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DIVISION II

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COURT OF APPEALS, DIVISION II OF THE STATE OF
WASHINGTON

IN Re the Marriage of Lemmons

APPELLANT'S OPENING BRIEF

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INTRODUCTION

This appeal follows a motion for discretionary review granted on December 23, 2015 regarding a denial of a trial setting by the Appellant. Appellant contends that the court erred in refusing the schedule the above case for trial and is asking this court for relief.

ASSIGNMENT OF ERROR

The trial court erred by entering an order on August 3rd, 2015 denying the Appellant's request for a trial setting made on May 22, 2015.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Issue 1. Did the court violate the Petitioner's right to a trial without unnecessary delay as guaranteed under Article 1 Section 10 of the Washington State Constitution when it refused to schedule a trial date as requested?

Issue 2. Did the court violate Cowlitz County Local Rule (CCLCR) 40(b)(iii) by removing the case from the trial setting docket and shifting the burden away from the party objecting to the trial date?

STATEMENT OF THE CASE

The divorce of Bryce and Jessica Lemmons began with a filing for dissolution on August 30, 2010. Clerks papers at 1. The case was actively pursued by both parties since the filing of the case through the current date. After extensive action by the parties the case progressed to the point that the court entered an order for reunification counseling on July 22, 2013. Clerks papers at 9. As the case continued the matter ended up bifurcating; with a dissolution completing but leaving the parenting plan unresolved. Ms. Lemmons prior counsel filed for a trial date on October 2, 2014 which did not occur. Clerks papers at 13. The matter continued to be fought between the parties and on May 22, 2015 this Petitioner filed a docket notice for a trial setting on June 1, 2015, pursuant to CR 40 and CCLCR 40 indicating that the matter was ready for trial. Clerks Papers at 16. The court, without following the state or local court rules, required the moving party file a motion requesting a trial date, which was denied on June 15, 2015. Clerks Papers at 18 and 26. As of the date of the hearing on June 15, 2015, a parenting plan had not been established. As of the date of this appeal, the court still has not finalized a parenting plan or allowed this Petitioner the ability to schedule the case for trial. The issue is still ongoing, as the unresolved parting plan has been holding up additional

proceedings. See generally clerk's papers 29-59 (pleadings regarding a motion to relocate and the denial of the court).

ARGUMENT

ISSUE I—The trial court violated the constitutional rights of the Petitioner in refusing to schedule the matter for trial

Article 1 Section 10 of the Washington State Constitution provides that “Justice in all cases shall be administered openly, and without unnecessary delay.” A number of statutory provisions support the argument that cases involving children are entitled to a speedy resolution of their status. RCW 26.12.205 prioritizes domestic proceedings involving children above those without children. RCW 26.09.181 likewise identifies a priority for cases to determine parenting plans. (RCW 26.09.181(6) “Trial dates for actions involving minor children brought under this chapter shall receive priority.”) RCW 13.34.136 establishes timelines for dealing with the requirement for final determination in dependency proceedings. That statute requires the court to demand filing by the department for termination of a parent’s rights if the child has resided outside of the home for fifteen (15) of the prior twenty-two (22) months. All of these statutes have one thing in common, the overriding policy that cases involving the placement of children require finality for the sake of

the child. This is echoed in the family law principle that the court, in domestic proceedings, base their decisions on the “best interest of the child”. RCW 26.09.002.

Some cases provide guidance on what type of delay in a domestic case would be unreasonable. It is a recognized principle that the court, in their discretion, can delay the imposition of a final residential schedule or parenting plan when it is in the best interest of the child. Little v. Little, 96 Wn.2d 183, 194, 634 P.2d 498 (1981); see also In re. Marriage of Possinger, 105 Wn. App. 326, 336, 19 P.3d 1109 (2001). Looking at those cases however, identifies some distinguishing characteristics from our present case. In Little, a six-month delay in finalizing the parenting plan was determined by the court to be appropriate. 96 Wn.2d at 185. In Possinger, a more significant delay of almost a year and a half was allowed because the equitable power of the court allowed for entry of a temporary plan for a specific identified period of time. 105 Wn. App. At 336-37. (although in Possinger the objecting party did not challenge the duration of the plan, only the authority to enter the plan).

Possinger was analyzed by In re: C.M.F. in circumstances similar to those in the current case. In re: C.M.F., 179 Wn.2d 411, 411 P.3d 1109 (2013). In C.M.F., a paternity action was initiated by the State and an

order was entered in 2008 determining parentage and establishing custody with the mother. 179 Wn.2d at 416. The order allowed for either parent to move the Family Law Court to establish a residential schedule under the cause number. Id. In December of 2009 the father petitioned for a parenting plan which proceeded to trial January 2011. Id. At the trial, after the father completed his presentation, the mother moved for dismissal under CR 12(b)(6) claiming that the father had failed to file the correct pleadings to establish adequate cause to modify the initial parenting plan. Id. at 416-17. The trial court denied the motion and at the end of the trial changed placement to the father. Id. at 417.

One issue addressed in C.M.F. was whether the reservation in the original parentage order was appropriate. Id. at 425. The father argued “that the court allowing either party to later move to establish a residential schedule under this cause number reserved the issue of [the child’s] custody and residence for later, allowing him to avoid the adequate cause and modification requirements.” Id. For his authority he cites Possinger amongst other cases. Id. The court recognized that the court has broad discretion over matters involving the welfare of children. Id. at 427. However, the cases cited by the father in C.M.F., including Possinger, were distinguished by the court because the trial court retained jurisdiction to finalize a residential schedule or parenting plan “for approximately one

year and **in none of the cases is there an open ended reservation.**” Id., emphasis added. The Court holds that “to allow a ‘reservation’ of final residential placement to extend indefinitely runs contrary to the overriding policy considerations identified in RCW 26.09.002.” the Court goes on to state “[b]ecause the court’s reservation of a residential schedule in this case was open ended, it exceeded the authority provided by...the common law.” Id.

These cases, taken in concert, identify the issue in the matter currently before this Court. Although the court has some discretion to delay the finalization of a parenting plan or residential schedule in the best interest of the child the current delay is significant enough to impact the constitutional rights of the Petitioner. The reunification has been pending for over two years and the dissolution was finalized more than a year ago. The court has not provided any timeframe for the finalization of the case; instead reserving the finalization indefinitely. This open ended reservation by the court violates the rights of the Petitioner under the common law and the Washington State Constitution.

ISSUE II—The trial court failed to comply with the local court rule in denying setting the matter for trial.

On multiple fronts the court has failed to properly schedule this matter for trial as required under Civil Rules and the Washington Constitution. Civil Rule 40 addresses the scheduling of a matter for trial, which is ministerial and required unless otherwise indicated in the rule. Each county is allowed to determine their own methods for scheduling matters onto their trial scheduling docket. CR 40(b). Cowlitz County established a local rule to determine the methods for setting a case on to trial which identifies the methods required for a party to object to the scheduling of a trial date CCLCR 40. The local court rule requires an objecting party file a motion and note the matter for an appropriate docket in order to remove the matter from the case scheduling docket. *CCLCR 40(b)(iii)* (“Should any party believe the case is not yet ready for trial, or that the Case Scheduling Order has not been completed, **they shall** file and serve an objection to the Certificate of Readiness and note the matter for hearing on the appropriate motion calendar. **This** will remove the matter from the court Administration’s trial assignment docket.” (emphasis added)).

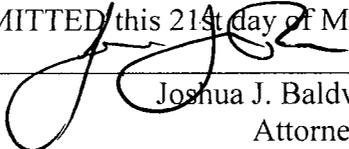
The opposing party in the above action failed to file or serve an objection to the trial setting and certificate of readiness filed on May 22,

2015. The clerk of the court was in error to remove the matter from the trial setting docket and the matter should have been set for trial as required under the court rule. The Court ordered this Petitioner to file a motion to request the trial after it was removed from the trial setting calendar. This was done without authority under the state and local court rules regarding scheduling trials and shifted the burden away from the party objecting to the setting of the trial and instead placing the burden on the party requesting the matter proceed to trial. On this basis the court erred procedurally in denying the Petitioner a right to trial; shifting the burden under the court rule to the party moving for a trial date.

CONCLUSION

The court erred when it refused to grant the Petitioner a trial and violated her right to a speedy resolution pursuant to Article 1 Section 10 of the Washington State Constitution and the recognized common law principles surrounding finality in child custody cases. The court also violated the court rules by shifting the burden to the party requesting a trial date in its denial. For those reasons the matter should be remanded to the trial court with an order to schedule the matter for trial.

RESPECTFULLY SUBMITTED this 21st day of March, 2016.



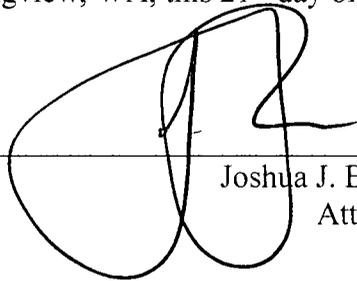
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CERTIFICATE OF DELIVERY

I certify under penalty of perjury under the laws of the state of Washington that on the 21th day of March, 2016, I caused a true copy of this Appellant Opening Brief to be hand delivered to:

John A. Hays
1402 Broadway
Longview, WA 98632

Dated at Longview, WA, this 21th day of March, 2016.

A handwritten signature in black ink, appearing to read 'JB', is written over a horizontal line.

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