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NO. 72709-5-I

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

AZEEM KHAN,

Appellant,

v.

ALINA FAROOQ,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Kimberly Prochnau

OPENING BRIEF OF APPELLANT

Azeem Khan
pro se

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A. SUMMARY OF ARGUMENT

The trial court lacked authority under CR 6(b)(2) enlarge time to file Ms. Farooq's Motion For Reconsideration; her motion was filed 38 days after the decisions were entered, which is 28 days too late. This Court should therefore reverse those portions of the trial court's Order on Reconsideration that grant Ms. Farooq relief.

Further, the Court failed to apply RCW 26.09.060 in its Order of Child Support because it failed to credit to Mr. Khan's child support obligation the post-separation monthly payments he made to Ms. Farooq totaling \$42,700. Since the court found that the parties had a committed intimate relationship, and maintenance is not possible in a committed intimate relationship, the post-separation funds Mr. Azeem paid to Ms. Farooq could not have been maintenance and therefore could only have been child support. The trial court made a legal error by failing to characterize these payments as child support and credit them to Mr. Azeem's back and future child support obligation.

Mr. Khan requests that this Court reverse all the relief granted to Ms. Farooq on reconsideration. Additionally, Mr. Khan asks this court to remand to the trial court for a \$42,700 reduction of his back child support obligation.

B. ASSIGNMENTS OF ERROR

1. Pursuant to CR 6(b)(2), the trial court lacked authority to enlarge time to file Ms. Farooq's Motion For Reconsideration since it was filed 28 days after the end of CR 59(b)'s 10 day Motion For Reconsideration deadline. (CP – 372-373 Page #2).

2. The trial court failed to apply RCW 26.09.060 to this dissolution of a Committed Intimate Relationship when it impliedly characterized the \$42,700 voluntarily paid in monthly installments by Mr. Azeem to Ms. Farooq post-separation as maintenance. As a result, the trial court erroneously entered a principal judgment amount for back child support of \$13,426.70 that did not acknowledge Mr. Farooq's previously-paid child support. Finding of Fact 3.8; (CP 19-30 Page #1).

(CP 1-18 Pages 16, 17 Section 3.8).

(CP 664-677 Exhibit 198,199,200,201).

(CP 678-693 Exhibit 151,198,199,200,201,203,,204,205,206).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. CR 6(b) (2) deprives the court of authority to enlarge time for filing of any Motion for Reconsideration that was filed after CR 59(b)'s 10 day deadline has elapsed. In this case, the trial court enlarged the time for filing and granted Ms. Farooq relief on reconsideration even though her

Motion for Reconsideration was filed 28 days after the CR 59(b) deadline had elapsed. Should the portions of the Order on Reconsideration that grant relief to Ms. Farooq be reversed because the trial court lacked authority to hear Ms. Farooq's untimely request? (Assignment of Error 1.)

2. RCW 26.09.060 sets forth the proceedings in which maintenance may be ordered; dissolution of a committed intimate relationship is not among the enumerated proceedings. Upon separation, Mr. Azeem voluntarily made monthly payments to Ms. Farooq for the support of their child totaling \$42,700. At trial, the court found that the payments were made but failed to characterize them as child support, instead entering a principal judgment amount for back child support of \$13,426.70. Did the trial court commit legal error by treating Mr. Azeem's post-separation payments as maintenance? If so, should this court remand for final determination of the amount of child support already paid by Mr. Azeem and entry of an amended Order of Child Support that properly characterizes Mr. Khan's payments as child support and recalculates child support accordingly? (Assignment of Error 2.)

D. STATEMENT OF THE CASE

1. **Procedural History.** Ms. Farooq and Mr. Khan separated on February 23, 2013 after an 8 month committed intimate relationship.

CP 1-18 (FINDINGS OF FACT & CONCLUSIONS OF LAW P.2 and P.3 and P.4 Section 2.4 Section 2.5) ¹

Ms. Farooq filed for dissolution of a committed intimate relationship on August 12, 2013. During the 15 months between separation and the end of trial, Mr. Azeem voluntarily paid Ms. Farooq an average of approximately \$3,000 per month in cash and bill payments to support the parties' son.

(CP 664-677 Exhibits 151, 204, 205, 206).

(CP 678-693 Exhibits 151, 198, 199, 200, 201, 203, 204, 205, 206).

The matter went to trial from July 28th 2014 to August 28th 2014, after which the court entered Findings of Fact and Conclusions of Law, a Decree of Dissolution, a Parenting Plan and an Order of Child Support on September 5, 2014.

(CP 1-18 CP 19-30 CP 374-384).

Post-trial, Mr. Khan filed a Motion for Reconsideration. **CP 31-142. 38 days** after final orders were entered; Ms. Farooq also filed a Motion for Reconsideration. **(CP 385-458)**. Judge Prochnau made a decision on both parties' motions on 10/13/2014 and entered an Order on Motion for Reconsideration on October 13, 2014 granting both parties partial relief. **(CP 464-468 CP 626-631)**.

¹ The Clerk's Papers will be referred to as "CP" followed by their number.

Amended final orders were entered on November 14, 2014 and this appeal timely followed. (CP 632-634 CP 614-625).

2. Relevant Facts.

Mr. Khan and Ms. Farooq met online in June 2011 and had a long distance romance during which they visited various U.S. cities together. (CP 1-18 Page #2 Section 2.4) Ms. Farooq became pregnant and the parties had a Muslim religious ceremony in Georgia in May, 2012. Id. The ceremony was not legally binding. Id. Ms. Farooq moved to Washington in July 2012. Id. The parties separated on February 23, 2013. Id. During the 15 months between the parties' separation and the end of trial, Mr. Khan voluntarily paid Ms. Farooq monthly cash for their son's support, as well as paying housing, utility, and other bills to maintain their son's home. (CP 664-677 Exhibits 151, 204, 205, 206). (CP 678-693 Exhibits 151, 198, 199, 200, 201, 203, 204, 205, 206).

After entry of the Decree of Dissolution of Committed Intimate Relationship and other final orders, the court thereafter entered an Order on Reconsideration that granted relief in part to both parties.(CP 464-468) (CP 626-631)

E. ARGUMENT

1. THE TRIAL COURT LACKED AUTHORITY ENLARGE TIME FOR FILING MS. FAROOQ'S

MOTION TO RECONSIDER, THEREFORE THIS COURT SHOULD REVERSE THOSE PORTIONS OF THE ORDER ON RECONSIDERATION THAT GRANT HER RELIEF

a. Standard of Review. Whether the trial court properly applied CR 59(b) and CR 6(b) to this case is a question of law that this Court should review *de novo*. Kaech v. Lewis County Public Utility Dist. No. 1, 106 Wn. App. 260, 23 P.3d 529, 534 (2001).

b. CR 6(b)(2) prohibits a trial court from enlarging time to file a Motion For Reconsideration under CR 59(b). CR 59(b) allows a party to seek reconsideration of a judgment or court order if that motion is filed “not later than 10 days” after the order was entered:

(b) Time for Motion; Contents of Motion. A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision.

Trial courts do not have discretion to enlarge the 10 day time for filing a Motion For Reconsideration, as CR 6(b)(2) prohibits such enlargement:

(b) Enlargement. When by these rules or by a notice given there under or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion, (1) with or without motion or notice, order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order or, (2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time

for taking any action under rules 50(b), 52(b), 59(b), 59(d), and 60(b).

(Emphasis added.)

The trial court may not extend the time for filing a CR 59(b) motion. CR 6(b)(2); Schaefco, Inc. v. Columbia River Gorge Comm'n, 121 Wn.2d 366, 367-68, 849 P.2d 1225 (1993); Metz v. Sarandos, 91 Wn.App. 357, 360, 957 P.2d 795 (1998); Moore v. Wentz, 11 Wn.App. 796, 799, 525 P.2d 290 (1974). The CR 59 service requirement is mandatory. Kaech v. Lewis County Public Utility Dist. No. 1, 106 Wn. App. 260, 23 P.3d 529, 534 (2001).

In Kaech, the Lewis County P.U.D. failed to timely serve its motion for new trial on Kaech within the 10 day period of CR 59. Id. at 531. Kaech moved to strike, but the trial court denied the motion, ruling that the CR 59 motion was timely because it was joined to a CR 50 motion. Id. at 534. On appeal, this court held that “nothing in either CR 59 or CR 50(b) excuses the 10-day service requirement of CR 59. The CR 59 service requirement is mandatory. Since the motion for a new trial was untimely, the trial court lacked authority to order a new trial. Metz, 91 Wash.App. at 360, 957 P.2d 795.” 23 P.3d at 534.

This case is even more egregious than Kaech. Ms. Farooq neither filed nor served her CR 59 motion until 38 days after the orders were

entered. Both court rule and case law lead unambiguously to the conclusion that the trial court failed to properly apply CR 6(b)(2).

Reversal is required.

2. **THE TRIAL COURT FAILED TO APPLY RCW 26.09.060 TO THIS DISSOLUTION OF A COMMITTED INTIMATE RELATIONSHIP WHEN IT IMPLIEDLY CHARACTERIZED THE \$42,700 VOLUNTARILY PAID IN MONTHLY INSTALLMENTS BY MR. AZEEM TO MS. FAROOQ POST-SEPARATION AS MAINTENANCE. THIS COURT SHOULD REMAND FOR ENTRY OF AN AMENDED ORDER OF CHILD SUPPORT THAT PROPERLY CHARACTERIZES MR. AZEEM'S PRIOR PAYMENT OF CHILD SUPPORT OF \$42,700.**

- a. Standard of Review. "The process of applying the law to the facts ... is a question of law and is subject to *de novo* review."

Tapper v. Employment Sec. Dep't, 122 Wash.2d 397, 403, 858 P.2d 494 (1993). Whether the trial court properly applied RCW 26.09.060 to this case is a question of law that this Court should review *de novo*.

- b. The trial court failed to apply RCW 26.09.060 to this case. RCW 26.09.060 restricts the payment of maintenance to a selected group of actions:

**§ 26.09.060. Temporary maintenance or child support -
Temporary restraining order - Preliminary injunction -
Domestic violence or antiharassment protection order -
Notice of termination or modification of restraining
order - Support debts, notice**

- (1) In a proceeding for:
- (a) Dissolution of marriage or domestic partnership, legal separation, or a declaration of invalidity; or
 - (b) Disposition of property or liabilities, maintenance, or support following dissolution of the marriage or the domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner; either party may move for temporary maintenance or for temporary support of children entitled to support. The motion shall be accompanied by an affidavit setting forth the factual basis for the motion and the amounts requested.

(Emphasis added.) The enumerated actions do not include dissolution of a committed intimate relationship. Maintenance is therefore not possible in a committed intimate relationship case.

Here, there was a span of approximately 15 months between separation and entry of final orders. During this time, Mr. Azeem voluntarily paid an average of approximately \$3,000 for the support of his son. Yet the trial court failed to characterize this amount as child support paid prior to entry of final orders. By failing to characterize it as child support, the trial court necessarily attributed it to maintenance. This is contrary to RCW 26.09.060.

For this reason, the trial court failed to apply RCW 26.09.060 when it entered an order of back child support for \$13,765. The evidence amply supported that Mr. Khan had paid these amounts to Ms. Farooq.

Mr. Khan respectfully requests that this Court remand for entry of an amended Order of Child Support reflecting the \$42,700 of child support he has already paid. Since the trial judge who heard this case, Judge Prochnau, is no longer on the bench, Mr. Khan requests that this Court direct the trial court on remand to reopen the evidence as it may deem necessary in order to clarify and properly characterize the child support payments.

F. CONCLUSION

Mr. Khan respectfully requests this court reverse the portions of the Order on Reconsideration that grant relief to Ms. Farooq, remanding if necessary, and further requests this Court remand for recalculation of the Order of Child Support to take into account the 15 months of child support already paid by Mr. Khan.

DATED this 26th day of August, 2015.

Respectfully submitted:

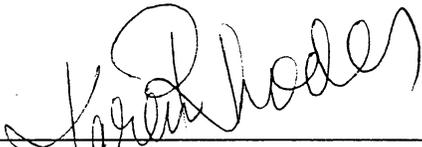


Azeem Khan
pro se

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of August, 2015, the original of the foregoing document was transmitted for filing to the Court of Appeals, Division I, by Azeem Khan; copies were sent as follows in Certified mail.

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Karen Rhodes