified, but Ms. Baker waives opportunity to reschedule. The Court also, in the same paragraph, denies that the proceeding is a hearing, and is instead a telephonic meeting.

The Court then, from RP 6-17-2013, page 2 and going to page 3, explains that she is responding to an email received from Mr. Dilworth, dated May 29th, and confirms that Ms. Baker has also seen the email. This email does not appear anywhere in the court record, and neither does any written motion of any kind from Mr. Dilworth.

Beginning at RP 6-17-2013 page 9, line 17, until page 10, line 12, the Court then declares that the parties are to share the cost of airfare, but also hotel accommodation and car rental. The Court then goes on to declare that this was taken "right out of the prior parenting plan." (RP 6-17-2013, page 10, line 17-18).

The following day, the Court issued an Order Clarifying Motion (CP 136) which instructed the parties that, "Paragraph 3.11 shall require the Petitioner to reimburse the Respondent for half of the costs of airfare, hotel accommodations and car rentals pursuant to Paragraph 3.11"

ARGUMENT

1 – THE COURT LACKED SUBJECT MATTER JURISDICTION BECAUSE OF MR. DILWORTH’S FAILURE TO BRING A MOTION

Whether a court has subject matter jurisdiction is a question of law and is reviewed de novo (Dougherty v. Dep’t. of Labor & Indus. For the State of Washington, 150 Wn.2d 310, 314 (2003) Appeal of decision of Board of Industrial Insurance filed in wrong venue cured by change of venue.)

Subject matter jurisdiction may be raised at any time (Henderson v Shinseki, 131 S. Ct. 1197, 1202 (2011) Court held that 120-day deadline to file appeals to Veterans Court ruling is not jurisdictional; Kontrick v. Ryan, 124 S. Ct. 906, 909 (2003) Debtor forfeits right to rely on time limit for creditor to file objections to bankruptcy discharge if not raised before bankruptcy court reaches merits.) Subject matter jurisdiction may be raised for the first time upon appeal. (Scanlon v. Witrak, 110 Wn.App. 682, 685 (Div I, 2002) In case involving child support arrearages, husband permitted to raise subject matter jurisdiction for the first time upon appeal.) Ms. Baker failed to raise an objection during the proceedings of June 17th, but raises objection now.

Subject matter jurisdiction is statutory. (Sullivan v Purvis, 90 Wn.App. 456, 459 (Div III, 1998) Court lacked jurisdiction because landlord failed to follow R.C.W. 59.18, the Residential Landlord Tenant Act.) A court may lack subject matter jurisdiction if relief from the court is contingent upon compliance with a requirement of a statute. (James v. Cnty of Kitsap, 154 Wn. 2d 574, 588-589 (2005) Court lacked jurisdiction because parties failed to substantially comply with procedural requirements; Habitat Watch v. Skagit Cnty, 155 Wn.2d 397 (2005) Court lacked jurisdiction because parties had not followed the requirements of the Land Use Petition Act; Christel v. Blanchard, 101 Wn.App. 13, 23 (Div I, 2000) Court erred in clarifying or modifying order when no motion for clarification or modification was before the Court.)

CR 7(b) requires that “(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. (2) The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules. (3) All motions shall be signed in accordance with Rule 11.” (In the Matter of Lindquist, 172 Wn.2d 120, 129 (2011), affidavit of prejudice

was properly dismissed because it was not accompanied by the signed motion, even though the petitioners were pro se.) (Davenport v. Davenport, 4 Wn.App. 733, 734 (Div III, 1971) No written motion was made until December, and court could not grant relief as of August, based on oral motion.)

In this case, it is apparent from RP 6-17-2013 that an email sent on May 29, 2013 initiated the hearing, but the record does not include the email, which was apparently never filed with the court clerk. In the court record, there simply is no written motion initiating this hearing.

CR 5 provides extensive instructions on service of all pleadings, including, at CR 5(e), the requirement that the pleadings be filed with the court clerk.

CR 7 requires procedures that provide notice to all parties of what issues are to be addressed, so that responsive pleadings may be prepared, attorneys may be enlisted if appropriate. “The purpose of a motion under the Civil Rules is to give the other party notice of the relief sought. CR 7(b)(1) requires that a motion ‘shall state with particularity the grounds therefor, and shall set forth the relief or order sought.’” (Pamelin Indust., Inc. v. Sheen – U.S.A., Inc., 95 Wn.2d 398, 402 (1981) case examining the sufficiency of a discovery motion.) CR 5 also ensures that all parties

receive notice of issues raised and that all pleadings, including motions, are preserved in the court records.

Ms. Baker acknowledges that in ZDI Gaming, Inc. v. State of Washington, 173 Wn.2d 608 (2012), the Court ruled that subject matter jurisdiction could not be made dependent upon procedural rules, but in that case, the issue was whether the statute in question could limit jurisdiction to one county and bar another county from hearing the case. (ZDI at 616-617) The Court found the statute, if read to limit subject matter jurisdiction (which the Court found in this case to be a reference to venue) to a single county, violated Const. art IV, § 6. The constitutionality of a statute requiring that venue be found in a particular county is a very different matter than the question of whether Washington State's Rules of Civil procedure are optional.

A judgment entered without jurisdiction is void. (Sullivan at 460.) Mr. Dilworth failed to comply with either CR 7 or CR 5. Therefore, his motion was not properly before the Court, and the Court lacked subject matter jurisdiction to amend the order.

**2 – THE COURT LACKED SUBJECT MATTER JURISDICTION
BECAUSE OF MR. DILWORTH’S FAILURE TO TIMELY MOVE
FOR AMENDMENT.**

Ms Baker relies on her statement of argument in the previous section regarding subject matter jurisdiction and does not restate it here.

The Court describes the June 18, 2013 order (CP 136) as a clarification, but it is a modification. A modification occurs when rights given to one of the parties are either extended beyond the scope originally intended or reduced, giving the party fewer rights than those originally received. (Rivard v. Rivard, 75 Wn.2d 415, 418 (1969) decree which granted the father “reasonable visitation rights” was amended to clarify what specifically constituted “reasonable visitation rights”, Christel v. Blanchard, 101 Wn.App. 13, 23 (Div I, 2000) parties were before the court to enforce terms of an existing order, and the court added new dispute resolution terms.)

CR 59 (h) provides that, “A motion to alter or amend a judgment shall be filed not later than 10 days after entry of the judgment.”

The parenting plan issued immediately after trial in this case (CP 132) made no provision for Ms. Baker to share in the costs of car rental and hotel costs. Mr. Dilworth wished to have those costs shared. This was an amendment, and not a clarification. Therefore, because Mr. Dilworth

was not timely in moving for amendment under CR 59, the Court lacked subject matter jurisdiction to make the amendment.

3 – THE COURT ERRED IN MODIFYING THE PARENTING PLAN WITHOUT MAKING APPROPRIATE FINDINGS OF FACT

The trial court’s conclusions of law are reviewed de novo. (MH2 Co. v. Hwang, 104 Wn. App. 680, 683-684 (Div III, 2001) Court’s conclusions of law regarding unlawful detainer subject to review de novo; Landmark Dev. Inc. v City of Roy, 138 Wn.2d 561, 569 (1999) Statutory questions, being questions of law, are reviewed de novo). Ms. Baker does not disagree with the Court’s findings of facts made following the April 17, 2013 trial, but argues that the conclusions of law entered on June 18, 2013 are not supported by the findings of fact.

Even if subject matter jurisdiction is found for the Court to rule following the June 17, 2013 proceeding, the Court erred in issuing a modification contrary to its own findings of fact.

RCW 26.09.260(1) requires that modifications to the parenting plan must be based on appropriate findings of fact. This section begins with the exception, “Except as otherwise provided in subsections (4), (5), (6), (8), and (10)” but upon closer review, these subsections also prescribe findings that the court must make prior to modifying a parenting plan. This has also been borne out in case law. (Shryrock v. Shryrock, 76

Wn.App. 848, 852 (Div III, 1995) Court lacked authority to make modifications to a parenting plan when it found that the plan “should not be modified”.)

In this case, following trial, the Court set forth findings of fact in two different documents, the Findings of Fact and the Order on Modification (CP 133 and CP 134 respectively). In the Order on Modification (CP 134), only two sentences relevant to the issue appear (“The petition for modification should be denied. The modified parenting plan of April 18, 2013 is effective immediately.”)

However, in the Findings of Fact (CP 133), the Court stated, at page 3, that, “The Court finds that the prior parenting plan of March, 2010 was entered by agreement and was drafted in circumstances similar to those now applicable. The parties foresaw that relocation was a probability due to the mother’s husband’s military obligations. The Court finds that the cost for the father to travel to San Antonio is not substantially different from the cost to travel to Anchorage, and is in most situations is just slightly less.” On page 4, the Court ruled, “The fact of the mother residing in San Antonio does not create circumstances that are substantially different from those that applied when the mother resided in Anchorage. The mother’s relocation is not a circumstance that was unforeseen at the time the current parenting plan was drafted, and was addressed in detail in

that plan. There is therefore no basis under RCW 26.09.260 to modify the plan.”

In the light of this unambiguous language in the Findings of Fact, the Court had no basis under RCW 26.09.260 and related case law to then significantly modify the plan. It was therefore reasonable to assume that the Parenting Plan (CP 132) at 3.11 meant what it said, that Ms. Baker was obligated to pay half of the airfare within 30 days, the arrangement that had applied in the previous two parenting plans (CP 39 and CP 92) notwithstanding the additional language regarding hotels and cars.

Therefore, the order issued on June 18, 2013 (CP 136) is a modification of the April 18, 2013 parenting plan (CP 132) as well as previous plans. No findings of fact were made following either the June 17, 2013 proceeding or the April 17, 2013 trial to support this modification.

It even appears to be the intent of the Court that the previous parenting plan should not be modified, as the Court asserts that this was taken “right out of the prior parenting plan.” (RP 6-17-2013, page 10, line 17-18).

CONCLUSION

For these reasons, this Court should void the order issued on June 18, 2013 and hold that:

1. The issues raised in the June 17, 2013 proceeding were not properly before the Court under CR 5, CR 7, and CR 59 and the Court therefore lacked subject matter jurisdiction to issue orders.
2. The Court below modified the parenting plan without making required findings of fact, and such modification should therefore be reversed.
3. The Order issued on June 18, 2013 should be declared void, and Ms. Baker should be permitted to recover any reimbursements for hotel and car rental costs made to Mr. Dilworth in compliance with the June 18, 2013 Order

Dated: August 28, 2013

Respectfully submitted,



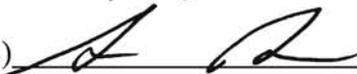
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CERTIFICATE OF SERVICE

I certify that I directed the Opening Brief of Appellant Michelle Wilburn-Donahue (not Baker) to be served by U.S. Mail on August 28, 2013 to the following:

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