

No. 303527

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

**FILED**

AUG 27 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

RICHARD T. WIXOM,  
Petitioner-Father-Appellant,

v.

LINDA B. WIXOM,  
Respondent-Mother.

**REPLY BRIEF OF APPELLANT**

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## **I. Introduction**

The Respondent-Mother has presented four defenses in this appeal.

The first defense presented by the Respondent-Mother is the baseless claim that the parties somehow have no actual, present, or existing dispute and, therefore, that the Petitioner-Father has not met the procedural requirements for the trial judge to consider the father's motion for declaratory relief.

The second defense presented by the Respondent-Mother is the unfounded claim that no effective relief is available for the Petitioner-Father and, therefore, that this appeal by the Petitioner-Father is moot. Though around twelve months have passed, the Petitioner-Father could still receive makeup time for the lost time the court took from him during the summer of 2011. For this reason, effective relief is available to resolve an actual dispute between the parties.

The third defense presented by the Respondent-Mother is the groundless claim that declaratory relief is somehow improper when a party has an alternate remedy. Although this was the rule in the State of Washington, the Supreme Court changed this rule in 1967. See CR 57 (providing that the "existence of another adequate remedy does not preclude . . . declaratory relief in cases where it is appropriate").

The fourth defense presented by the Respondent-Mother is the unsupported claim that the Petitioner-Father cannot now challenge the Commissioner's August 5, 2011 order despite the clear mandate of RAP 2.4(b) (allowing the appellate court to review a ruling or trial court order entered before the appellate court accepts review if "the order or ruling prejudicially affects the decision designated in the notice").

A reply brief is limited to the contents of the brief of respondent. RAP 10.3(c). As the Respondent-Mother chose not to address the decisive issues of the case law regarding the proper interpretation of orders, of the case law regarding equitable estoppel, and of the case law regarding the Constitutional rights of the Petitioner-Father to parent his child, this reply brief will not address those in any depth.

This Court should reverse the trial judge's denial of the father's motion for declaratory relief and remand for the trial court to enter the declaratory relief to which the father is entitled and for the trial court to impose makeup time for the father against the mother. The father is also entitled to his reasonable attorney fees and litigation expenses.

## **II. Factual Corrections**

According to the Respondent-Mother, the trial judge found that there was "no actual, present, or existing dispute." Brief of Respondent, page 13. For this claim, the Respondent-Mother cites page 39 of the

Report of Proceedings. Nowhere on page 39 of the Report of Proceedings is the word “actual” even mentioned. Also absent are the words “present,” “existing,” or “dispute.” Indeed, the only reference in the Report of Proceedings to the existence of an “actual, present, or existing dispute” is argument by the Respondent-Mother’s trial counsel. RP 14. The only instances of the words “existing” or “dispute” are in this context. RP 14. Although the Report of Proceedings does have other instances of the words “actual” or “present,” none of these are in the context of these procedural requirements for declaratory relief.

Simply stated, the trial court chose not to enter a finding that the parties did not have an actual, present, or existing dispute. The Petitioner-Father disagrees with the unfounded statement of the Respondent-Mother that the trial court made a finding that “there is no actual, present, and existing dispute.” Brief of Respondent, page 13. The Respondent-Mother’s allegation to this effect does not reflect the record. This Court should ignore the Respondent-Mother’s unfounded attempt to change the record.

The existence of an actual, present, or existing dispute between the parties is a procedural requirement of declaratory relief. Brief of Respondent, page 13. If the trial court had decided that the parties lacked an actual, present, or existing dispute, the trial court would have had no

reason to decide the motion for declaratory relief on the merits. Because the trial court analyzed and actually decided the motion for declaratory relief on the merits, the trial court must have decided by implication that the parties had an actual, present, and existing dispute.

### **III. Argument**

#### **A. Despite the clear mandate of RAP 2.4(b), the Respondent-Mother claims that the Petitioner-Father cannot now challenge the Commissioner's August 5, 2011 order.**

The Respondent-Mother defends on the basis that the Petitioner-Father did not seek revision of, appeal, or seek discretionary review of the August 5, 2011 Order. Brief of Respondent, 8-9, 12. In addition to the briefing from the Brief of Appellant on pages 19-20, which includes the reviewability of a "manifest error affecting a constitutional right" under RAP 2.5(a)(3) even if the appellant failed to raise the issue before the trial court, this Court should find that the complaint of the Respondent-Mother is not well taken for the additional reason that the appellate court may review a ruling or trial court order entered before the appellate court accepts review if "the order or ruling prejudicially affects the decision designated in the notice." RAP 2.4(b).

An order denying a party's motion to dismiss a case prejudicially affects an order compelling production on the discretionary review in an interlocutory appeal of the latter order. Right-Price Recreation, L.L.C. v. Connells Prairie Cmty. Council, 146 Wn.2d 370, 379 (2002). In that case, the Supreme Court held that the court of appeals could not narrow the materials under consideration because the appeal was interlocutory. Id. at 380.

The test for whether an earlier order prejudicially affects a later order that is actually appealed is whether "the order appealed from would not have happened but for the first order." Id. In this case, the Order from September 23, 2011 denying declaratory relief would not have happened if the Petitioner-Father had not filed his motion for declaratory relief. The Petitioner-Father would not have filed his motion for declaratory relief, if the Order from August 5, 2011 had not been entered. The Respondent-Mother cannot dispute that the Order from September 23, 2011 denying declaratory relief would not have happened but for the Order from August 5, 2011. As such, the earlier order prejudicially affects the later order.

Simply stated, the Order from August 5, 2011 prejudicially affects the Order from September 23, 2011. Thus, the father may certainly litigate in this appeal whether the August 5, 2011 Order violates the father's constitutional rights and whether the commissioner should not have

entered this Order because the mother was equitably estopped from pursuing the relief she received in that Order.

**B. Effective relief is still available to resolve this actual, present, and existing dispute between the parties.**

According to the Respondent-Mother, the parties have no actual, present, or existing dispute. See Brief of Respondent, page 13. The position of the Respondent-Mother appears to be that she can take the Petitioner-Father's visitation and parenting time from him, with the court's blessing, and direct or give that visitation and parenting time to her parents. Additionally, the Petitioner-Father could receive makeup time to compensate him for the time he lost in the summer of 2011, although the child would not be the same age as the child would have been in the summer of 2011. For these reasons, the parties do have an actual, present, and existing dispute.

Therefore, the Petitioner-Father meets the procedural requirements for the consideration of his motion for declaratory relief. For these same reasons, effective relief is available for the Petitioner-Father. Therefore, this appeal by the Petitioner-Father is not moot.

Effective relief is available to resolve an actual, present, and existing dispute between the parties. This Court should not dismiss any part of this appeal.

**C. Declaratory relief remains available in cases where a party has an alternate remedy.**

The Respondent-Mother states that “RCW 26.09 clearly provides adequate relief and there is no need for declaratory relief.” Brief of Respondent, 12-13 (citing Ronken v. Board of County Comm’rs of Snohomish County, 89 Wn.2d 304, 310, 572 P.2d 1 (1977)). The Respondent-Mother’s citation of Ronken is improper for four reasons. First, Ronken does not even mention RCW 26.09. Ronken cannot relate to a statute it never cites. Second, the Ronken court **rejected** argument of the Commissioners that their opponents “had an alternative remedy at law” and, for this reason, “should not have been permitted to bring this action.” Id. at 307.

Third, the Ronken court did not follow the “rule previously followed by Washington” that “declaratory relief will not lie where an alternative remedy is available.” Id. at 310. Fourth, the previous rule in Washington “was changed by court rule in 1967.” Id.

The Superior Court Civil Rule for “Declaratory Judgments” states in its entirety as follows:

The procedure for obtaining a declaratory judgment pursuant to the Uniform Declaratory Judgments Act, RCW 7.24, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in rules 38 and 39. **The existence of another adequate remedy does not preclude**

**a judgment for declaratory relief in cases where it is appropriate.** The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

CR 57 (emphasis added). The Ronken court cites the exact language of the second sentence of CR 57. Ronken, 89 Wn.2d at 310 (holding that declaratory relief is available when another adequate remedy exists).

The Respondent-Mother has cited Ronken for the proposition that declaratory relief is not available when another adequate remedy exists. Brief of Respondent, 12-13. Instead, Ronken stands for the proposition that declaratory relief is available when another adequate remedy exists. The Respondent-Mother has cited Ronken for the exact opposite of what Ronken actually says!

This Court should reject the attempt of the Respondent-Mother to rewrite Ronken.

**D. The mother chose not to provide adequate support for her interpretation of the Commissioner's Order from August 5, 2011.**

The Respondent-Mother quotes certain language from the oral ruling of the trial court, on the apparent belief that this language supports her interpretation of the Order from August 5, 2011.

The Respondent-Mother quotes the following statement by the trial court about the commissioner: "I think what she did was recognized that

the child had a history . . .” Brief of Respondent, page 3 (quoting RP 40:1-2). This statement by the trial court is apparently based on evidence outside the record and is inadmissible. ER 605 (prohibiting a judge from testifying in trial as a witness). For this reason, this Court should disregard the statement by the trial court. Alternatively, this statement by the trial court is speculation and conjecture on the part of the trial court. A trial court may not make a decision based on speculation and conjecture. See In Re Pers. Restraint of Dyer, 157 Wn.2d 538, 369 ¶ 21, 139 P.3d 320 (2006) (remanding the matter to the board for a new hearing without “speculation and conjecture”).

The Petitioner-Father has been unable to locate any discussion of **the actual language** of the Commissioner’s Order from August 5, 2011 in the Brief of Respondent.

The Order of August 5, 2011 was a written judicial determination. CP 53-54. The reviewing court must base its interpretation of a document on the language of the document. Byrne v. Ackerlund, 108 Wn.2d 445, 455, 739 P.2d 1138 (1987) (describing the language of the document as reflecting the intent of the parties) (citing Kinne v. Kinne, 82 Wn.2d 360, 362, 510 P.2d 814 (1973)). Where the language of a document “is unambiguous on its face,” the meaning of the document “is interpreted

from its language and not from parol evidence.” Kinne, at 362 (citing Messersmith v. Messersmith, 68 Wn.2d 735, 415 P.2d 82 (1966)).

Simply stated, the first question is whether the language of the order is ambiguous. The Brief of Respondent never asked or answered this question. If the language of the order is unambiguous, the court and the parties must abide by the actual language of the order and may not proceed to other sources, such as the language of the court’s oral ruling.

Even if the language of the order is ambiguous, any ambiguity is interpreted against the one who drafted the order. See Brief of Appellant, pages 29-31. This Court should resist the invitation of the Respondent-Mother to re-write the Commissioner’s Order of August 5, 2011.

**E. The Commissioner’s Order of August 5, 2011 and the trial court’s Order of September 23, 2011 denying declaratory relief were clear violations of the father’s Constitutional rights to parent his child.**

The Petitioner-Father asserts that the Commissioner violated his constitutional rights and that the trial court perpetuated this violation. The constitutional rights of the Petitioner-Father that the Commissioner and the trial court violated are the father’s rights to parent his child under the Washington State Constitution, under the procedural and substantive due process provisions of the Fifth Amendment and the Fourteenth Amendment to the United States Constitution, and his liberty interest

rights of association under the First Amendment to the United States Constitution. Brief of Appellant, pages 31-33.

The Respondent-Mother alleges that “no rights were granted or created in the grandparents.” Brief of Respondent, 14. The Respondent-Mother has chosen not to substantiate this bare allegation with any argument. The Respondent-Mother has chosen not to attempt to reconcile its allegation with the actual language of the August 5, 2011 order. This allegation of the Respondent-Mother has no merit.

**F. The mother oversimplifies the standard of review.**

As applied in this matter, the standard of review has three aspects. First, the construction of a written judicial determination is a question of law. Byrne v. Ackerlund, 108 Wn.2d 445, 455, 739 P.2d 1138 (1987). A question of law is interpreted de novo. See Nevers v. Fireside, Inc., 133 Wn.2d 804, 809, 947 P.2d 721 (1997) (citations omitted).

Second, the “de novo standard is best applied when the appellate court stands in the same position as the trial court and may make a determination as a matter of law.” State v. Ortega, 120 Wn. App. 165, 171, 84 P.3d 935 (2004) (citing State v. Garza, 150 Wn.2d 360, 366, 77 P.3d 347 (2003)).

Where, as in this case, the record on both trial and appeal consists of affidavits and documents, and the trial court has neither seen nor heard testimony requiring it to assess the

credibility or competency of witnesses, nor had to weigh the evidence or reconcile conflicting evidence in reaching a decision, the appellate court stands in the same position as did the trial court in reviewing the record.

Spokane Police Guild v. Wash. State Liquor Control Bd., 112 Wn.2d 30, 35-36, 769 P.2d 283 (1989) (citations omitted). In this circumstance, the standard of review is de novo. Id.

The third aspect of the standard of review is the definition of abuse of discretion. A trial court abuses its discretion when its decision is based on untenable grounds or for untenable reasons. Wagner Dev. v. Fidelity & Deposit, 95 Wn. App. 896, 906, 977 P.2d 639 (Div. 2, 1999) (citing State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), cert. denied, 118 S. Ct. 1193 (1998); State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

If the trial court based its decision on untenable grounds or for untenable reasons, the trial court has abused its discretion, by definition.

The Respondent-Mother claims that the “granting of declaratory relief is discretionary with the trial court. Ronken, 89 Wn.2d at 310.” Brief of Respondent, page 14. The Respondent-Mother also claims that an “abuse of discretion occurs when a decision is manifestly unreasonable or is based on untenable grounds or for untenable reasons. State ex rel.

Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971).” Brief of Respondent, page 14.

Even if these claims have any merit, they grossly over-simplify the standard of review. They omit the facts discussed above that the construction of a written judicial determination is a question of law which is decided de novo, that the appellate court stands in the same position as the trial court and may make a determination as a matter of law, and that the trial court abuses its discretion when it bases its decision on untenable grounds or for untenable reasons.

For these reasons, the Petitioner-Father asks this Court to reject the invitation of the Respondent-Mother to apply an incorrect standard of review and asks this Court to apply the correct standard of review.

**G. The mother is not entitled to any attorney fees.**

**1. The mother is not entitled to statutory attorney fees as a taxable cost.<sup>1</sup>**

The Respondent-Mother seeks to recover statutory attorney fees. Brief of Respondent, 15. In addition, the Respondent-Mother seeks reasonable attorney’s fees. See Brief of Respondent, 15-16 (seeking reasonable attorney fees under RCW 26.09.140 and intransigence).

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<sup>1</sup> This section is not discussing reasonable attorney fees on a statutory basis (for clarification).

A “party is not entitled to the attorney’s fee thus provided [“as a reasonable attorney’s fee”] and also to the statutory fee of \$10 [now \$200] allowed as costs to the prevailing party.” Montesano v. Blair, 12 Wash. 188, 189-190 (1895).

This Court should follow the clear precedent of the Supreme Court of the State of Washington and decline to award the Respondent-Mother the statutory attorney’s fee as a taxable cost.

Even if this Court finds in favor of the Respondent-Mother and denies reasonable attorney fees to her, this Court should still not award the statutory attorney’s fee as a taxable cost to the Respondent-Mother.

The Respondent-Mother is only entitled to the statutory attorney’s fee as a taxable cost one time. RCW 4.84.080. This Court also has on its docket an appeal of the trial court’s decision on the parties’ petitions for modification of custody, Case Number 308511. If the mother is entitled to the statutory attorney’s fee as a taxable cost at all, she may be entitled to the statutory attorney’s fee as a taxable cost in Case Number 308511, not in the instant appeal. For this reason, she is not entitled to the same statutory attorney’s fee as a taxable cost in each appeal.

This Court should decline to award the statutory attorney’s fee as a taxable cost to the Respondent-Mother in this appeal.

**2. The mother is not entitled to reasonable attorney fees.**

The Respondent-Mother seeks “her fees for defending against this appeal” on the basis that “she has the need” and the Petitioner-Father has the ability to pay. To the contrary, the Petitioner-Father denies that he has the ability to pay and denies as well that the Respondent-Mother has the need.

This Court should deny the Respondent-Mother’s request for reasonable attorney’s fees based on RCW 26.09.140.

With respect to the motion for declaratory relief, the Respondent-Mother claimed that the procedural requirements were not met for declaratory relief (Brief of Respondent, 13), that the trial court found that the parties had no actual, present, existing dispute (Brief of Respondent, 13), and that an alternate remedy prevents declaratory relief (Brief of Respondent, 12). All of these claims by the Respondent-Mother are false. For the proposition that an alternate remedy prevents declaratory relief, the Respondent-Mother cites a case that states the exact opposite! Brief of Respondent, 12-13 (citing Ronken).

If the Respondent-Mother’s legal costs have escalated, she cannot blame such escalation on the Petitioner-Father. Instead, her legal costs are due to her own improper arguments. For this reason, the Petitioner-Father has not engaged in intransigent conduct of litigation.

The Petitioner-Father's actions in bringing this appeal to uphold his Constitutional rights to parent his child are justified. The Respondent-Mother would have this Court deny the Petitioner-Father access to the courts on this constitutional issue by claiming intransigence. This Court should deny the Respondent-Mother's request for reasonable attorney's fees.

**H. The father is entitled to attorney fees.**

In the Brief of Appellant, the Petitioner-Father requested reasonable attorney fees on the basis of RCW 26.09.140. The Petitioner-Father will timely file an affidavit of financial need pursuant to RAP 18.1(c). As the Respondent-Mother has chosen not to discuss in her Brief of Respondent the need of the Petitioner-Father and the ability to pay of the Respondent-Mother as a basis for an award of reasonable attorney's fees to the Petitioner-Father, this reply brief will not discuss it any further.

In the previous section, the Petitioner-Father explains how the Respondent-Mother has conducted this litigation in an intransigent manner. To repeat, the Respondent-Mother falsely claimed that the procedural requirements were not met for declaratory relief (Brief of Respondent, 13), falsely claimed that the trial court found that the parties had no actual, present, existing dispute (Brief of Respondent, 13), and falsely claimed that an alternate remedy prevents declaratory relief (Brief

of Respondent, 12). For the proposition that an alternate remedy prevents declaratory relief, the Respondent-Mother cites a case that states the exact opposite! Brief of Respondent, 12-13 (citing Ronken).

The conduct of the Respondent-Mother has been intransigent. For this reason, the Petitioner-Father asks for reasonable attorney fees on this basis.

#### **IV. Conclusion**

The Respondent-Mother falsely claims that declaratory relief is somehow improper when a party has an alternate remedy. Although this was the rule in the State of Washington, the Supreme Court changed this rule in 1967. See CR 57 (providing that the “existence of another adequate remedy does not preclude . . . declaratory relief in cases where it is appropriate”). A violation of a person’s Constitutional rights is an appropriate matter for declaratory relief.

The Respondent-Mother falsely claims that the parties somehow have no actual, present, or existing dispute and falsely claims that no effective relief is available for the Petitioner-Father. Even today, however, the Petitioner-Father could still receive makeup time for the time he lost during the summer of 2011. For this reason, effective relief is available to resolve an actual dispute between the parties. Effective relief is still

available to resolve this actual, present, and existing dispute between the parties.

Contrary to RAP 2.4(b), the Respondent-Mother falsely claims that the Petitioner-Father cannot now challenge the Commissioner's August 5, 2011 order. The appellate court may review a ruling or trial court order entered before the appellate court accepts review if "the order or ruling prejudicially affects the decision designated in the notice." RAP 2.4(b). The earlier order from August 5, 2011 prejudicially affects the appealed-from order from September 23, 2011 and is a proper subject of this appeal.

This Court should reverse the trial judge's denial of the father's motion for declaratory relief and remand for the trial court to enter the declaratory relief to which the father is entitled and for the trial court to impose makeup time for the father against the mother. The father is also entitled to his reasonable attorney fees and litigation expenses at the trial court as well as the appeal court levels.

Respectfully submitted this 24<sup>th</sup> day of August 2012.



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