90618-1

Cause No. 309657-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re Marriage of

ROBIN JOHNSON, Respondent /Appellant

v.

PETER JOHNSON, Petitioner/ Respondent

PETITION FOR REVIEW TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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PETITION FOR REVIEW

I. Identity of the Petitioner.

Robin Johnson, Respondent at the trial court, Appellant at the Court of Appeals, Division III, petitions for review by the Supreme Court of the State of Washington.

II. Citation to Court of Appeals Decision petitioned to be reviewed.

Appellant Robin Johnson seeks review of the unpublished decision of July 3, 2014, #30965-7-III. *In re Marriage of Peter Allen Johnson, Respondent and Robin Earlene Johnson, Appellant. Appended.*

III. Issues Presented for Review.

Does the Spokane County local rule LAR 0.7(d) impermissibly impinge, on the important Wa. Constitutional right to revision of a commissioner's ruling and Wa. State Court Rules, when the local rule operates to strike the motion and hearing to revise, because a phone call to the judicial assistant to the family law coordinator was made slightly after the local rule said a call disclosing the ready status of the hearing needed to be made, two days prior to the hearing.

IV. Statement of the Case.

Appellant Robin Johnson, filed a timely motion to revise a decision

of a court commissioner, who had denied her motion for a finding of contempt and a judgment for unpaid maintenance and unpaid debt her husband was ordered to pay in their decree of dissolution. A4-5. The motion to revise had to be continued several times to accommodate the court's and parties' schedules. A-5 and A-21. The continuances were in the form of court orders. A-21. Before each hearing, whether set by notice or court order, attorney for Respondent had followed the local rules' requirement to call in the hearing prior to noon, two days prior to the hearing. A-21. For the third and final ordered hearing time, attorney for Respondent called the court at about 2:00 p.m. on the correct day, rather than prior to noon. A-21. She was informed her hearing, as a matter of course, was already stricken. A-23. She motioned the court for a continuance of the hearing in order to allow compliance with the local rule, rather than a striking of the hearing, but the judge would not continue a hearing he said had already been stricken, as a matter of law, per local rule. A-22-A-23.

Strictly construed and applied and now affirmed by the Court of Appeals Div III, the power of LAR 0.7 (d) to automatically strike a revision hearing by local court rule, is now shown to be greater than the court order that set the hearing, greater than all court rules that require notice and hearing and good cause before dismissing actions, and greater than the constitutional right to revise.

The trial court noted it could not manage the high volume of requests for revision without a call-in procedure that gives the court notice to review the file materials presented to the commissioner. A-9 and A 23-29 and A-9. The court of appeals agreed, ignoring the harsh nature of the remedy. A-9.

V. Argument:

Although a call-in procedure may be necessary, the law requiring striking of the hearing – which for a revision is usually forever – if the exact parameters of the call in procedure are not followed, is the impermissible issue. The call in requirement is not just used as management, but as a clearing house escape from revision hearings – for each one that is not called in "timely", per this local rule, the volume of revisions reduces to a manageable level. It is the clearing house escape, the automatic striking, in compliance with or by operation of the local rule, that is impermissible.

LAR 0.7 directive to strike, directly contravenes the whole purpose of the Superior Court Rules which is, per CR 1, to govern all suits in such a manner as to reach the merits of the case (justness) in a speedy and inexpensive fashion.

This Court of Appeals decision from Division III, meet not just one, but all four criteria governing acceptance of review under RAP 13.4 (b). The inappropriate elevation of the power of LAR 0.7 to effect dismissal of this action, is in conflict with Washington Court Rules; in conflict with

Supreme Court Cases; in conflict with other divisions of the Court of Appeals decisions; in conflict with the State Constitution; and is of substantial public interest in Spokane County, since the trial court impermissibly curtailed an important right of litigants, claiming it was both permissible and mandatory, and now the court of appeals has affirmed, claiming that the judge giving effect to the local rules is no violation of anything.

The valuable right at stake was the right to revision as set forth by statute:

> **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.
>
> RCW 2.24.050 *emphasis added.*

The impermissible provision in local rule 0.7 "Revision of Court Commissioner's Order or Judgment" that impinged on the rights of RCW 2.24.050 was:

"The moving party shall notify the Judicial Assistant to the Presiding Family Law Judge by noon, two days before the hearing date, as to the ready status of the motion. Failure to comply with this rule will result in the motion being stricken."

LAR 0.7.

To reach an appropriate perspective on the status and purpose of a local rule, consider the chain of authority of rule promulgation.

Our constitution conferred power to the supreme court to prescribe methods of pleading, practice and procedure for all suits and all courts of this state. The purpose is to simplify the system, practice and procedure to promote "the speedy determination of litigation ***on the merits.***" RCW 2.04.190 *Emphasis added.*

Additionally, RCW 2.28.150 allows superior courts or judicial officers to effect any suitable process "most conformable to the spirit of the laws." where a course of proceeding is not specifically pointed out by statute.

CR 81 explains that Court Rules govern all civil proceedings, except where inconsistent with rules or statutes applicable to special proceedings,

and supersede all procedural statutes and other rules that may be in conflict. No Washington State Court Rules apply, specifically, to revision hearings.

CR 83 provides authority to the action of a majority of the judges in a court making local rules governing its practice, not inconsistent with State Court rules.

Synthesizing the directives of CR 83 with RCW 2.28.150, the local rules must conform to the spirit of the laws – whether statutory or State Court ruled. "Local rules cannot conflict with court rules or statutes." *Mabe v. White*, 105 Wn.App. 827, 829, 15 P.3d 681 (2001)(*citing Harbor Enter., Inc., v. Gudjonson*, 116 Wn.2d 283, 293, 803 P.2d 798 (1991).

The fundamental scope of all court rules is to effect the "*just*, speedy, and inexpensive determination of every action." CR 1. "[M]odern rules of procedure are intended to allow the court to reach the merits, not to dispose of cases on technical niceties." *Rinke v. Johns-Manville Corp.*, 147 Wn.App. 222, 227, 734 P.2d 533 (1987).

But here, Spokane County LAR 0.7 strikes hearings and actions on revision, before the judicial officer even sees the file and issues, indiscriminately barring litigants from a just determination in violation of the fundamental scope of Washington Court Rules of CR 1, and RCW 2.24.050.

LAR 0.7 has been allowed to impermissibly rise in authority and power, whereby the trial court judge believed LAR 0.7 struck the hearing as

a matter of law, and thereby allowed the force of LAR 0.7 to act as a jurisdictional bar, to strike the entire action, due to the attorney's accidental failure to call in the status of a revision hearing to a judicial assistant, by 2 hrs.

CR 41 governs dismissal of actions. CR 41 (b) allows for dismissal for failure to comply with the Superior Court rules or any order of the court, upon motion of any claim against him or her.

But under CR 41, the court is not given unfettered discretion to dismiss for failure to comply with a court order or court rule. Rather, the *Burnet* factors require the court to impose the lease severe sanctions that will be adequate to serve the purpose of the particular sanction. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 495-96, 933 P.2d 1036 (1997)

Dismissal of an action (or exclusions of witnesses) is considered to be one of the harshest remedies available to effect punishment, due to the loss of rights at stake *See Blair v. TA-Seattle East No. 176,* 171 Wn.2d 342, 348-49, 254 P.3d 797 (2011). A court is not allowed to sanction with dismissal unless the court finds three things: "willfulness of violating (court orders); substantial prejudice arising from it: and the trial court's consideration of a lesser sanction." *Id.*

CR 41 (b) (2)(D), however, also explains that CR 41 does not limit "any other power that the court may have to dismiss or reinstate any action upon motion or otherwise." This counsel found no cases discussing or

applying this provision. But this local rule LAR 0.7 does not fit the bill, because any such rule would still need to be in compliance with the spirit of the other rules of dismissal, such as a motion and hearing, and the underlying purpose of the rules, which is to reach a just determination in every action. *See CR 1.*

LAR 0.7's directive that motion to revise whose status is not called in is struck, does not reach the merits, nor justice, but was justified by the court of appeals and the superior court as a case management and efficiency tool.

But, as stated in *Burnet,* "While we are not unmindful of the need for efficiency in the administration of justice, our overriding, responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action. *See Cr 1.* " *Burnet*, 131 Wn.2d at 9.

Here, it is undisputed that Attorney for Appellant's failure to call in the hearing as ready before noon was an unintended failure to calendar mistake, not a wilfull violation of the local rule. A-5 and A-23 - A-24.

The question then is, does accidental failure to comply with a local rule where the failure did not prejudice opposing, justify, as a matter of law, automatic dismissal of Appellant's case, and preclude fulfillment of a constitutional right?

Although no case found is exactly on point regarding this kind of local rule, our prior supreme court and appellate court decisions do not allow a valuable right to be proscribed by any local rule.

In re Marriage of Lemon, 118 Wn.2d 422, 424, 823 P2d 1100 (1992) proclaims the clear precedent of longer than just the last 13 years, from *Harbor Enters., Inc. v. Gudjonsson,* 116 Wn.2d 283, 293, 803 P.2d 798 (1991) that "[t]he statue grants a valuable right to a litigant; a local rule cannot restrict the exercise of that right by imposing a time requirement different from the statute." Although these two cases dealt specifically with affidavits of prejudice and disallowing local rules to change the time frame to exercise the right to affidavit, the legal principle has been properly applied to many different kinds of valuable statutory rights.

In Wilson v. Olivetti North America, 85 Wn.App. 804, 934 P.2d 1231 (1997), Division III did not allow the lack of compliance with a local Spokane rule waive a parties' constitutional right to a jury trial, and reversed and remanded. In that case, the plaintiff had followed the State Court Rules in demanding a jury, but she had not followed the Spokane local rule requiring that the demand "be contained on a separate document." *Id.* at 808-809. Her failure to comply with the local rule was deemed by Division III an inappropriate reason to waive that constitutional right.

In *Parry v. Windermere Real Estate/East, Inc.,* 102 Wn.App. 920, 10 P.3d 506 (2000), Division 1 did not allow conformance with a case

management local rule, requiring checking of boxes on a form concerning service and joinder, to waive the valuable right to a properly claimed defense in an answer under state court rule. *Id.* at 928.

In *Mabe v. White*, 105 Wn.App. 827, 829, 15 P.3d 681 (2001) Div. 3 invalidated a Spokane local rule that restricted those qualifying for an extraordinary writ to less than those granted the right by statute.

Division I in *In re the Dependency of: R.L. and I.L.*, 123 Wn.App. 215, 98 P.3d 75 (2004) relied on the maxim from *Lemon* and *Harbor*, "where a statute grants a valuable right to a litigant, a local rule cannot restrict the exercise of that right" in the context of live testimony in a dependency hearing. Division I reversed the disallowing of live testimony in a dependency hearing, where the trial judge had relied upon a local rule to require hearing by affidavit. Because the valuable right at issue was the need for "a full and meaningful opportunity to present evidence" by live testimony in the dependency, on appeal, the local rule was not accorded deference over the valuable statutory right. *In re Dependency of: R.L. and I.L.*, 123 Wn.App., 215, 222, 98 P.3d 75 (2004)(*citing In re the Marriage of Lemon*, 118 Wn.2d 422, 424, 823 P.2d 1100 (1992)).

Division 2 in *Sorenson v. Dahlen*, 136 Wn.App. 844, 149 P.3d 394 (2006) *amended on reconsideration* 136 Wn.App. at 858 (2007), reversed a trial court decision to strike a request for a trial de novo following

arbitration, for failure of Defendant to strictly comply with a local rule. The appellate court deemed the result too harsh and found that strict compliance was not required, but that only substantial compliance was mandated to meet the orderly resolution of the matter. *Id.*

Local court rules are inconsistent when they are "so antithetical that it is impossible as a matter of law that they can both be effective." *Id.* at 853, (*quoting Heaney v. Seattle Mun. Court*, 35 Wn.App. 150, 155, 665 P.2d 918 (1983), *review denied*, 101 Wn.2d 1004 (1984)). In other words, the two rules are irreconcilable; both cannot be given effect. *Id. (citing City of Seattle v. Marshall,* 54 Wn.App. 829, 833, 776 P.2d 174 (1989)).

Can CR 41 dismissal provisions with notice and motion and requirement of very bad acts and CR 1 setting forth the purpose of court rules being to manage the expeditious determination of cases on the merits be harmonized with LAR 0.7? In contrast to the careful protection of a litigant's right to a determination on the merits, per CR 41 and CR 1, LAR 0.7 precludes all right to a judicial determination on the merits if a litigant accidentally overlooks one phone call to a judicial assistant, one time. LAR 0.7 striking and dismissal does not allow or require a hearing, or a notice prior to dismissal, or a willful violation of anything. It operates to remove a valuable right in an instance, automatically. *See* A-23 – A-25.

There is no harm in requiring litigants to call in the status of a hearing to a judicial assistant two days prior to a hearing, to ensure the

judicial officer has time and notice to review the file on revision. That leads to the effective administration of justice. The only antithetical element of LAR 0.7 is the automatic striking of the revision motion – as nothing more than an affect for non-compliance with LAR 0.7.

In the decision at issue, the court of appeals division III cites *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn.App. 125, 896 P.2d 66 (1995) to explain that the court has the discretion to manage its own affairs, for the orderly and expeditious disposition of cases. But, even *Woodhead* allows for dismissal only after finding bad faith acts in willful and deliberate disregard of reasonable and necessary court orders that have also prejudiced the other side to the action. Consistent with other case law, in *Woodhead*, lesser monetary sanctions are required for any lesser violations, not dismissal.

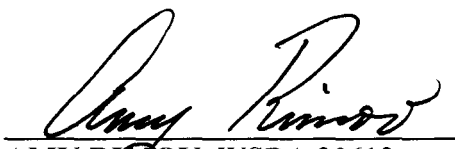
The court of appeals also claims that the call in process and striking of the hearing did not affect the constitutional and statutory right to revision, because the striking occurred after the hearing had been properly and timely noted. But the right to revision is not limited to proper filing of the notice, the constitutional right to revision encompasses the actual revision hearing and decision, and the local rule snuffed that right out with its mandatory or jurisdictional operation of local rule strike for failure to strictly follow its process – no lesser "sanction" is discretionarily offered or allowed, per the trial judge.

There is no way to reconcile the harsh result of non-compliance with the call in procedure of LAR 0.7, and CR 1; CR 41; RCW 2.28.150; and RCW 2.24.050. LAR 0.7 striking process is antithetical to the entire purpose of court rules, which is to reach the merits expeditiously, and protect the exercise of a litigant's valuable rights. LAR 0.7 impermissibly barred the exercise of the valuable constitutional right to revision of RCW 2.24.050 due to an accidental oversight. One small procedural over-sight does not justify dismissal under state court rules. *See* CR 41. The automatic strike of LAR 0.7 prohibited reaching the merits, tossing away and dismissing a litigant's valuable rights as a matter of law.

VI. Conclusion:

Appellant respectfully requests the Supreme Court of the State of Washington accept review, in order to invalidate a local rule that has harmed and continues to harm the public by impermissibly removing the valuable statutory right to revision to the unwary. The court of appeals decision is in conflict with decisions of the Supreme Court and other Court of Appeals decisions.

Respectfully submitted this 1st day of August, 2014.



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Attorney for Appellant, Robin Johnson

VII. APPENDIX

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

In re the Marriage of:	)	No. 30965-7-III
	)	
PETER ALLEN JOHNSON,	)	
	)	
Respondent,	)	
	)	
and	)	UNPUBLISHED OPINION
	)	
ROBIN EARLENE JOHNSON,	)	
	)	
Appellant.	)	

SPERLINE, J.* — Robin Johnson challenges a commissioner's ruling that declined to find Peter Johnson in contempt for failing to pay maintenance. The commissioner determined that Mr. Johnson's payment of Ms. Johnson's liabilities assigned to her in the separation decree fulfilled his maintenance obligations for the contested period. Ms. Johnson also assigns error to a superior court's decision to strike her motion to revise after she failed to comply with a local court rule that required her to notify the court of the ready status of the motion. We affirm the trial court's decision to strike Ms.

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* Judge Evan E. Sperline is serving as judge pro tempore of the Court of Appeals pursuant to RCW 2.06.150.

Johnson's motion to revise. We also affirm the commissioner's ruling denying Ms. Johnson's motion for contempt. However, we remand for the trial court to address whether Ms. Johnson is entitled to attorney fees.

FACTS

Mr. Johnson and Ms. Johnson, each acting pro se, dissolved their 30-year marriage. The parties filed a petition of legal separation and related findings. Later, the parties filed a decree of separation and attached the petition and related findings. However, the agreed-upon provisions in the decree of separation differed from the findings. In the findings, Mr. Johnson was obligated to pay spousal maintenance for seven years. However, the decree of separation did not define the length of the maintenance obligation. The decree of legal separation was eventually converted into a decree of dissolution.

Mr. Johnson's monthly maintenance obligation was to begin June 1, 2003. Between June 2003 and March 2005, Mr. Johnson did not pay maintenance directly to Ms. Johnson. However, he paid her separate liabilities, including her one-half of the mortgage payment, her car payment, and her car insurance. Ms. Johnson did not object. After the couple's home sold in March 2005, Mr. Johnson stopped paying Ms. Johnson's liabilities and began paying $1,200 for maintenance directly to her.

In May 2011, Mr. Johnson informed Ms. Johnson that he was making his last maintenance payment. Ms. Johnson filed a motion for contempt against Mr. Johnson, contending that he was obligated to pay maintenance for life as set forth in the dissolution decree. A court commissioner denied Ms. Johnson's motion, holding that Mr. Johnson's maintenance obligation was for seven years.

Ms. Johnson filed a motion for revision. The trial court's ruling on revision mirrored the commissioner's decision. However, the court noted that it was not deciding whether the seven years of maintenance had ended or whether Mr. Johnson satisfied his maintenance obligations in the first few years of separation and dissolution. The court determined that those issues needed to be presented in a separate motion.

On January 26, 2012, Ms. Johnson filed a second contempt motion, contending that Mr. Johnson owed unpaid maintenance and other financial obligations. Ms. Johnson maintained that Mr. Johnson did not make his $1,200 monthly maintenance payments between June 2003 and March 2005. She also maintained that Mr. Johnson failed to make $260 monthly payments on a VISA card account as negotiated in the decree, and that this payment was required indefinitely even though she continued to place charges on the card after dissolution. With accumulated interest, she sought a judgment of $58,573.40 and attorney fees in the amount of $4,000.

A court commissioner denied Ms. Johnson's second motion for contempt on February 28. The commissioner determined that Mr. Johnson satisfied his maintenance obligations from June 2003 until the house sold in 2005. The commissioner found that the parties mutually agreed that benefits Mr. Johnson transferred to Ms. Johnson constituted in-kind payments, satisfying his maintenance obligation. These benefits included Mr. Johnson's payment of Ms. Johnson's one-half of the mortgage and her independent use of the family home, totaling a value of $1,000. In addition, Mr. Johnson paid the utilities on the home, Ms. Johnson's health insurance, and car payment. The commissioner found that the value of these benefits exceeded the $1,200 maintenance payment.

As for the VISA payment, the commissioner found that Mr. Johnson was required to make payments of $260 per month. However, the commissioner rejected Ms. Johnson's contention that Mr. Johnson was required to make those payments indefinitely. Instead, the commissioner determined that Mr. Johnson's obligation was to pay off the account balance at the time of separation. The commissioner recognized that the parties neglected to include the account balance in the decree, likely because they were unrepresented at the time it was created. The commissioner determined that without any evidence of the balance at the time of separation, he could not make a judgment as to whether Mr. Johnson met his VISA obligation.

On March 9, Ms. Johnson filed a motion to revise the commissioner's ruling on the second contempt motion. A hearing on the revision motion was initially scheduled for March 29. Spokane County Local Administrative Court Rule (LAR) 0.7(d) required the motion hearing to be confirmed by noon, two days before the hearing, by notifying the judicial assistant to the assigned judge.

The revision hearing was continued to April 12 and then again to April 19. Ms. Johnson's attorney did not comply with LAR 0.7 for the April 19 hearing. At approximately 2:00 p.m. on April 17, counsel realized her mistake and contacted the court to note the hearing as ready. She acknowledged the delay and explained that her failure to call in was a result of a calendaring error at her office. After being notified that the trial court struck the motion, she requested an order continuing the revision hearing.

On April 19, the court heard the motion to continue. The trial court denied the motion to continue the hearing because the motion had been stricken. The court explained that striking the motion to revise was mandatory when a party fails to comply with the call-in procedures in LAR 0.7(d). And, because of the statutory time frame for filing a revision motion, the motion to revise could not be refiled.

Ms. Johnson filed a motion for reconsideration. The trial court reaffirmed its decision, stating (1) the local rule was clear and unambiguous that failure to call the court to confirm readiness of a motion for revision requires the court to strike the motion, and

(2) Ms. Johnson failed to follow the local rule that requires the moving party to discuss a requested continuance with the other party before calling in the status of the motion. As for the compelling reason justifying LAR 0.7, the court explained that it could not manage the high volume of motions for revision without a confirmation procedure that gives the court notice to review the file as it existed at the time of the commissioner's decision.

Ms. Johnson appeals. She contends that the trial court erred in striking her revision motion for failure to follow LAR 0.7(d) because the local rule conflicts with the statutory right to revision. She also contends that the commissioner erred by failing to find Mr. Johnson in contempt.

ANALYSIS

LAR 0.7. When the interpretation and application of a court rule is challenged, we apply de novo review. *Spokane County v. Specialty Auto & Truck Painting, Inc.*, 119 Wn. App. 391, 396, 79 P.3d 448 (2003).

A trial court's order dismissing an action for lack of compliance with court rules is reviewed for an abuse of discretion. *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn. App. 125, 130-31, 896 P.2d 66 (1995). "A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds." *Id.* at 131.

Ms. Johnson challenges the trial court's decision to strike her revision motion pursuant to LAR 0.7(d). She contends that LAR 0.7(d) restricts the statutory right to revision of a commissioner's ruling in RCW 2.24.050. She maintains that once a motion to revise is timely filed, the local court rule cannot take away that right by imposing an additional timing requirement.

RCW 2.24.050 provides the right to revision of a commissioner's decision by the superior court. A motion for revision must be filed within 10 days from the entry of the order or judgment of the court commissioner. RCW 2.24.050. The right to seek revision of a commissioner's decision is rooted in article IV, section 23 of the Washington Constitution. *State v. Smith*, 117 Wn.2d 263, 268, 814 P.2d 652 (1991). The loss of the right to revise is presumptively prejudicial. *State v. Wicker*, 105 Wn. App. 428, 432, 20 P.3d 1007 (2001).

Spokane County enacted LAR 0.7 to govern revision of a court commissioner's order. In addition to incorporating the 10-day rule in RCW 2.24.050, LAR 0.7 sets the procedure for hearing a revision motion. LAR 0.7(d) dictates that the moving party contact the presiding judge's assistant by noon, two days before the hearing date, as to the ready status of the motion. Failure to comply with this rule results in the motion being stricken. LAR 0.7(d).

"Superior courts have the procedural authority to adopt rules to carry out a statutory directive where a mode of proceeding is not specifically pointed out and jurisdiction is otherwise conferred upon the court." *Mabe v. White*, 105 Wn. App. 827, 829, 15 P.3d 681 (2001) (citing RCW 2.28.150). However, when a statute grants a valuable right to a litigant, the exercise of that right cannot be restricted by a local rule that imposes a time requirement different from the statute. *Harbor Enter., Inc. v. Gunnar Gudjonsson*, 116 Wn.2d 283, 293, 803 P.2d 798 (1991).

Here, the statute and the local court rule are not in conflict. LAR 0.7(d) does not restrict a litigant's right to revision by adding an additional time requirement to RCW 2.24.050. Instead, LAR 0.7(d) is a procedural court rule to manage timely motions for revision. It does not change the court's jurisdiction to hear the matter. A party gains the right by filing a revision motion within 10 days from the entry of the order or judgment of the court commissioner. RCW 2.24.050. Filing a timely motion confers jurisdiction on the superior court to hear the motion. Once jurisdiction is established, LAR 0.7(d) sets the procedure for hearing the motion. It does not remove jurisdiction or act as a jurisdictional bar.

A procedural requirement of the sort incorporated in LAR 0.7(d) is particularly important to efficient use of public resources in light of the fact that RCW 2.24.050 contains no limitation on when a revision motion must be argued, assuming it is filed

within the 10-day limitation of the statute. The elected judge to whom a revision motion is presented must duplicate the file review previously undertaken by the commissioner. Without a confirmation requirement, that investment of time may be wasted. The judge or a colleague may have to repeat the process yet again if the hearing is continued.

Here, Ms. Johnson timely filed her motion for revision in accordance with RCW 2.24.050. At that point, the court obtained jurisdiction to hear her revision motion. Ms. Johnson's revision hearing was subject to the procedural requirements of LAR 0.7(d). When Ms. Johnson failed to call in the motion as ready, the trial court struck the motion as required by the court rule. The trial court explained that it could not manage the high volume of requests for revision without a call-in procedure that gives the court notice to review the file materials presented to the commissioner.

The court did not abuse its discretion by following this mandatory rule. "A trial court . . . has the discretionary authority to manage its own affairs so as to achieve the orderly and expeditious disposition of cases." *Woodhead*, 78 Wn. App. at 129. The local court rule does not affect a party's right to move for revision.

Ms. Johnson mistakenly relies on *In re Marriage of Lemon*, 118 Wn.2d 422, 823 P.2d 1100 (1992) in support of her position. In *Lemon*, the Supreme Court invalidated a local court rule that imposed a more restrictive time frame for filing an affidavit of prejudice than required by RCW 4.12.050. *Lemon*, 118 Wn.2d at 423. The court found

that the right to a change of judge accrues when the applicant meets the statutory criteria, and that the local court could not restrict that right by imposing a time requirement different from the statute. *Id.* at 423-24. The court rule in *Lemon* is distinguishable from the rule challenged by Ms. Johnson. LAR 0.7(d) does not change the statutory criteria for exercising a right to revision in RCW 2.24.050. It is a procedural rule to manage the court's docket once the right to revision has been invoked.

LAR 0.7 does not restrict a litigant's constitutional and statutory right to revision. The court did not abuse its discretion by striking the motion in accordance with LAR 0.7. Once Ms. Johnson's motion to revise was stricken, the commissioner's decision became the decision of the superior court. RCW 2.24.050.

Contempt of Court. A superior court's decision in a contempt proceeding is reviewed for an abuse of discretion. *In re Marriage of Myers*, 123 Wn. App. 889, 892, 99 P.3d 398 (2004). A superior court abuses its discretion if its decision is based on untenable grounds or untenable reasons. *Id.* at 892-93. Superior court decisions in dissolution proceedings will seldom be changed on appeal. *In re Marriage of Griffin*, 114 Wn.2d 772, 776, 791 P.2d 519 (1990). The reviewing court must defer to the sound discretion of the trial court unless the superior court exercised that discretion "in an untenable or manifestly unreasonable way." *In re Marriage of Wayt*, 63 Wn. App. 510, 513, 820 P.2d 519 (1991).

Findings of fact supported by substantial evidence, i.e., evidence sufficient to persuade a rational person of the truth of the premise, will not be disturbed on appeal. *In re Marriage of Stern*, 57 Wn. App. 707, 717, 789 P.2d 807 (1990) (quoting *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986)). "This court will not substitute its own judgment for that of the trial court where the record shows that the trial court considered all relevant factors and the award is not unreasonable under the circumstances." *Id.*

Here, we review the decision of the commissioner as the decision of the superior court. RCW 2.24.050. Ms. Johnson assigns error to the trial court's conclusion that Mr. Johnson satisfied his maintenance payments from October 2003 to March 2005 through in-kind payments. She contends that the trial court erred in finding that the parties mutually agreed to the in-kind maintenance payments and that the in-kind payments were equivalent to the $1,200 monthly maintenance payment owed by Mr. Johnson. Also, Ms. Johnson maintains that the trial court's decision was an impermissible modification of the separation decree.

Contempt proceedings may be initiated as part of a dissolution action when the party obligated to pay maintenance fails to comply. RCW 26.18.050(1). A court may issue an order requiring the obligor to appear and show cause as to why the relief requested under a petition or motion for contempt should not be granted. RCW 26.18.050(1).

In contempt proceedings, reviewing courts apply a strict construction rule to judicial decrees that are the basis for the contempt motion. *Graves v. Duerden*, 51 Wn. App. 642, 647, 754 P.2d 1027 (1988). In such proceedings, an order will not be expanded beyond the plain meaning of its terms read in light of the issues and purposes of the order; the facts found must constitute a plain violation of the order. *Johnston v. Beneficial Mgmt. Corp. of Am.*, 96 Wn.2d 708, 712-13, 638 P.2d 1201 (1982). The purpose of this rule is to protect persons from contempt proceedings based on violations of judicial decrees that are unclear or ambiguous, or that fail to explain precisely what must be done. *Graves*, 51 Wn. App. at 647-48.

When contempt proceedings are brought upon claims for past due spousal maintenance, equitable principles have been applied to mitigate the harshness of contempt remedies when application of the principle does not cause an injustice to the former spouse. *In re Marriage of Sanborn*, 55 Wn. App. 124, 127, 777 P.2d 4 (1989). Equitable estoppel rests on the principle that when a person, by acts or representations, causes another to change position or to refrain from performing a necessary act to his or her detriment or prejudice, the person who performs such acts or makes such representations is precluded from asserting the conduct or forbearance of the other party to his or her advantage. *Hartman v. Smith*, 100 Wn.2d 766, 769, 674 P.2d 176 (1984) (quoting *Dickson v. U.S. Fid. & Guar. Co.*, 77 Wn.2d 785, 788, 466 P.2d 515 (1970)).

Equitable estoppel requires a defendant to prove that: "(1) the plaintiff asserted a statement or acted inconsistently with a claim afterward asserted; (2) the defendant acted on the faith of that statement or act; and (3) the defendant would be injured if the plaintiff were allowed to contradict or repudiate the statement or act." *In re Marriage of Capetillo*, 85 Wn. App. 311, 320, 932 P.2d 691 (1997). "'Equitable estoppel is not favored, and the party who asserts it must prove every element with clear, cogent, and convincing evidence.'" *Id.* (quoting *Sanborn*, 55 Wn. App. at 129).

Here, the plain language of the decree required Mr. Johnson to pay $1,200 per month beginning in June 2003. Mr. Johnson admits that he did not make payments directly to Ms. Johnson between June 2003 and March 2005. However, the commissioner did not abuse his discretion by denying to hold Mr. Johnson in contempt of court. The doctrine of equitable estoppel applies.

While the commissioner did not expressly apply the doctrine, it is clear that his decision relied on the equitable principle. The commissioner found that the parties entered into a mutual agreement regarding Mr. Johnson's maintenance payments from June 2003 to March 2005. Mr. Johnson acted on the mutual agreement and supported Ms. Johnson by paying her obligations. The commissioner noted that the purpose of maintenance was for payment of Ms. Johnson's housing, insurance, and car payment. These were the same obligations that Mr. Johnson paid during the contested period.

Also, the commissioner found that Ms. Johnson would receive a double payment if Mr. Johnson were required to pay back maintenance payments after providing her with benefits to her in excess of $1,200, and that this result would be absurd. The court found that Ms. Johnson never complained about Mr. Johnson's performance during this period, and that the mutual agreement resulted in terms more favorable to Ms. Johnson.

The commissioner did not abuse his discretion by denying to hold Mr. Johnson in contempt of court. The commissioner's decision is supported by the evidence. The declaration of Mr. Johnson stated that after the parties entered the decree of separation, they agreed that Mr. Johnson would pay the monthly mortgage installments pending the sale and that this would represent $653 of the $1,200 maintenance payment. He also stated that he paid all of the utilities associated with the home, Ms. Johnson's medical insurance, and Ms. Johnson's automobile insurance. These payments continued until the house was sold in March 2005. At that point, Mr. Johnson contends that he began paying the $1,200 directly to Ms. Johnson. Ms. Johnson does not dispute that these payments were made by Mr. Johnson. This evidence supports the commissioner's decision that the parties agreed that Mr. Johnson would pay Ms. Johnson's obligations, and that this in-kind payment satisfied his maintenance obligation.

The evidence also supports the trial court's finding that the value of the in-kind payments was in excess of the required maintenance payment. It is undisputed Mr.

Johnson paid $1,008.75 per month to cover Ms. Johnson's house note, car insurance, and car payment. Also, evidence shows that Mr. Johnson paid approximately $170 for Ms. Johnson's telephone and utilities and, beginning in April 2004, approximately $300 for her medical insurance. At some point before the house sold, he also made an additional telephone payment in the amount of $1,000. While Mr. Johnson was a few dollars short of the $1,200 monthly payment from June 2003 to March 2005, he more than compensated for the shortfall when he began paying Ms. Johnson's medical insurance and by making the extra utility payment. The court found that the parties had a mutual understanding that the payments were a substitute for direct payment of spousal support and that Mr. Johnson's maintenance obligation was more than satisfied from June 2003 until March 2005.

The court did not modify the decree in reaching its decision. The commissioner did not adjust the amount of past due maintenance. Mr. Johnson made the $1,200 maintenance payment to Ms. Johnson by means of payment of her obligations. The parties agreed to the payment scheme. Mr. Johnson, in carrying out this agreement, did not constitute a "plain violation" of the decree upon which a finding of contempt could be based.

As for the dispute over the VISA payments, Ms. Johnson contests the commissioner's conclusion that the decree required Mr. Johnson to pay off the balance of

the VISA. We conclude that the commissioner's decision not to hold Mr. Johnson in contempt for the VISA payments was proper, albeit for a different reason.

Contempt was not warranted because the divorce decree is ambiguous in relation to the VISA obligation. The decree is unclear as to whether the parties share the responsibility of one VISA account or whether there were two separate accounts and two separate obligations. Mr. Johnson's separate liabilities include a "VISA" with a $260 payment, while Ms. Johnson's separate liabilities include "Horizon VISA Credit Union" with a $30 payment. Additionally, the amount owed on the VISA account or accounts is not listed as a community or separate liability. The underlying debts on the accounts are not allocated to either party in the decree. Mr. Johnson cannot be held in contempt of this ambiguous decree, as his obligations under the decree are unclear.

The commissioner did not need to interpret the decree in the contempt proceeding to determine the parties' obligations. In the contempt proceeding, the commissioner's review was limited to the plain language of the divorce decree. Neither party filed a motion to clarify the decree.

While contempt of court is a remedy available to enforce court-ordered obligations, it is not the exclusive remedy. Ms. Johnson could have moved the court for entry of a judgment based on the allegedly unsatisfied obligations of Mr. Johnson under the decree. In doing so, she would have the burden of proving, by a preponderance of the

evidence, the existence and outstanding balance of the obligation. The trial court would be justified in interpreting the language of the decree in resolving these issues. The party moving for judgment on the decree would not be burdened with the strict construction principles applicable to contempt. Concomitantly, Ms. Johnson would not be entitled to invoke the remedial contempt sanctions provided by statute, including costs and fees awarded without regard to her need and ability to pay, and incarceration. RCW 7.21.030.

In sum, the commissioner did not abuse his discretion when he determined that Mr. Johnson was not in contempt of court. The commissioner's finding that Mr. Johnson did not commit a plain violation of the maintenance order is supported by the evidence. The decree is ambiguous in regard to the VISA payments and incapable of enforcement by contempt.

Attorney Fees on Appeal. A court's award of attorney fees is reviewed for an abuse of discretion. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

Ms. Johnson challenges the commissioner's denial of her request for attorney fees. She contends that the commissioner failed to consider the parties' resources and ability to pay. She also requests attorney fees on appeal under RAP 18.1, RCW 26.18.160, and RCW 26.09.140.

RCW 26.18.160 provides for an award of attorney fees and costs to the prevailing party in a contempt action for enforcement of maintenance. Ms. Johnson is not entitled

to attorney fees under RCW 26.18.160 at the trial court or on appeal. She is not the prevailing party in her contempt action.

RCW 26.09.140 allows the court to order one party to a marriage dissolution action to pay attorney fees and costs to the other party for enforcement or modification proceedings after entry of judgment, based on the financial resources of both parties. The trial court may award attorney fees in accordance with need and the other side's ability to pay. RCW 26.09.140. "The trial court must indicate on the record the method it used to calculate the award." *In re Marriage of Knight*, 75 Wn. App. 721, 729, 880 P.2d 71 (1994). A lack of findings regarding need of ability to pay requires reversal. *In re Marriage of Scanlon*, 109 Wn. App. 167, 181, 34 P.3d 877 (2001). Nothing in the statute conditions this award on whether a party prevails in an action or not. *In re Marriage of Rideout*, 150 Wn.2d 337, 357, 77 P.3d 1174 (2003).

On appeal, RCW 26.09.140 grants the appellate court discretion to award attorney fees after considering the parties' relative ability to pay and the merit of the issues on appeal. *In re Marriage of Muhammad*, 153 Wn.2d 795, 807, 108 P.3d 779 (2005).

The commissioner abused his discretion when he failed to consider Ms. Johnson's request for attorney fees under RCW 26.09.140. This attorney fee provision does not require Ms. Johnson to prevail in the contempt proceeding in order to recover attorney fees. She sought to enforce the dissolution decree. At a minimum, the trial court was

required to consider the financial resources of both parties before denying attorney fees. There are no findings in the record to indicate that the trial court undertook this review. We remand the issue of attorney fees to the trial court.

However, we decline to award Ms. Johnson attorney fees in this appeal. The merits of Ms. Johnson's contempt arguments are not sound. Additionally, while she demonstrated financial need, she did not produce documents showing that Mr. Johnson has the ability to pay.

We affirm the commissioner's ruling denying Ms. Johnson's motion for contempt. However, we remand to the trial court to determine if Ms. Johnson is entitled to attorney fees. Her request for attorney fees incurred on appeal is denied.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Sperline, J.P.T.

WE CONCUR:

Brown, A.C.J.

Korsmo, J.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

PETER A. JOHNSON, Petitioner,	)	
	)	No. 03-3-01189-2
v.	)	COA No. 309657
	)	
ROBIN E. JOHNSON, Respondent.	)	

VERBATIM REPORT OF PROCEEDINGS

BEFORE: Honorable James M. Triplet

DATES: April 19, 2012

APPEARANCES:

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Allison R. Stovall, CCR No. 2006
Official Court Reporter
1116 W. Broadway, Department No. 2
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VERBATIM REPORT OF PROCEEDINGS

APRIL 19, 2012

THE COURT: Good morning. This is Spokane County Cause No. 03-3-01189-2, Peter and Robin Johnson; neither party present. Ms. Rimov, Mr. Dudley here on behalf of their respective clients. This is Ms. Rimov's motion to continue a revision. Ms. Rimov, you're up.

MS. RIMOV: Your Honor, I am requesting a revision be continued until next week. It is within the 60 days of the local rule. The reason for the continuance is because it was -- I called it in at 2:00 and not at before noon simply because it was not on my calendar as yet. It usually is a matter of a few days' delay in getting it in the calendar, and it got missed for a couple hours. The matter has been continued a number of times, all of which were based on -- first on your absence of the vacation and then being off the bench last week being sick. Those were all called in timely.

THE COURT: Weren't there judges, though, that were available to cover those? I thought I had coverage.

MS. RIMOV: Yes, you did, and it was assigned to Ms. Clark, and then in the middle of the day --

THE COURT: Judge Clark.

MS. RIMOV: -- we got an e-mail that says she's not hearing this, and your assistant said file a motion or do a

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continuance order, which -- which we did. It wasn't specified to when the continuance order was, and I don't know why Ms. Clark --

THE COURT: Judge Clark.

MS. RIMOV: Judge Clark did not hear the motion.

THE COURT: And the -- I guess I just want to put on the record apparently there was a previous order that said that the two most recent motions are sufficiently intertwined that Judge Triplet was the one that had to hear the motion, but have I done anything on this case before?

MS. RIMOV: Yes, Your Honor. You had filed a memorandum opinion October 31st, and in the last page of that memo opinion, you're discussing the question that remains that needs to be brought before the Court. And so this motion was resolving that issue and a question for the judge in resolving that issue on the last page of your memorandum decision.

I do note that just because a hearing is stricken because it's not called in doesn't mean that it is denied from ever being continued or denied to be heard. The same local rule of 0.7(d) talks about if a person doesn't show up that has brought the revision hearing, then the motion is denied. But with the same language in the paragraph (d), one being denied and one being stricken, obviously the stricken language doesn't mean that it's gone forever. It

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just needs to be back -- put back on the docket and continued, and that's what I'm asking the Court to do today, Your Honor, to just continue this hearing until next Thursday.

I did note that the proposed order I provided -- the order on -- the language in the order had an error in it. I do ask that the judge strike April -- I think it says continued to April 19th, and it needs to be continued from April 19th to continued to April 26th. I do ask that that modification be made. Any further questions?

THE COURT: No. I've dealt with this local rule -- have a seat, Counsel -- on numerous cases, and so I'm familiar with it. I have it in front of me. Local rule requires motions to be filed -- I'm sorry -- motions to be called in for revisions by noon two days before, which is Tuesday. It's acknowledged that that didn't happen. It was called in, I think, at 2:10 p.m., so a little after 2 o'clock that day. And the rule is clear that that then strikes the motion.

Now I agree that striking a motion from a hearing does not necessarily mean that that motion's dismissed or denied, but that means then if the motion is stricken, it's not just the hearing date; it's the motion that's stricken. Because these are time sensitive, meaning that there is a statutorily prescribed time that a motion must be filed, you

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can't just re-file a new motion because it's outside the timeline.

I have interpreted this in every case that's come before me that failure to call it in or to seek a continuance before the deadline, which is the other part of the rule, that you have to confirm with the other party whether they are ready for the hearing or whether a continuance may be requested, and then notify the judicial assistant two days before that it is ready to go. So I think once it's struck, it is now barred by time from being re-filed, and I'm going to deny the request to continue. I think it's time-barred now. Do you have any other findings you want me to address?

MS. RIMOV: Would it also be appropriate to consider that the time for hearing is 1:30 today, and by noting the hearing and requesting it before the time of the hearing, it is not time-barred.

THE COURT: Your motion to revise, not the notice of hearing, the motion to revise was stricken. That's what the rule says. The moving party shall notify the judicial assistant by noon two days before the hearing as to the ready status of the motion. Failure to comply with this rule will result in the motion being stricken.

I don't read that as discretionary. I think it is mandatory that we will strike the motion. So once the

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motion is struck -- for example, let's say you had 30 days to file a motion and you -- well, I can even do it shorter. Let's say you filed the motion to revise the day of the hearing, set a hearing seven days later. Then I suppose the motion could be stricken, and you could just file a new motion; you're still within the 10 days.

Now I recognize it's a very short time frame, but that's my interpretation of this of our local rule. And again, this isn't the first time I've had this issue come up, and I have consistently held that failure to call it in strikes the motion. And unless you can still get a new motion filed within your timeline, I think that ends the motion to revise.

So again, I guess technically I'm denying the motion to continue as it wasn't timely filed. Because the motion's been stricken, it's time-barred to be filed again. Any other findings you want me to address?

MS. RIMOV: No, Your Honor.

THE COURT: Any other findings you need me to address, Mr. Dudley?

MR. DUDLEY: No, sir.

THE COURT: All right. That concludes this matter. And I have already noted on the docket that it was called in late and that the motion was struck. I have my judicial assistant do that on all of the files. I guess what I need

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today is an order denying the motion to continue. All right. That concludes that matter.

(End of Proceedings.)

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C E R T I F I C A T E

I, ALLISON R. STOVALL, do hereby certify:

That I am an Official Court Reporter for the Spokane County Superior Court, sitting in Department No. 2, at Spokane, Washington;

That the foregoing proceedings were taken on the dates and places as shown on the cover page hereto;

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this 28th day of September, 2012.

ALLISON R. STOVALL, CCR No. 2006
Official Court Reporter
Spokane County, Washington

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LAR 0.7
REVISION OF COURT COMMISSIONER'S ORDER OR JUDGMENT

(a) Revision by Motion and Notice. Revision shall be initiated by filing a motion on a form approved by the Court, with the Clerk of the Court within 10 days after entry of the order or judgment as provided in RCW 2.24.050. The motion must specify each portion of the Order for which revision is sought. The revision form shall designate a hearing date no later than 30 days after the filing of the motion. The Motion for Revision shall also be noted in accordance with Civil Rules 6 and 7. A copy of the motion for revision shall be served upon the other party, or their counsel, if represented, within 10 days after the entry of the order or judgment and at least five court days before the hearing date. An additional three days notice shall be required if service is by mail.

Amended effective 3/1/06

(b) Transcript Required. At least two days prior to the hearing on the motion, the moving party shall file a transcript of the oral ruling of the Commissioner. The moving party shall obtain the transcript at their expense. A copy of the transcript shall, at least two days before the hearing, also be served upon the other party and furnished to the Judge who will hear the motion. A transcript will not be required if the matter was decided by letter decision, or if no oral decision was rendered. The transcript shall be double spaced in at least eleven point type. The person preparing the transcript shall certify, under penalty of perjury, that it is an accurate transcription of the record. Failure to comply with these requirements may result in denial of the motion.

Amended effective 3/1/06

(c) Assignment and Procedure. Revision motions in cases that have been assigned, will be heard by the assigned judge. Family Law revision hearings involving non-assigned cases will be heard by the Chief Family Law Judge. Non-Family law revision hearings will be heard by the Presiding Judge. The Juvenile Judge will hear all Juvenile Court revision hearings. A Judge required by this rule to conduct the revision hearing, may, in the efficient administration of justice, assign the matter to another Judge.

Amended effective 9/1/12

(d) Hearing Procedure. Hearings before the Family Law Judges shall be scheduled at 1:30 p.m. on Thursdays. Hearings before other judges shall be set pursuant to motion procedures for each department. The hearing will be on the factual record made before the Commissioner. Argument will be up to 10 minutes per side. The moving party shall confirm with the other party whether they are ready for hearing, or whether a continuance may be requested. The moving party shall notify the Judicial Assistant to the Presiding Family Law Judge by noon, two days before the hearing date, as to the ready status of the motion. Failure to comply with this rule will result in the motion being stricken. The non-moving party may be granted sanctions if they appear at the time set for hearing and the matter is stricken due to non-compliance with the rule by the moving party. The Judge scheduled to conduct the hearing shall approve any order of continuance. If the moving party fails to appear at the time set for hearing, the Court may enter an order denying the motion. The Juvenile Judge shall determine the setting of motions in that Court. Absent good cause, a party seeking revision shall be deemed to have abandoned the motion if they fail to calendar the case and obtain a hearing within 60 days of the filing of the motion. Multiple orders of continuance shall not be freely granted. The agreement of the parties, standing alone, may not be deemed sufficient basis for a continuance.

Amended effective 3/1/06

(e) Emergency Motions. If a party can demonstrate exigent circumstances, an emergency motion may be presented to the Presiding Judge, upon reasonable

notice to the opposing party, without the necessity of meeting the requirements set forth in the above sections of this rule. The Presiding Judge may determine that exigent circumstances do not justify an emergency hearing. In that event, the moving party shall follow the procedures set forth above.

Amended effective 3/1/06

(f) Stay. The filing of a Motion for Revision does not stay the Commissioner's order. The moving party may seek a stay of the order from the Judge expected to conduct the revision hearing as set forth in this rule. A request for stay may also be addressed to the Commissioner who issued the judgment or order.

Amended effective 3/1/06

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.

[1988 c 202 § 1; 1971 c 81 § 10; 1909 c 124 § 3; RRS § 86.]

Notes:

Severability -- 1988 c 202: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1988 c 202 § 97.]

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C

Effective:|See Text Amendments|

West's Revised Code of Washington Annotated Currentness
Title 2. Courts of Record (Refs & Annos)
Chapter 2.28. Powers of Courts and General Provisions (Refs & Annos)
➡➡ 2.28.150. Implied powers--Proceeding when mode not prescribed

When jurisdiction is, by the Constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.

CREDIT(S)

[1955 c 38 § 15; 1891 c 54 § 12; RRS § 69.]

HISTORICAL AND STATUTORY NOTES

Laws 1955, ch. 38, § 15, substituted "is" for "be" after "proceeding"; and substituted "the laws" for "this code" at the end of the section.

Source:

RRS § 69.

LIBRARY REFERENCES

Action 16, 20.
Westlaw Topic No. 13.
C.J.S. Actions §§ 10 to 12, 66 to 67, 69, 71 to 72, 74 to 77.

RESEARCH REFERENCES

ALR Library

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C

West's Revised Code of Washington Annotated Currentness
Part IV Rules for Superior Court
Superior Court Civil Rules (Cr)
I. Introductory (Rules 1-2A)
➡ RULE 1. SCOPE OF RULES

These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

CREDIT(S)

[Amended effective September 1, 2005.]

NOTES OF DECISIONS

Application of rules 3
Construction of rules 1
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1. Construction of rules

Superior court civil rule stating that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action" did not create basis for permitting an action to remain in county in which venue was not proper, despite plaintiff's contention that the action was more advanced, and would be more swiftly resolved, than action defendant had sought to initiate in another county, which action had been stayed pending venue dispute; the civil rule did not provide authority for disregarding venue statute, and there was no advantage to maintaining the case in the venue advocated by plaintiff. Moore v. Flateau (2010) 154 Wash.App. 210, 225 P.3d 361, review denied 168 Wash.2d 1042, 233 P.3d 889. Venue 46; Venue 51

Time computation rule of excluding weekends and holidays from time periods of less than seven days did not apply to three-day waiting period for landlord to commence unlawful detainer action after serving notice of need to pay rent or surrender premises; the ordinary meaning of "day" in the unlawful detainer statute was twenty-four hour period be-

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C

West's Revised Code of Washington Annotated Currentness
Part IV Rules for Superior Court
Superior Court Civil Rules (Cr)
6. Trials (Rules 38-53.4)
➡ **RULE 41. DISMISSAL OF ACTIONS**

(a) Voluntary Dismissal.

(1) *Mandatory.* Subject to the provisions of rules 23(e) and 23.1, any action shall be dismissed by the court:

(A) By Stipulation. When all parties who have appeared so stipulate in writing; or

(B) By Plaintiff Before Resting. Upon motion of the plaintiff at any time before plaintiff rests at the conclusion of his opening case.

(2) *Permissive.* After plaintiff rests after his opening case, plaintiff may move for a voluntary **dismissal** without prejudice upon good cause shown and upon such terms and conditions as the court deems proper.

(3) *Counterclaim.* If a counterclaim has been pleaded by a defendant prior to the service upon him of plaintiff's motion for **dismissal**, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court.

(4) *Effect.* Unless otherwise stated in the order of **dismissal**, the **dismissal** is without prejudice, except that an order of **dismissal** operates as an adjudication upon the merits when obtained by a plaintiff who has once dismissed an action based on or including the same claim in any court of the United States or of any state.

(b) Involuntary Dismissal; Effect. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for **dismissal** of an action or of any claim against him or her.

(1) *Want of Prosecution on Motion of Party.* Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff, counterclaimant, cross claimant, or third party plaintiff neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined, unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss. Such motion to dismiss shall come on for hearing only after 10 days' notice to the adverse party. If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.

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(2) ***Dismissal*** *on Clerk's Motion.*

(A) Notice. In all civil cases in which no action of record has occurred during the previous 12 months, the clerk of the superior court shall notify the attorneys of record by mail that the court will dismiss the case for want of prosecution unless, within 30 days following the mailing of such notice, a party takes action of record or files a status report with the court indicating the reason for inactivity and projecting future activity and a case completion date. If the court does not receive such a status report, it shall, on motion of the clerk, dismiss the case without prejudice and without cost to any party.

(B) Mailing Notice; Reinstatement. The clerk shall mail notice of impending **dismissal** not later than 30 days after the case becomes eligible for **dismissal** because of inactivity. A party who does not receive the clerk's notice shall be entitled to reinstatement of the case, without cost, upon motion brought within a reasonable time after learning of the **dismissal.**

(C) Discovery in Process. The filing of a document indicating that discovery is occurring between the parties shall constitute action of record for purposes of this rule.

(D) Other Grounds for **Dismissal** and Reinstatement. This rule is not a limitation upon any other power that the court may have to dismiss or reinstate any action upon motion or otherwise.

(3) *Defendant's Motion After Plaintiff Rests.* After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a **dismissal** on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in rule 52(a). Unless the court in its order for **dismissal** otherwise specifies, a **dismissal** under this subsection and any **dismissal** not provided for in this rule, other than a **dismissal** for lack of jurisdiction, for improper venue, or for failure to join a party under rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross Claim, or Third Party Claim. The provisions of this rule apply to the **dismissal** of any counterclaim, cross claim, or third party claim. A voluntary **dismissal** by the claimant alone pursuant to subsection (a)(1) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of taxable costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

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(e) Notice of Settlements. If a case is settled after it has been assigned for trial, it shall be the duty of the attorneys or of any party appearing pro se to notify the court *promptly* of the settlement. If the settlement is made within 5 days before the trial date, the notice shall be made by telephone or in person. All notices of settlement shall be confirmed in writing to the clerk.

CREDIT(S)

[Amended effective September 1, 1997.]

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I. IN GENERAL

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C

West's Revised Code of Washington Annotated Currentness
Part IV Rules for Superior Court
Superior Court Civil Rules (Cr)
II. General Provisions (Rules 81-86)
➡ **RULE 83. LOCAL RULES OF COURT**

(a) Adoption. Each court by action of a majority of the judges may from time to time make and amend local rules governing its practice not inconsistent with these rules. Local rules shall be numbered and indexed in a manner consistent with the numbering and index system for the Civil Rules.

(b) Filing with the Administrator for the Courts. Local rules and amendments become effective only after they are filed with the state Administrator for the Courts in accordance with GR 7.

CREDIT(S)

[Amended effective January 1, 1976; January 1, 1981; October 19, 1999.]

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1. In general

For purposes of **CR 83**(a), which permits adoption of local superior court rules which are "not inconsistent" with statewide civil rules for superior courts, local rule is consistent with statewide rules when both local rule and statewide rules can be reconciled and given effect. King County v. Williamson (1992) 66 Wash.App. 10, 830 P.2d 392.

Under **CR 83** and GR 7, no formal action or order need be promulgated to document the concurrence of a majority of the judges in adopting a local superior court rule, and such a rule is valid without it being entered into the records of the county clerk. The requirement of **CR 83** and GR 7 that local court rules be consistent with rules adopted by the Supreme Court means that local rules must be capable of reconciliation with statewide rules so that both can be given effect. State v. Chavez (1988) 111 Wash.2d 548, 761 P.2d 607.

A local court rule which is inconsistent with the Superior Court Civil Rules, in violation of **CR 83**, is void. Hessler

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STATE OF WASHINGTON,
COURT OF APPEALS, DIVISION III

PETER JOHNSON,

RESPONDENT,

And,

ROBIN JOHNSON,

APPELLANT.

No.: 309657-III

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 1st day of August, 2014, a copy of the Petition for Review, in the above-captioned matter, as well as this Certificate of Service was caused to be served on the following person in the manner indicated:

Via HAND DELIVERY: Matthew Dudley
2824 E 29th Ave 1B
Spokane, WA 99223

Signed this 1st day of August, 2014 in Spokane Washington.

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