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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON**

**IN RE THE MARRIAGE OF:
DENISE WILKIE (nka HOFFMAN)
Appellant**

V.

**GREGORY WILKIE
Respondent**

NO. 289761-III

APPELLANT'S REPLY BRIEF

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REPLY ARGUMENT

I. ASSIGNMENT OF ERROR NUMBER ONE: THE COURT ERRED BY CONDUCTING THE REVISION HEARING ON AN ABUSE OF DISCRETION STANDARD RATHER THAN A DE NOVO REVIEW.

In his responsive brief, the Respondent states the standard of review for revision is de novo. However, the respondent then discusses the legal standard for modification of a parenting plan which has no relevance to the proper standard of review in a revision hearing. For some reason, the general sentiment among the Bar is that civil rules somehow do not apply to family law actions. However, no case law or other authority exists to support the proposition that the standard of review for a revision hearing in a family law case is different than the standard of review for a revision hearing in a non-family law case.

While a Superior Court judge can certainly adopt the findings of a court commissioner as its own on revision as noted by the Respondent in his brief, in conducting the revision hearing the Superior Court judge can never apply an abuse of discretion standard even in a family law case. In reviewing a contempt determination in a family law case, this Court recent held that “On a revision motion, a trial court reviews a commissioner's ruling de novo based on the evidence and issues presented to the commissioner.” In the Matter of Lydia D., 156 Wn.App. 22, 27 (2010).

It cannot be seriously argued that the lower court applied the required de novo review standard where the written findings clearly state that “The requested revision should be denied for lack of abuse of discretion by the Commissioner’s original decision.” CP 99-100. This is clear error requiring reversal.

II. ASSIGNMENT OF ERROR NUMBER TWO: THE COURT ERRED BY REFUSING TO CONSIDER THE REVISION MEMORANDUM FILED BY THE PETITIONER.

In his responsive brief, the Respondent correctly states that a court’s refusal to consider new issues and new evidence in a revision hearing is not error, citing In re Marriage of Moody, 137 Wn.2d 979 (1999). Similarly, this Court stated that the revision review is based on

the evidence and issues presented to the commissioner.” In the Matter of Lydia D., 156 Wn.App. 22, 27 (2010).

However, In re Marriage of Moody, is not applicable to the issue at hand in this case. In Moody, the Respondent presented to the Superior Court judge new issues and evidence which were not presented to the court commissioner. 137 Wn.2d at 991. Here, no new issues or evidence were presented to the Superior Court judge.

A memorandum of authority or legal brief is not evidence. The Respondent cannot show that the Appellant’s memorandum presented to the Superior Court judge raised new issues, and in fact concedes that the Petitioner’s revision memorandum did not present new issues or new evidence. (Respondent’s Brief page 28, footnote 7).

In a revision hearing, the trial court judge is required to undertake an appellate court review of the certified record. In re Marriage of Moody, 137 Wn.2d 979, 992 (1999). A revising party therefore must be allowed to provide case law to show where the court commissioner erred in his or her analysis just as briefing is permitted, and in fact required, in any appeal to the Court of Appeals.

Further, there were no scheduling orders that dictated the timing of filing a memorandum. Nor does Local Spokane County Rule 0.07 dictate a time schedule for filing of legal memorandums. Given the ten minute

time limitation in LSPR 94.04(8) for oral argument, there is little time available during argument for citation to legal authority and meaningful analysis. Legal argument is best presented as a memorandum.

This failure to review the revision memorandum is not harmless error. The revision memorandum provides the court with specific legal authority which outlines where the court commissioner erred in his ruling. Counsel's (for appellant) argument to the lower court was based on the presumption that the lower court had read the cited authority. Only after the bulk of the ten minutes allowed for argument by counsel had passed was the fact that the revision memorandum not read revealed to counsel by the lower court. RP 21, line 23. There was no time to then present a case law analysis and citations to other authority. The Appellant was prejudiced.

This is further compounded by the fact that Respondent's counsel cited legal authority during her argument. RP 14, lines 14-25. These "claims" to citations were not briefed for the commissioner or for the revision court, denying the appellant any chance to review the claimed authority and meaningfully respond. RP 22, line 7. The state of the law cannot be such that properly cited legal authority provided to the court and opposing counsel prior to hearing may not be considered, but "claimed" legal authority cited in oral argument is properly considered by the court.

The lower court could have taken the matter under advisement allowing time to review the applicable legal authority provided in the revision brief. The lower court could have continued the matter to allow for time to review the applicable legal authority. The lower court instead stated that “I simply had no time if I did have the inclination to take a look at it.” RP 22, line 15.

This is a critical issue which should be addressed by this Court. Any ruling that counsel cannot present a memorandum of authority prior to a hearing or trial would have chilling consequences on a litigant’s ability to properly apprise a judge or court commissioner on the status of the law. There is no case law, statutory or other authority for such a proposition.

III. ASSIGNMENT OF ERROR NUMBER THREE: THE COURT ERRED BY RULING THAT “PRINCIPLES OF CONTRACT LAW” DO NOT APPLY TO FAMILY LAW PROCEEDINGS AND THAT THERE WAS NOT AN ENFORCEABLE SETTLEMENT AGREEMENT BETWEEN THE PARTIES.

The Respondent incorrectly states the standard of review. In his brief, the respondent states that “the standard of review for this Court of

the factual findings of the court commissioner and the trial court is substantial evidence.” Respondent’s brief at page 29.

However, this is an appeal of the trial court’s decision to enforce a settlement agreement pursuant to CR 2(A). See Morris v. Maks, 69 Wn.App. 865, 868 (1993) holding that a Washington trial court’s authority to enforce a settlement agreement between parties is governed by CR 2A. An appellate court reviews de novo the interpretation of a court rule. Nevers v. Fireside, Inc., 133 Wn.2d 804, 809 (1997). Court rules are interpreted as though they were drafted by the legislature and thus the appellate court construes them in accord with their purpose.” Nevers, 133 Wn.2d at 809.

Where there is a written contract, Washington courts have determined intent by focusing on the objective manifestations of agreement. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503 (2005). We give words their ordinary, usual, and popular meaning unless the entirety of the agreement evidences a contrary intent. Id. at 504. If relevant for determining mutual intent, surrounding circumstances and other extrinsic evidence may be used to determine the meaning of specific words and terms used, but not to show an intention independent of the instrument or to vary, contradict, or modify the written word. Id. at 503 (emphasis added).

In his responsive declaration to Ms. Hoffman's original motion to enforce the settlement agreement, the Respondent argues that the intent of his offer (via counsel) was to only give up his Wednesday overnight visits in exchange for extending his weekend from a Sunday evening return time, to a Monday morning. CP 25-34. He argues that he never intended to give up his Wednesday non-overnight visits. CP 25-34.

However, the letter dated December 7, 2009 from Respondent's counsel, two options for changes to the residential schedule during the school year were offered. CP 11-24, motion to enforce settlement agreement, exhibit C. In pertinent part, option two stated:

In the alternative, Mr. Wilkie would suggest that his weekend visitation during the school year be extended to Monday morning rather than Sunday evening and he will bring the children directly to school. If this schedule is adopted, it would take the place of the current Sunday and Wednesday evening visitation during the school year.

In response, Appellant's counsel on behalf of the Appellant, accepted option 2 by letter dated January 12, 2010. CP 11-24, motion to enforce settlement agreement, exhibit D. In accepting the offer to option 2, Appellant's counsel re-stated the agreement as follows:

Nonetheless, my client will accept your offer of option 2 set forth in your December 7, 2009 letter. During the school schedule only, Mr. Wilkie will extend his weekend until Monday morning when he will bring the children to school. Per the terms of your letter/offer, the Wednesday evening mid-week will be eliminated.

I assume that this schedule will begin with Mr. Wilkie's

next weekend. Please advise if this is correct so that I can advise my client. I have advised her that the first Wednesday that will be eliminated is the Wednesday following your client's weekend. This way he has the mid-week until that point given that his prior weekends were not expanded.

Immediately following the acceptance of option 2 outlined above in Appellant's counsel's January 12, 2010 letter, Respondent's counsel followed up with a letter on January 15, 2010 (misdated for December 7, 2009). CP 11-23, motion to enforce settlement agreement, exhibit E. In this letter, counsel of the Respondent requests that the agreed upon change to the school visitation schedule not begin until January 22, 2010. Once again, the Respondent, through counsel, indicates that "the Wednesday visitation will not start again until the school year has ended."

Further supporting the contention that the Respondent fully intended to terminate his Wednesday overnight visit as well as the Wednesday evening visit was correctly pointed out by the court commissioner in his oral ruling. The Wednesday visitation immediately following the Respondent's requested start date was a Wednesday evening visit, not an overnight visit. CP 53-83, verbatim report of proceedings page 21, line 23 through page 23, line 7. This completely contradicts the Respondent's claim that he only intended to give up his Wednesday overnight visitation. CP 25-34.

There is no ambiguity. The Respondent unequivocally proposed terminating the Wednesday visitation for expanding his weekend visitation during the school year. The lower court erred in failing to review the letters for the Respondent's objective manifestation of agreement. Hearst Comm'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503 (2005).

Ultimately, since the court commissioner recognized that the respondent's claims regarding his offer were contradictory as discussed directly above, the court commissioner based his denial to enforce the settlement agreement on the fact that the offer was retracted so quickly after the January 15, 2010 letter. CP 53-83, verbatim report of proceedings page 26, line 17. Normally, when an appeal is taken from an order denying revision of a court commissioner's decision, the Court of Appeals will review the superior court's decision, not the commissioner's. In the Matter of Lydia D., 156 Wn.App. 22, 27 (2010). However, since the superior court judge adopted an abuse of discretion standard, it appears that her findings are the same as the court commissioner's findings.

However, this area of contract law is one that is not seriously debatable. An offer may be rescinded or revoked up until the time of acceptance. Once acceptance has been made, a contract exists. 1 Samuel Williston & Richard A. Lord, A Treatise On The Law Of Contracts § 5.8, at 666 (4th ed. 1990); A.A.B. Elec., Inc. v. Stevenson Pub. Sch. Dist. No.

303, 5 Wn. App. 887, 889 (1971) (“There is no contract until the offer is accepted). Once mutual assent is present, offer and acceptance, the contract formed may only be void or voidable due to misrepresentation, fraud or unconscionability. Fire Protection District V. Yakima, 122 Wn.2d 371, 390 (1993). None of which exist here.

The Respondent now argues for the first time that the settlement agreement is not enforceable based on public policy. Respondent Brief page 33. However, the Parenting Act requires a trial court fashioning a residential schedule for a child to consider the agreements of the parents, provided the agreements were entered into knowingly and voluntarily. RCW 26.09.187(3)(a)(ii). The statute also attempts to encourage amicable settlements of disputes connected with separation and marriage dissolution. RCW 26.09.070.

A trial court is not required to follow the terms of a separation agreement which relate to the parenting of children, RCW 26.09.070(3); In re Marriage of Their, 67 Wn.App. 940, 944, *review denied*, 121 Wn.2d 1021 (1992) (the terms of an agreement pertaining to child custody are not binding on the trial court). However, this is based on the fact that the court has an independent responsibility to ensure that the parties’ agreements result in a parenting plan that is in the child’s best interest. See e.g., RCW 26.09.070(3). But see RCW 26.09.187(3) which requires

the court to approve an agreement of the parties regarding the allocation of decision making authority if such agreement was “knowing and voluntary” and complies with RCW 26.09.191.

Here, the agreement was not found to be unenforceable due to public policy reasons, nor did the Respondent ever indicate that the agreement should not be enforced as it was not in the best interest of the children. The lower court made no finding that this agreement was not in the best interests of the children. In all candor, whether a Wednesday night visit was traded for additional weekend residential time could have virtually no impact on the children’s overall interests. The entire issue before the trial court was simply whether there was an agreement under CR 2(A).

As a matter of public policy, to hold that written agreements between parents represented by counsel and that were drafted by counsel, are not enforceable would virtually eliminate all settlement discussions. Settlement letters would be meaningless as a party could back out at any point before the judicial officer signs the subsequently drafted order. Mediated agreements would be futile. The only agreement that would be enforceable would be those read on the record to a judicial officer and subsequently approved by the judicial officer. Certainly, the authority cited above stands for the proposition that settlements between the parents

as to parenting plan issues are encouraged. The lower court erred in finding that there was no binding and enforceable agreement.

IV. ASSIGNMENT OF ERROR NUMBER FOUR: THE COURT ERRED BY ORDERING SANCTIONS AGAINST THE PETITIONER'S COUNSEL FOR REQUESTING A CONTINUANCE OF THE REVISION HEARING.

Local Spokane County Superior Court Rule 0.7 governs revisions of court commissioner's order or judgment. LAR 0.7. LAR 0.7(d) requires the moving party to confirm with the other party whether they are ready for hearing or whether a continuance may be requested. LAR 0.7(d) further provides that sanctions may be issued if the non-moving party is forced to appear at a hearing and the hearing is stricken due to non-compliance with this rule. Neither of those circumstances occurred here even under the facts asserted by the respondent.

The revision court made clear that her imposition of sanctions was directly related to "trying to sort out the true status when all parties had been there and the court had been recognizing that this was a – was not to be on the schedule so had to go get the file etcetera, it just created issues that didn't need to be there." RP 24, line 14. The court goes on to state that "I had to have my JA come out and explain from her perspective what

happened, which was contrast to what was being asserted”. RP 24. This is the basis for imposing sanctions.

What occurred that day was Appellant’s counsel was unavailable due to a pre-schedule mediation. CP 84-85. Notice was given to the Respondent’s attorney prior to the schedule revision hearing. CP 84-85. Respondent’s counsel opposed the continuance of the hearing, thereby requiring the court’s time for the continuance hearing. CP 86-91.

As in the opening brief, the appellant does not deny the judicial time is taken when parties cannot agree to a continuance and court time is required to resolve the dispute. However, both parties have the right to agree to or oppose a continuance request and both parties share in the responsibility for the failure to reach a continuance resolution. This does not change the fact that requesting a continuance is not a basis for sanctions under the rule unless such request is deemed frivolous (CR 11) or due to intransigence.

The lower court did not make a finding of intransigence in awarding fees. Intransigence is a basis for an equitable award of attorney fees in a domestic relations matter. Marriage of Buchanan, 150 Wn.App. 730, 739 (2009). Thus, intransigence was a basis for an award of fees where a husband concealed military benefits resulting in unnecessary litigation. Id. Intransigence was also an appropriate basis for fees when a

husband inappropriately transferred assets. In re Scalf-Foster, 155 Wn.App. 1028 (2010). Certainly the request for a continuance due to a conflict with mediation, especially where the continuance request was granted, does not rise to the level of intransigence as seen in the case law.

V. REQUEST FOR ATTORNEY FEES

Pursuant to RAP 14.2 the Appellant again requests an award of attorney fees and costs as the prevailing party.

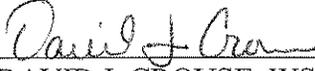
CONCLUSION

By its own written findings, the lower court conducted the revision hearing on an abuse of discretion standard. The lower court did not consider the Appellant's memorandum of authority. This resulted in the revision hearing being denied, despite the fact that the court commissioner's decision (an accepted settlement offer could be rescinded the next day) was clearly contrary to established contract law.

A settlement agreement was reached. There was no finding that the settlement was contrary to the best interests of the children. This Court should reverse the decision of the lower court and find that the

agreement was enforceable and direct the lower court to enter an order in accord with the settlement agreement. The \$300.00 in sanctions should also be reversed as there is no for such an award.

Respectfully Submitted:

By: 

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Attorney for Petitioner

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DIVISION III
STATE OF WASHINGTON
BY

AMENDED CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is a person of such age and discretion to be competent to serve papers.

That on the 7th day of December, 2010, she had served a copy of the Appellant's Reply Brief to the persons hereinafter named at the places of address stated below which is the last known address.

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CHRISTINA RADZIMSKA

SUBSCRIBED AND SWORN to before me this 9th day of December, 2010.


NOTARY PUBLIC in and for the State of
Washington, residing in Spokane.
My Commission Expires: 3-19-2012