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Court of Appeals No. 64834-9-1
Snohomish County Superior Court 03-3-02479-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:
CHRISTINE L. BROWN (KNA McCAULEY),
RESPONDENT,
v.
FRED F. BROWN,
APPELLANT

BRIEF OF RESPONDENT

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COURT OF APPEALS
DIVISION I
EVERETT, WA

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I. STATEMENT OF FACTS

The facts of this case, at least insofar as this appeal is concerned, are not at issue. The Appellant, Fred Brown, brought a motion to terminate spousal support and that matter was sent to arbitration. An award was issued (sub no. 99) from that award, the respondent filed a request for a trial de novo (sub no. 103) and the matter proceeded to trial. At the time of trial, the court found the income of the parties and adjusted support and maintenance. At trial the respondent's position at the time of trial did not improve her position as provided for in the arbitration award.

II. ISSUE

The trial did not err in exercising discretionary authority over attorney fees even though the respondent did not improve her position from an arbitration where the matter was limited to family law issues.

III. ARGUMENT

The issue in this case is whether or not the trial court has discretion in awarding attorney fees against a party who has failed to improve their position in an action involving maintenance and/or child support when following an arbitration that party fails to improve his or her position at the time of trial. The two statutes appear to govern the situation. The first

statute is RCW 7.06.060, which provides, in part “the Superior Court shall assess costs and reasonable attorneys fees against a party who appeals the award and fails to improve his or her position on the trial de novo.” The second statute, which applies to this situation, is RCW 26.09.140, which provides in part:

“The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney’s fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment. Upon appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney’s fees in addition to statutory costs.”

RCW 7.06.060 appears to make the award of reasonable attorney fees against a party who requests a trial de novo but fails to improve their position mandatory. RCW 26.09.140 makes that same award of attorney fees discretionary.

The trial court, applying rules of statutory construction found that RCW 26.09.140 should control. The trial court’s analysis in this matter should prevail on appeal.

RCW 7.06.060 includes within its scope, all cases scheduled for the arbitration process. In this sense it applies generally to all types of cases. RCW 26.09.140 is specific as to family law cases.

Only when two statutes dealing with the same subject matter “conflict to the extent that they cannot be harmonized” will a more specific statute supersede a general statute superseded a general statute. In re Estate of Kerr, 134 Wash.2d 328, 343, 949 P.2d 810 (1998) *Walker v. Wenatchee Valley Truck and Auto Outlet, Inc.* 2010 wl 961598, 4 (Wash.App.Div.3)(Wash.App.Div. 3,2010)

Similarly, the court has ruled,

It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act and thus conflict with it, the special act will be considered as an exception to, or qualification of, the general statute, whether it was passed before or after such **846 general enactment. If it was passed before the general statute, the special statute will be construed as remaining an exception to its terms, unless it is repealed by express words or by necessary implication. *People v. Breyer*, 139 Cal.App. 547, 34 P.2d 1065 (1934); 2A C. Sands, *Supra*; 82 C.J.S. Statutes, *supra*. *Wark v. Washington Nat. Guard* 87 Wash.2d 864, 867, 557 P.2d 844, 845 - 846 (WASH 1977)

The court has previously ruled in the case of *Leslie v. Verhey*, 90 Wash.App. 796, 954 P.2d 330 (1998) that the application of RCW 26.09.140 should prevail over the language of MAR 7.3.

The public policy behind the *Leslie v. Verhey* matter is significant. Family law cases, including child support and maintenance awards have arisen as equitable common law actions. While there are codified, they are equitable in nature. The Washington legislature has, from time to time adopted a rule that the prevailing party should be awarded attorney fees in an action, but that rule has never extended to family law cases. The award

of attorney fees in family law matters has traditionally been discretionary, even an appeal.

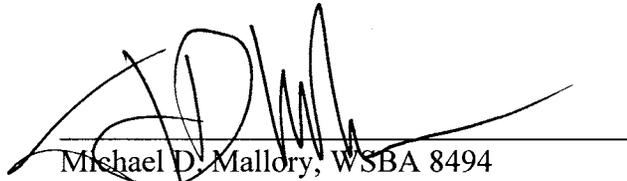
The discretionary authority with regard to attorney fees in family law cases is particularly appropriate when, as here, one of the issues was child support. A parent who is acting as an advocate for the best interest of their children should not be penalized for attempting to achieve a reasonable result. The reasonability of a parents action with regard to their position at trial may affect the trial courts discretionary award of fees, RCW 7.06.060 does not grant judges the authority to determine the reasonableness of conduct, only the reasonability of fees.

IV. CONCLUSION

The statutes governing the award of attorney fess for family law matters that proceed through the mandatory arbitration process are in conflict. The values of statutory construction provide that the statute specific to family law matters should control. The public policy surrounding the award of attorney fees and family law matters is to maintain the discretionary flexibility of judges to fashion a just and equitable result. The decision of the trial court in this case not to award attorney fees to the Appellant should be upheld.

DATED this 4th day of May 2010.

Respectfully submitted,



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Appendix

Statutes and Rules

A. Statutes

RCW 26.09.140. Payment of costs, attorney's fees, etc.:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.

The court may order that the attorney's fees be paid directly to the attorney who may enforce the order in his name.

RCW 7.06.060. Costs and attorneys' fees:

(1) The superior court shall assess costs and reasonable attorneys' fees against a party who appeals the award and fails to improve his or her position on the trial de novo. The court may assess costs and reasonable attorneys' fees against a party who voluntarily withdraws a request for a trial de novo if the withdrawal is not requested in conjunction with the acceptance of an offer of compromise.

(2) For the purposes of this section, "costs and reasonable attorneys' fees" means those provided for by statute or court rule, or both, as well as all expenses related to expert witness testimony, that the court finds were reasonably necessary after the request for trial de novo has been filed.

(3) If the prevailing party in the arbitration also prevails at the trial de novo, even though at the trial de novo the appealing party may have improved his or her position from the arbitration, this section does not

preclude the prevailing party from recovering those costs and disbursements otherwise allowed under chapter 4.84 RCW, for both actions.

B. Court Rules

RULE 7.3 COSTS AND ATTORNEY FEES:

The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo. The court may assess costs and reasonable attorney fees against a party who voluntarily withdraws a request for a trial de novo. "Costs" means those costs provided for by statute or court rule. Only those costs and reasonable attorney fees incurred after a request for a trial de novo is filed may be assessed under this rule.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

<p>In re the Marriage of:</p> <p>CHRISTINE L. BROWN (KNA MCCAULEY),</p> <p style="text-align: right;">Respondent,</p> <p>AND</p> <p>FRED F. BROWN,</p> <p style="text-align: right;">Appellant.</p>	<p>NO. 64834 9-I [Court of Appeals] NO. 03-3-02479-3 (Snohomish County)</p> <p>CERTIFICATE OF SERVICE</p>
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I hereby certify on this 4th day of May 2010, I caused true and correct copies of the *Brief of Respondent*, and this *Certificate of Service*, to be served on the following in the manner indicated:

Via US Mail:
Mr. Fred Brown
1013 140th St. CT NW
Gig Harbor, WA 98332

Via Messenger:
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Seattle, WA 981010-1176

I certify under penalty of perjury under the law of the State of Washington that the foregoing is true and correct:

Dated this 4th day of May 2010.



Jamie L. Franzen, Paralegal