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No 68357-8-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of

DANIEL McMINN

Respondent

v.

LORI McMINN

Appellant

BRIEF OF RESPONDENT

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STATEMENT OF CASE

On October 31, 2011 Lori McMinn (the mother) registered an Indiana child support order requesting a judgment for past due support under RCW 26.21A.505. The affidavit dated August 5, 2011, which she filed in support at the time stated that the debt was \$19,394.72. (CP 168) She did not say which payments of child support were alleged not to have been paid, only that a total of \$69,394.72 had been ordered and that Mr. McMinn (the father) had paid \$50,000. (CP 168) Since there was no current child support obligation, the sole reason to register the child support order was to collect past due support.

The father objected to the registration of the child support order on the grounds that all child support owed had been paid. RCW 26.21A.530. He supplied copies of checks from as far back as bank records were available until the parties' child began college. College expenses had been paid by a trust fund established by the father's great aunt, and two inheritances. The mother made no contribution. She in fact received reimbursement from the trust for pre-college expenses.

The court commissioner requested additional briefing. In response to the checks the father was able to provide, the mother refined her claim

to claiming that the missed payments were for the prior time when checks were unavailable and for payments allegedly due her when the child was away at college being supported by his trust and inheritances. She now claimed that more child support was owed beyond what she had requested before.

Upon weighing the evidence, the court commissioner denied judgment, after which an untimely motion for revision was denied.

ISSUES

Respondent believes that the following issues are before the court.

1. Is an order entered without prejudice appealable under RAP 2.2
2. Was it error for the judge to deny a time barred motion for revision
3. Was it error for court commissioner to not enter a judgment for past due child support when mother did not consistently state a sum certain she claimed was due?
4. Was it error for the court commissioner not to enter judgment in favor of mother for past due child support when evidence showed she was not owed any unpaid child support?

ARGUMENT

I PROCEDURAL ISSUES

The mother has not set forth an appealable issue. Neither Commssioner Wagoner's order denying registration of an Indiana Support

Order nor Judge Lucas's order denying a motion for revision of the commissioner's order is appealable.

1. Appealability of the Commissioner's Ruling

(a) Because it was "without prejudice," CP 32 Commissioner Wagoner's order of January 26, 2012, is not appealable:

The order dismissing the petition for distribution of undisclosed assets without prejudice is not appealable as a matter of right. RAP 2.2 specifically enumerates which superior court decisions are appealable as a matter of right. Under RAP 2.2(a)(3) an appeal is permitted from (a) any written decision affecting a substantial right in a civil case which in effect determines the action and prevents a final judgment or discontinues the action. Under this rule decisions are appealable which in substance determine the action and prevent a final judgment. See generally **2A L. Orland, Wash.Prac.**sec 3064 (3d 3d. 1978); **Washington State Bar Association, Washington Appellate Practice Handbook** sec 9.3(e) (1980)

Here, the *order of dismissal without prejudice* (Emphasis supplied) does not satisfy this criteria because it is not a decision which determines the action, prevents a final judgment or discontinues that action. *The former wife was free to commence an action in accordance with the civil rules seeking the same relief.* (Emphasis supplied.) Accordingly we hold the order of dismissal without prejudice is not appealable as a matter of right under RAP 2.2. It is therefore only subject to discretionary review.

In re the Marriage of Molvik, 31 Wn.App. 133, 134-5, 639 P.2d 238 (1982)

In this case the court commissioner not only left the mother free to commence another action, the commissioner suggested one action she might commence.

(b) The mother's only appellate remedy, therefore, would be discretionary review under RAP 2.3, which would be available only when there has been either obvious error, RAP 2.3(b)(1) or "probable error which substantially alters the status quo or substantially limits the freedom of a party to act." RAP 2.3(b)(2)

It was surely not obvious error for Commissioner Wagoner to refuse to enter a judgment against the father when (a) the mother did not ever settle on exactly the amount of the judgment she was seeking and, further, when (b) there is substantial evidence that the alleged debt for which she wanted judgment had been paid in full.

Because the order of dismissal was not appealable as a matter of right, the notice of appeal will be given the same effect as a notice of discretionary review. RAP 5.1(c) Under RAP 2.3(b)(2) discretionary review will be accepted only if the trial court has committed probable error and the decision substantially limits the freedom of a party to act.

Molvik at 135

Under RAP 2.3 discretionary review is appropriate either if (1) the court commissioner "committed an obvious error," or if the court commissioner "committed probable error" and "the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act."

It is not “obvious error” for the court to have found, on the evidence before it, that the father had paid all the child support he owed. The status quo has not been altered: That the court commissioner did **not** alter the status quo, as required by RAP 2.3(b)(2) is precisely what Ms McMinn wants to appeal. The mother’s freedom to act has not been substantially limited. Ms McMinn remains free to return to Indiana and attempt to get a judgment against the father, as the court commissioner suggested.

2. Appealability of the Judge’s Ruling.

(a) By denying the mother’s motion for revision, Judge Lucas left Commissioner Wagoner’s order in place, leaving the mother precisely where she would have been had she not made a motion for revision.

[U]nless 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

Consequently the mother retains the same right to apply for the same relief that Commissioner Wagoner left her with as she had before her motion for revision was denied.

Therefore she cannot appeal this order under RAP 2.2 anymore than she can appeal Commissioner Wagoner's order under RAP 2.2.

(b) Discretionary review of Judge Lucas's order denying the mother's motion for revision would be available only if it were available under RAP 2.3(b)(1)(2) or (3), each of which requires readily apparent error as a precondition of appealability.

But there was no error in denying the mother's motion for revision. The judge did precisely what the statute required him to do: dismiss a motion for revision that did not meet the requirements of the statute.

A motion for revision must be filed (RCW 2.24.50) and served (SCLCR 7) within ten days of entry of the order sought to be revised. The ten days in this case expired on Monday February 6, 2012. Therefore, the mother's revision motion, dated February 7, 2012 (CP 24) and filed February 8, 2012 (CP 15) was neither filed nor served on time. Failure to do so is jurisdictional and cannot be waived by the court.

"Under RCW 2.24.050, however, in the absence of a motion to revise within 10 days of the entry of the Commissioner's order on September 23, 1993, the order was final and was subject only to appellate review." *State v. Mollich*, 132 Wn.2d 80, 83, 936 P.2d 408 (1997)

"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 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

This language clearly and unambiguously gives the party requesting superior court review of a commissioner’s order only 10 days from the date of the commissioner’s order to move for revision. The statute also clearly and unambiguously provides that a party who fails to act within 10 days must seek relief from the appellate court. (emphasis supplied) See *State v. Mollich*, 132 Wash.2d 80, 93, 936 P.2d 408 (1997)

Robertson v. Robertson, 113 Wn.App. 711, 714 – 715, P.3d 708 (2002)

“Where statutory language is plain and unambiguous, a statute’s meaning must be derived from the wording of the statute itself.” *Human Rights Comm’n ex rel. Spangenberg v. Cheney Sch, Dist. No. 30*, 97 Wash.2d 118, 121, 641 P.2d 163 (1982) See also *Erection Co. V. Department of Labor and Indus.*, 121 Wash.2d 513, 852 P.2d 288 (1993); *Marquis v. City of Spokane* 130 Wash.2d 97, 107, 922 P.2d 43 (1996) (under our rules of statutory construction, a statute clear on its face is not subject to judicial interpretation). We have no license to rewrite explicit and unequivocal statutes.

State v. Mollich, 132 Wn.2d 80, 85, 936 P.2d 408 (1997)

The statute, the case law interpreting the statute, and the local rule are all clear and unambiguous.

The motion for revision was filed late. It was served late. Late mailing added an extra day of delay. The most the mother can claim as an excuse for late filing and late service would be that complying with the

statute and court rule were inconvenient. That is insufficient. The time barred motion for revision was properly denied.

II SUBSTANTIVE ISSUES

1. Judgment for an uncertain sum is not possible. The mother, in her initial pleading, asked for judgment against the father for \$19,394.72 for unpaid child support under and Indiana Child Support Order. CP 170. At various times she requested different amounts: \$24,374.72, CP 204; \$11,015.00, CP 197; \$45, 445.00, CP 200; \$31,416.09, CP 133; and \$30,565.25, CP 5. Under the Indiana Order, there was no current support due, so the only possible issue could have been the amount of any past due support.

In order to grant the mother's request that judgment be entered it would be absolutely crucial in this case to determine **which** child support payments, if any, have not been made and when they were was due, since 18% interest is being claimed from the dates due.

Consequently, without even considering the father's evidence of payment in full, it was reasonable for the court commissioner to conclude that she could not enter a judgment for a sum certain, deny the mother's request without prejudice and grant permission to determine if "a sum certain continues to be owed." CP 32

2. *All child support due has been paid.* The father supplied copies of cancelled checks (CP 223 – 264) for the period February 2005 to August 2008, when Aaron entered college. Prior to February 2005 copies of cancelled checks were not available. CP 72 In addition to his certainty that he had made those pre-February 2005 payments, CP 144, the father was forced to rely on two inferences: (a) Had he missed some payments the mother surely would not have waited seven or more years to complain, and (b) Since he could show it was his regular pattern to pay all support due when it was due for the period when records were available, it was reasonable to infer that he had paid regularly prior to then.

Since the father can prove payment for an extended period of time, all of the time for which records are available, one can infer under ER 406, habit and routine, that his payments were just as regular when there are no records: ER 406: “Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not, and regardless of the presence of eyewitnesses, is relevant to prove the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.” Evidence of regular payment for all times for which records exist is evidence of regular payment at all times.

Also, there is a defense of laches against the mother’s claim that child support that was paid more than ten years ago is precisely the child

support owed **after and only after the mother's discovering that is precisely which child support payments it was for which the father no longer has documentary proof.**

3. *Payment by third party.* By agreement of the mother and father, (CP 144) when the child entered college his expenses were paid from a trust established by the father's great aunt, an inheritance, a pay on death account and earnings. CP 81 The mother has not claimed to have made any contribution. In fact she was reimbursed for expenses she had incurred while the child was in high school and she was receiving child support. CP 81

Under both Washington and Indiana law the fact that all expenses were paid by someone other than the mother out of money in which the mother had no interest relieved the father of a duty to pay the mother for the same expenses.

4. *Indiana Law.* Indiana appears to be much more sympathetic to enforcement of private agreements about child support than Washington is. Aaron was fortunate enough to receive two sizable inheritances: \$25,000 from his grandmother; and stock worth \$33,000 in pay on death accounts and \$112,000 in trust from the father's great aunt. CP 80

The parents agreed (1) that Mrs. McMinn would be the parent responsible for dealing with the trust and (2) that the trust would be

responsible for Aaron's college expenses including room and board.

Because of the trust monies, the parties agreed that the trust would cover Aaron's post secondary expenses. CP 144,5

There was ample money to do so, from three sources: a trust with \$112,000 from the father's great aunt, CP 80, an inheritance from Aaron's grandmother, of \$25,000 and a pay on death account for \$33,029.46 CP 73. In fact there were sufficient funds for the mother to receive reimbursement for pre-college expenses that would normally have been her responsibility. CP 81 Under Indiana law courts are sympathetic to arrangements made between the parties even though not reduced to a court order.

Arrangements the parties have worked out between themselves should be honored where their interests and theirs alone, are at stake . . . I would find that the wife is estopped from seeking court relief to adjust a financial arrangement that both parties had lived with, and come to rely upon for more than a decade.

Vagenas v. Vagenas, 879 NE 2d 115 (2008 Westlaw pp 6

Rules of law should be structured so far as possible to facilitate the affairs of ordinary citizens without the need of for legal advice. Most people believe a deal is a deal if it is clear, fair, and knowingly reached through arms length bargaining.

Vagenas at 7

5. *Washington Law Unjust Enrichment*. Under Washington law the same result would be reached. **All child support owed under the order**

has been paid. All child support owed which was not paid by the father was paid by a trust established in her will by his great aunt Betty B. Lynd.

The case of *Boisen v. Burgess*, 87 Wn.App. 912, 943 P.2d 682 (1997) is controlling.

In *Boisen* all of the children's college expenses were paid by the mother's estranged husband, their step-father, to benefit the children, his step-children. The mother then sought to have the father reimburse **her** for expenses she had not paid on the theory that her estranged husband's payments should be credited to her. The court of appeals denied her request.

Because the mother and her current husband were estranged, his earnings, which paid the college expenses, were his separate money and she was not entitled to claim any part of the payment as **her** payment. Since she had paid no college expenses she was entitled to nothing in compensation for college expenses. "Reimbursement" to her for college expenses would be clear unjust enrichment

Here, in this case, the facts are even **more** compelling. There is no possible argument that college support made as a gift by the father's great aunt was somehow payment by the mother and should be credited to her. Presumably when Ms Lynd established a trust to pay the child's college expenses, she intended to benefit her great nephew, the father, and her

great-grand-nephew, his son. She did **not** pay the college expenses in order to enable the child's mother to sue the child's father for not personally paying the college expenses. In any event, the mother paid nothing that the father was supposed to pay and should receive nothing in "compensation."

The mother apparently claims that the child support order, in addition to requiring the father to pay Aaron's college expenses, required him to continue to the mother \$96.92 per week, even though Aaron was not residing with her or being supported by her. That is not a unreasonable interpretation of the child support order.

In another college expense case, it was ruled that where equity permits, the court can relieve a party of a past due obligation "if such could be done without an injustice to the plaintiff." *Mathews v. Mathers*, 1 Wn.App. 838, 843, 466 P.2d 208 (1970) The equitable reason to relieve Mathews of a child support obligation to the mother was that the children were away at college and she did not pay their expenses. See also *Marriage of Hughes* 69 Wn.App. 778, 850 P.2d 555 (1993); *Schumacher v. Watson*, 100 Wn.App. 208, 997 P.2d 399 (2000); and *In re Custody of CCM*, 149 Wn.App. 184, 202 P.3d 971 (2009) These cases all cite *Mathews* and affirm the equitable principle in abrogating a child support obligation in an order in the interests of justice.

6. *Emancipation.* Under Indiana law, when Aaron entered college he became emancipated since he was “not under the care or control of either parent.” Indiana code 31--16--6—6(b)(3)(A)

He was self supporting, both from his trust fund and also from additional bequests and his campus employment. That ended any need or duty of child support from either parent.

Educational support was ended by Aaron’s being self-supported by his trust, his employment, and his additional inheritance. In any event, Ms McMinn paid no educational expenses. So there is nothing to reimburse **her** for, even if, arguendo, there had been a duty for Mr. McMinn to do so.

It is important to see that the Indiana statute says that the child becomes emancipated as soon as the emancipating situation occurs, not when a court determines that emancipation has taken place.

7. *Deference to Court Commissioner.* Obviously credibility is a major issue in this case. The father says he paid child support; the mother says he didn’t. Credibility is particularly an issue when she changes her mind about which payments are owing after she finds out which records he has.

Since credibility an issue, court commissioner’s findings given deference and reviewed only for abuse of discretion.

The court decided to defer to the trial judge and review the decision only for an abuse of discretion, *Jannot* 37 P.3d at 1267-68. The court reasoned, in part, that “a local trial judge handles domestic dockets frequently, sometimes exclusively. He or she reviews and considers questions on a regular basis and is therefore in a much better position than us to pass upon the merits of competing allegations and affidavits. *Jannot* 37 P.3d at 1267. We agree. . . . The trial courts are better equipped to resolve conflicts and draw inferences from the evidence. Although the commissioner here decided the issue on declarations, he could have taken testimony if the declarations were inadequate to resolve the credibility issue and disputes between the declarations.

In re the Marriage of Rideout, 110 Wn.App. 370, 375-76, 40 P.3d 1192 (2002)

8. *Time Barred Revision Motion* The court was correct when it denied the mother’s untimely motion for revision. A motion for revision must be filed (RCW 2.24.50) and served (SCLCR 7) within ten days of entry of the order sought to be revised. The ten days in this case expired on Monday February 6, 2012. Therefore, this revision motion was neither filed nor served on time. Failure to do so is jurisdictional and cannot be waived by the court.

“Under RCW 2.24.050, however, in the absence of a motion to revise within 10 days of the entry of the Commissioner’s order on September 23, 1993, the order was final and was subject only to appellate review.” *State v. Mollichi*, 132 Wn.2d 80, 83, 936 P.2d 408 (1997)

“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 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

This language clearly and unambiguously gives the party requesting superior court review of a commissioner’s order only 10 days from the date of the commissioner’s order to move for revision. The statute also clearly and unambiguously provides that a party who fails to act within 10 days must seek relief from the appellate court. (emphasis supplied) See *State v. Mollich*, 132 Wash.2d 80, 93, 936 P.2d 408 (1997)

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State v. Mollich, 132 Wn.2d 80, 85, 936 P.2d 408 (1997)

The statute, the case law interpreting the statute, and the local rule are all clear and unambiguous. The *Robertson* court observed that “Shellie [the appellant] has offered no support for the proposition that a

court may ignore a clear statutory mandate absent a finding that the statute is unconstitutional.” RCW 2.24.050 is not unconstitutional. Both the *Mollichi* and *Robertson* courts have declined to find the revision statute unconstitutional.

9. *Correct Result.* Commissioner Wagoner’s order is not a paradigm of clarity. Consequently the mother chooses to focus on statute of limitations and ignore the father’s proof of payment in full and her own failure to decide exactly what she claimed was owed. But what is relevant is that the decision was correct. . “[A]n appellate court can sustain the trial court’s judgment upon any theory established by the pleadings and supported by proof, even if the trial court did not consider it judgment will not be reversed when it can be sustained on any theory, even though different from the one relied upon by the finder of fact’ *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984)” *LaMon v. Butler*, 112 Wn.2d 193, 200-1, 770 P.2d 1027 (1989)

“[A] correct judgment will not be reversed when it can be sustained by any theory, even though different from the one relied upon by the finder of fact.” *Environmental Action Network v. Island County*, 112 Wn.App.156, 168, 93 P.3d 885 (2004)

SUMMARY

1. The court commissioner's order, being without prejudice, is not appealable. Consequently, the judge's order leaving it in place is not appealable.

2. The judge's order denying the motion for revision was squarely based on uncontested fact and interpreting a clear statute containing no ambiguity and should be upheld.

3. What the mother requested was a judgment for a sum certain; but she failed to even allege a sum certain. There was no error in failing to enter a judgment.

4. It is a defense to registration of a foreign support order that there is a defense under Washington Law. Payment is a defense. The father proved payment

5. The commissioner's order is correct in its result.

CONCLUSION

This appeal should be denied on any of three theories: Neither order appealed is an appealable order. Judgment for a sum certain could not be entered when the requesting party could not determine what the sum certain is that she wished the court to enter. The father does not owe the mother anything.

For any of these reasons, the mother's appeal should be denied.

Dated: May 31, 2012

LANDRUM & BALKEMA

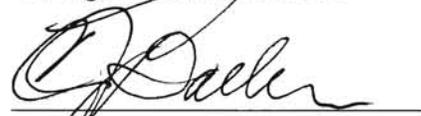
George R. Landrum/7373

Carolyn J. Balkema/21430

Dated: May 31, 2012

LANDRUM & BALKEMA


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