

No. 48957-1-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

ANDREA M. WEAVER nka WHEELER,
Appellant,

v.

BRANDON M. WEAVER,
Respondent.

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

The trial court's denial of the Appellant's untimely request for an award of attorney's fees underlies this appeal. CP 72 - 113, 134 - 37.

BACKGROUND

The Appellant is Andrea Wheeler (formerly Weaver). The Respondent is Brandon Weaver. Andrea and Brandon¹ were married on November 22, 2008. CP 2. They have two children. CP 1.

The trial court entered a Final Parenting Plan on April 12, 2013 in conjunction with the dissolution of their marriage. CP 10 - 18. The Parenting Plan included a "long distance" residential schedule because Brandon was on active duty in the U.S. Army, stationed in Virginia. CP 10 - 18, 29, 39.

The Parenting Plan was modified by agreement in 2014 in light of Brandon's transfer of duty station to Washington State. CP 20 - 36, 37 - 42, 39.

¹ The parties are referred to in this brief by their first names for ease of reference only. No disrespect whatsoever is intended by these designations.

2015 PETITION FOR MODIFICATION OF PARENTING PLAN

In February of 2015, Brandon petitioned for modification of the parenting plan, alleging a detrimental environment for the children in Andrea's home. CP 47 – 48.

On December 11, 2015, the trial court denied Brandon's petition, finding that "no credible and substantial facts supporting the requested modification [had] arisen" since entry of the June 16, 2014 Agreed Parenting Plan. CP 65, 65 - 71.

Final orders and the record on appeal are devoid of anything to indicate either party requested an award of attorney's fees and costs at trial. CP 65 – 71.

On December 16, 2015, Andrea's counsel broached the issue of attorney's fees and costs for Andrea to Brandon's trial counsel via e-mail. Copies of the ensuing series of e-mails between counsel were attached to Andrea's motion for attorney's fees at Exhibit 2. CP 90 – 100.

MOTION FOR ATTORNEY'S FEES

On February 9, 2016, sixty days after final orders on Brandon's petition were entered by the trial court, Andrea filed a motion for

attorney's fees and costs, seeking an award of \$35,373.85. CP 72 - 101 (motion), 102 - 107 (Andrea's declaration in support of the motion).

In her declaration, Andrea stated "[a]ttached as exhibit 1 is a complete listing of all the fees and costs I have incurred" in litigating Brandon's petition for modification. CP 102. The record does not include "exhibit 1" to Andrea's declaration that substantiates and supports Andrea's request for attorney's fees and costs.² Andrea went on to state, "I think that the fees and costs [I incurred] are reasonable and seem well within the costs that friends describe for contested divorce cases." CP 104.

Andrea's sole statutory basis for her motion was RCW 26.09.140, which provides:

Payment of costs, attorneys' 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 attorneys' 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.

² The only attachment to Andrea's declaration, not designated as an exhibit, is a printout showing employment opportunities Andrea was apparently pursuing. CP 107.

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 attorneys' fees in addition to statutory costs.

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

CP 72 – 73.

Andrea prefaced her argument by stating “no parent should ever [be] penalized for bringing concerns to the attention of the court, and so again, wants to emphasize that in asking for fees, she is not requesting that the court impose some penalty or assign some ‘fault’ to [Brandon]” (CP 74) but made three arguments in support of her motion:

1. Brandon’s supposed prior abusive behavior somehow supported her request. CP 76.
2. Her motion was based on the *children’s* need to have *their* fees and costs awarded for defending against Brandon’s petition. CP 75.
3. This proceeding was “community litigation.” CP 75.

Emphasis added.

In response to Andrea’s motion, Brandon argued that Andrea’s motion was two months untimely and should therefore be denied. CP 120.

Brandon relied on CR 54(d)(2), which provides:

(2) Attorney's Fees and Expenses. Claims for attorney's fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. Unless otherwise provided by statute or order of the court, **the motion must be filed no later than 10 days after entry of judgment.**

Emphasis added.

In reply, Andrea argued that CR 54(d)(2) does not apply to family law proceedings because "family law cases are never 'final.' " CP 128.

On March 3, 2016, Judge Johnson denied Andrea's motion for attorney's fees and costs. CP 132 – 33.

Judge Johnson's ruling included the following:

3. Award of attorney fees and costs was not addressed at the time of entry of said [final orders].
4. [Andrea's] Motion for an Award of Attorney Fees and Costs was filed on February 9, 2016 – 60 days after the Order Denying Petition for Modification was entered.
5. [Brandon] has objected to the Court considering the merits of [Andrea's] motion based in part upon the CR 54(d)(2) 10 day filing time limit.
6. In [Andrea's] Reply she argues that CR 54 is not applicable. Her [principal] argument is that the CR 54 time limit[] only applies to judgments. She then argues that the Order Denying Petition for Modification is not a judgment hence CR 54 does not apply.

7. However, CR 4(a) provides: **Definitions.**

(1) *Judgment.* A judgment is the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies. A judgment shall be in writing and signed by the judge and filed forthwith as provided in rule 58.

CR 54(d)(2) provides: **Costs, Disbursements, Attorneys' Fees, and Expenses.**

Attorneys' Fees and Expenses. Claims for attorneys' fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. ***Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.***

The Court concludes that the Order Denying Petition for Modification is a "judgment" as it is "... the final determination of the rights of the parties in the action. ..." *See also Eclipse v. Commercial Driver Servs., Inc.*, 189 Wn. App. 776, 787, 358 P.3d 464, 470 (2015).

Now, therefore, it is hereby **Ordered**:

That the Petitioner's Motion for an Award of Attorney Fees and Costs is **denied**. This order is entered without oral argument as is authorized in PCLR 7(a)(10).

CP 132 - 33 (emphasis original).

Andrea sought reconsideration of the March 3, 2016 order. CP 134 - 37. She first objected to the court treating CR 54(d) as "a hard and fast 10-day rule from which there can be no relief." CP 134 - 35.

Andrea next argued that because the time limit set forth in CR 54(d) is not among deadlines that may not be enlarged under CR 6(b), the trial court had the ability to consider Andrea's initial untimely motion for attorney's fees and costs. CP 135.

Andrea next argued that the 10 day time limit imposed by CR 54(d)(2) is "intended to prevent parties from raising trial-level attorney fee issues very late in the appellate process, sometimes after one or all appellate briefs have been submitted," citing 4 Karl B. Teglund, *Washington Practice: Rules Practice* § 54, Supp. 40 (5th ed. 2006 & Supp. 2010) (quoting drafters' comment on 2007 amendment to CR 54(d)(2)).

Andrea next argued that it is unlikely our Supreme Court imposed this 10-day time limit as a means of denying a prevailing party the remedy to which it is entitled. CP 135, citing *Mitchell v. Wash. State Inst. of Public Policy*, 153 Wn. App. 803, 823, 225P.3d 280 (2009).

Andrea reasoned that the best interests of a child is the guiding principle be followed by the trial court in family law matters; therefore, the trial court must protect the children's best interest by extending the deadline for a motion for fees in this case. CP 136.

Andrea also argued that because public policy favors resolution of disputes by agreement, she should not be penalized by her attempt to resolve this issue outside of court, which necessarily required an extension of time to file a motion for fees. CP 136.

Finally, Andrea argued that Brandon was not prejudiced whatsoever by the untimely filing of her motion for attorney's fees and costs. CP 136.

Judge Johnson denied the motion for reconsideration. CP 138 – 141. Judge Johnson first ruled that the motion “presumably relies (without citation) on CR 59” and that Andrea did not articulate on which subparagraphs of CR 59(a) she relied. CP 139, 140.

Finally, Judge Johnson ruled that Andrea's motion for reconsideration did not raise any new facts or provide any additional law she was unable to present to the court in her previous motion. CP 140. Judge Johnson ruled that

The evidence presented and the controlling law argued did justify the subject order. There is no showing that this court erred in understanding or applying the applicable law.

Pursuant to PCLR 7(c)(3), this motion is being decided without oral argument.

Now, therefore it is:

ORDERED, that the petitioner's Motion for Reconsideration is **DENIED**.

CP 140 – 41 (emphasis original). Andrea timely appealed.

II. ARGUMENT

A. STANDARD OF REVIEW

CR 59(a) Grounds for Reconsideration

This Court reviews a trial court's denial of a motion for reconsideration for abuse of discretion. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002); *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005); *Drake v. Smersh*, 122 Wn. App. 147, 151, 89 P.3d 726 (2004).

A trial court abuses its discretion when its decision is manifestly unreasonable or rests on untenable grounds or reasons, when no reasonable person would have taken the view adopted by the trial court, or when the trial court applied the wrong legal standard or relied on unsupported facts. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010); *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); *City of Longview v. Wallin*, 174 Wn. App. 763, 776, 301

P.3d 45, *review denied*. 178 Wn.2d 1020 (2013); *Holaday v. Merceri*, 49 Wn. App. 321, 324, 742 P.2d 127, *review denied*, 108 Wn.2d 1035 (1987).

Attorney's Fee Awards

A trial court's ruling on a request for attorney's fees is reviewed for abuse of discretion. *Mayer v. City of Seattle*, 102 Wn. App. 66, 79, 10 P.3d 408 (2000). Abuse is shown when [the trial court's] decision is manifestly unreasonable or based upon untenable grounds[.] *Id.* at 79.

B. THE TRIAL COURT HAD NO INDEPENDENT STATUTORY DUTY TO PROTECT THE BEST INTEREST OF THE CHILDREN BY GRANTING ANDREA'S UNTIMELY MOTION

Andrea argues that RCW.26.09.002 requires a trial court to determine and allocate parental responsibilities in light of the best interest of the children involved in the proceeding. Br. of Appellant at 8 – 9. She goes on to argue that even if she filed her request for attorney's fees late, according to this statute, the trial court should not have penalized the children by denying her motion, which would, in effect, "impoverish" Andrea's (and the children's) home. Br. of Appellant at 9.

Andrea cites no legal authority whatsoever to support her interpretation of this statute.

RCW 26.09.002 describes the policy underlying chapter 26.09

RCW. It provides:

Policy. Parents have the responsibility to make decisions and perform other parental functions necessary for the care and growth of their minor children. In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities. The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests. Residential time and financial support are equally important components of parenting arrangements. The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care. Further, the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.

RCW 26.09.002.

This statute does not include any reference to payment of attorney's fees inuring to the best interests of the children in any respect.

Parental responsibilities do include the responsibility to provide financial support for their children. RCW 26.09.004(2)(f). But parental responsibilities, including the responsibility to provide financial support, do not include the payment of attorney's fees. Andrea stated in her motion that her "friends and extended family, including her father," assisted her with paying her attorney's fees for the underlying litigation. CP 75.

Attorney's fees are defined as "[t]he charge to a client for services performed for the client, such as an hourly fee, a flat fee, or a contingent fee." BLACK'S LAW DICTIONARY 125 (7th ed. 1999). Therefore, attorney's fees compensate the attorney, not the children.

C. THE TRIAL COURT WAS NOT AUTHORIZED TO CONSIDER ANDREA'S UNTIMELY MOTION PURSUANT TO RCW 26.09.140

Andrea also argues that RCW 26.09.140 provides a basis for attorney's fees independent from the deadline imposed by CR 54(d)(2).

By its very wording, this statute does not impose a mandatory requirement on a trial court to award attorney's fees. It provides:

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 attorneys' 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 attorneys' fees in addition to statutory costs.

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

RCW 26.09.140 (emphasis added).

By contrast, RCW 26.09.160(2)(b) provides

If, based on all the facts and circumstances, the court finds after hearing that the parent, in bad faith, has not complied with the order establishing residential provisions for the child, the court **shall** find the parent in contempt of court. Upon a finding of contempt, the court **shall** order:

* * * *

(ii) The parent to pay, to the moving party, all court costs and reasonable attorneys' fees incurred as a result of the noncompliance, and any reasonable expenses incurred in locating or returning a child[.]

Our Courts have explained the distinction between the use of “shall” and “may” in statutes. *State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985) (use of “may” and “shall” in the statute indicates that the Legislature intended the two words to have different meanings: “may” being directory, while “shall” being mandatory); *Gorman v. Pierce County*, 176 Wn. App. 63, 79, 307 P.3d 795 (2013) (“Where a statute uses both “ shall” and “ may,” we presume that the clause using “ shall” is mandatory and the clause using “ may” is permissive.”) (citing *Scannell v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435 (1982)).

Therefore, the trial court was not required to award attorney`s fees according to this statute.

D. THE TRIAL COURT DID NOT ABUSE HIS DISCRETION BY FAILING TO GRANT ANDREA'S UNTIMELY MOTION

Andrea next argues that the trial court abused its discretion by denying her "motion to extend the time for seeking an award of fees under CR 54(d)(2)". Br. of Appellant at 12.

CR 54(d)(2) provides

Attorney's Fees and Expenses. Claims for attorney's fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. **Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.**

(Emphasis added.)

Andrea is correct that CR 54(d)(2) vests a trial court with the discretion to enlarge the 10 day deadline, *but she needed to seek an order of the court enlarging the deadline prior to filing her actual request for attorney's fees.* CR 54(d)(2). Absent leave of Court, the request needed to be filed no later than 10 days after final orders were entered. Nothing in the record indicates Andrea filed such a motion. Therefore, her request for attorney's fees was untimely, and Judge Johnson properly applied the rule and denied her request. This ruling should be affirmed. *See, e.g., Corey v. Pierce County*, 154 Wn. App. 752, 225 P.3d 367 (2010) (request for

attorney's fees properly denied due to failure to file attorney's fees request within 10 day time limitation under CR 54(d)(2)).

Andrea argues that it was unlikely our Supreme Court contemplated the 10-day filing deadline in CR564(d)(2) as a means to deny relief “if application is made within a reasonable time.” Br. of Appellant at 12.

This argument fails for two reasons. First, Andrea failed to seek leave of court to file her motion for attorney’s fees later than the 10-day deadline required by CR 564(d)(2). Second, filing a motion for attorney’s fees sixty days after entry of the final orders without leave of court is far from a “reasonable time.”

Andrea argues that “the trial court didn’t explain why the request for an extension of time was denied.” Br. of Appellant at 13. Her motion requests “an award of fees and costs” and includes no request for any enlargement of time to file her motion after the 10-day deadline required by CR54(d)(2).

i. Brandon, not Andrea, would be prejudiced by considering and granting Andrea’s untimely motion

Andrea briefly mentions twice in her brief that there is no prejudice to Brandon by her request for attorney’s fees being filed

untimely. Br. of Appellant at 11, 12. However, Andrea provided no argument to support these statements.

Andrea argues that CR54(d)(2) is “intended to prevent parties from raising trial-level attorney fee issues very late in the appellate process[.]” (citing 4 Karl B. Tegland, *Washington Practice: Rules Practice* § 54, Supp. 40 (5th ed. 2006 & Supp. 2010)).

A motion for attorney’s fees brought 60 days after the filing deadline is precisely what CR54(d)(2) is intended to prevent. Forcing a party to respond to a request for attorney’s fees, brought for the first time sixty days after final orders were filed is highly prejudicial to Brandon.

ii. Settlement discussions do not allow an enlargement of deadlines imposed by well-settled court rules

Andrea argues that settling disputes outside of court is favored by public policy, and she should therefore not be “penalized for trying to resolve things outside of court.” Br. of Appellant at 13.

The record on appeal indicates that final orders in this matter were entered by the Court on December 11, 2015. CP 63. The final order on modification makes absolutely no mention of attorney’s fees, indicating attorney’s fees were apparently not addressed at trial. CP 63 – 71.

Andrea had the opportunity to seek an award of attorney’s fees at trial, but seems to have failed to do so. Absent being addressed at trial,

Andrea had sufficient time to pursue “negotiation” of this issue between the conclusion of trial and the presentation of final orders on December 11, 2015. She had an opportunity to seek leave of court to extend the deadline for presentation of final orders to accommodate these “negotiations.” The record indicates she failed to do so. Andrea also had an opportunity to seek enlargement of the 10-day filing rule imposed by CR 54(d)(2) to accommodate “negotiations” regarding attorney’s fees. The record indicates she failed to do so.

This court should find this argument is without merit and should affirm Judge Johnson’s rulings.

E. ANDREA IS NOT ENTITLED TO ATTORNEY’S FEES ON APPEAL

Andrea argues she is entitled to attorney’s fees on appeal as authorized by RAP 18.1 and RCW 26.09.140. Br. of Appellant at 13.

Andrea provides nothing more than this request and a citation to what she believes is the relevant authority to support her request. Br. of Appellant at 13 – 14. However, Andrea does not provide any argument to support this request. Any attempt to cure this deficiency in her Reply Brief should not be considered by this Court.

RAP 10.3(a)(6) requires that each issue set out in an appellant’s or respondent’s brief must include argument in support of the issue(s)

presented for review. *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989) ("We will not consider issues on appeal that ... are not supported by argument and citation of authority.")

A party is not automatically entitled to attorney's fees on appeal by virtue of arguably being the prevailing party below. This Court should deny this request.

F. BRANDON SHOULD BE AWARDED HIS ATTORNEY'S FEES FOR THE NECESSITY OF RESPONDING TO THIS APPEAL

This appeal is frivolous.

RCW 26.09.140 provides that

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 attorneys' fees in addition to statutory costs. The court may order that the attorneys' fees be paid directly to the attorney who may enforce the order in his or her name.

RAP 18.9 provides, in pertinent part: "The appellate court on its own initiative or on motion of a party may order a party or counsel ... who ... files a frivolous appeal ... to pay terms ... to any other party who has been harmed by ... the failure to comply or to pay sanctions to the court."

"An appeal is frivolous if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit

that no reasonable possibility of reversal exists.” *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224 (1985) (citations omitted).

In her brief, Andrea urges an erroneous construction of well-settled statutes, Court Rules and case law. She has raised no issues subject to any debate, because each of the applicable statutes and court rules are clear. No reasonable minds can differ as to their meaning and application. There is no merit to any of the issues raised in her opening brief. Brandon should be awarded his reasonable attorney’s fees for the necessity of having to respond.

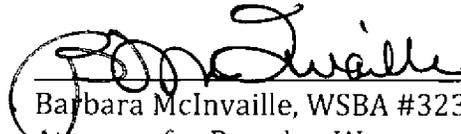
III. CONCLUSION

Judge Johnson was vested with broad discretion in awarding or denying this request for attorney’s fees. There is no applicable statute that mandated an award to Andrea. Moreover, Andrea failed to seek leave of court to file an untimely request for attorney’s fees, as required by CR 54(d)(2). Therefore, there was no abuse of discretion in denying her request.

Judge Johnson’s decisions followed all applicable legal standards. His rulings should be affirmed, and Brandon should be awarded attorney’s fees for having to prepare this response.

DATED this 23rd day of September, 2016.

RESPECTFULLY SUBMITTED,


Barbara McInville, WSBA #32386
Attorney for Brandon Weaver

Declaration of Transmittal

Under penalty of perjury under the laws of the State of Washington I affirm the following to be true:

On this date I transmitted the original document to the Washington State Court of Appeals, Division II by the e-filing portal, and delivered a copy of this document via e-mail to:

J. Mills
201 Atrium Court
705 So. 9th Street
Tacoma, WA 98405
jmills@jmills.pro

Signed at Tacoma, Washington on this 23rd day of September, 2016.


Barbara McInville

HELLAND LAW GROUP PLLC

September 23, 2016 - 3:56 PM

Transmittal Letter

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