Duda v. Mickelson

133 Wash.App. 1004 (2006) | Cited 0 times | Court of Appeals of Washington | May 23, 2006

JUDGES Concurring: Kenneth H. Kato Stephen M Brown

UNPUBLISHED OPINION

Jaimelynn Quinlin appeals the superior court's revision of three commissioner's orders concerning child support and residential issues in favor of her former husband Brent Duda. Ms. Quinlin claims: (1) Mr. Duda's motion to revise terms on an order to vacate an ex parte order modifying their parenting plan is time barred because he missed the 10-day deadline for revisions imposed by RCW 2.24.050; (2) the superior court had no authority to revise the commissioner's finding of contempt on a support order because Mr. Duda declined to seek revision of the amount of support ordered and that the superior court also used an impermissible standard for revising the attorney fee award on that order; and (3) the superior court erred in revising the contempt finding on the parenting plan because it misunderstood the degree and burden of proof necessary.

We conclude that the record is insufficient to review the timeliness of the revision of the terms on the order to vacate. We also conclude that the revising court had jurisdiction and authority to examine and revise the child support and residential placement issues before it, and the court did not employ impermissible standards in its review. Because we conclude that the revising court's findings are supported by substantial evidence and the conclusions of law are supported by the findings, we affirm. Finally, because we conclude the appeal was not frivolous, we decline to award attorney fees.

FACTS

On December 4, 2002, a parenting plan was entered and filed with the Grant County Superior Court in the case involving the marriage dissolution of Brent Duda and Jaimelynn Quinlin. The parties agree that the parenting plan provides that the parties' daughter Madison primarily reside with her mother and that Mr. Duda have visitation every other weekend.

On October 30, 2003, the parties signed a notarized agreement that set forth their intention to modify the parenting plan in light of Ms. Quinlin's impending move to Mukilteo, Washington. The parties agreed that Mr. Duda would have visitation with Madison for one week beginning the second Saturday of each month and return her by the following Saturday. The agreement was not approved by or filed with the court. The parties disagree on the length of time that they actually adhered to this modified schedule.

On August 10, 2004, Ms. Quinlin filed a show cause motion for contempt concerning Mr. Duda's alleged failure to pay $993.85 in child care expenses.

On August 14, Ms. Quinlin delivered Madison to Mr. Duda in Quincy, Washington for visitation. Mr. Duda told Ms. Quinlin that he intended to keep Madison for a week under the terms of their agreed October 2003 modified schedule. Ms. Quinlin attempted to enforce the December 2002 parenting plan by unsuccessfully requesting that the police arrest Mr. Duda for custodial interference. She then filed a motion for order to show cause for contempt under the provisions of the December 2002 parenting plan. The relief requested was granted in an oral decision on August 27 together with her request for child care expenses. Mr. Duda moved for reconsideration.

In the meantime, Mr. Duda apparently petitioned to modify the parenting plan in light of Ms. Quinlin's next impending move to Illinois. Ms. Quinlin set a motion on the docket for August 27, relating to a 'relocation hearing.' Clerk's Papers (CP) at 38-39. While the parties attempted to resolve the issues by an agreed parenting plan, Ms. Quinlin obtained an ex parte order modifying the parenting plan on August 25. Mr. Duda moved to vacate the ex parte order. Commissioner Suzanne Seburn granted the motion to vacate on October 22, and also ordered that '{s}uch terms as are just shall be awarded to {Ms. Quinlin}.' CP at 59. Ms. Quinlin then filed a motion to determine terms. Mr. Duda later filed a brief arguing that terms would be inappropriate.

On November 12, Commissioner Seburn entered three orders. First, Ms. Quinlin was awarded $1,560 in terms for the motion to vacate. Second, an order finding Mr. Duda in contempt was entered for child support in which Ms. Quinlin was awarded a reduced amount of $223.55 in day care expenses, attorney fees of $545, and costs of $55. Third, an order finding Mr. Duda in contempt was entered on the parenting plan in which Ms. Quinlin was awarded attorney fees of $1,000, costs of $65, and a civil fine of $100.

Mr. Duda moved for revision on November 22 of all financial awards except the amount of the day care expense. On January 6, 2005, the superior court issued a memorandum decision, which was reduced to findings of fact and an order on February 4. The superior court ruled that all of the judgments entered November 12 were revised, all of the contempt findings were stricken, and all of the financial awards were stricken except the day care expenses. Ms. Quinlin appeals.

DISCUSSION

We note that Ms. Quinlin did not set forth separate assignments of error as required by RAP 10.3(a). Instead, she headed each section as a separate issue. Nor did she comply with RAP 10.3(g) in that she did not set forth a separate assignment of error for each finding and reference to the finding by number. The record on appeal is also spotty. Many documents referenced are not provided, including the December 2002 parenting plan, orders to show cause, and the motion to modify. There were no reports of proceedings provided. Instead, Ms. Quinlin filed a RAP 9.2(a) statement of intent not to file

a verbatim transcript. Generally, the party seeking review is responsible for providing the appellate court with a report of proceedings. RAP 9.5(a).

A technical violation of the rules will not ordinarily bar appellate review where judicial efficiency and justice can better be served by reaching the merits. See Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd., 107 Wn.2d 427, 431, 730 P.2d 653 (1986). The appellate court may 'decide the case on its merits, promoting substance over form.' State v. Olson, 74 Wn. App. 126, 129, 872 P.2d 64 (1994), aff'd, 126 Wn.2d 315, 893 P.2d 629 (1995).

However, because of these deficiencies, it is difficult to sort out some of the parties' arguments. For instance, Mr. Duda did not directly respond to the first issue Ms. Quinlin presented. It is not clear whether Mr. Duda misunderstood the issue presented or if the misunderstanding is attributable to Ms. Quinlin's failure to comply with the rules. See State v. Grimes, 92 Wn. App. 973, 978, 966 P.2d 394 (1998) (court will reach the merits if the issues are reasonably clear from the brief, the opposing party has not been prejudiced, and the court has not been overly inconvenienced); Viereck v. Fibreboard Corp., 81 Wn. App. 579, 583, 915 P.2d 581 (1996) (if appellant's argument is clear to the extent respondent understood and was able to respond, court may chose to review on the merits). Mr. Duda does not, however, complain of any rules violations.

a. Revision on Terms re: Order to Vacate

Mr. Duda did not move to revise the order of October 22, 2004, granting his motion to vacate, which includes a notation that '{s}uch terms as are just shall be awarded to {Ms. Quinlin}.' CP at 59. His revision was sought within 10 days of the entry of the November 12 order that awarded terms in the amount of $1,560. Ms. Quinlin argues that when Mr. Duda failed to move to revise the October 22 order, the commissioner's award became the award of the superior court and Mr. Duda was required to seek relief through the appellate court. RCW 2.24.050. Mr. Duda only argues that the court did not abuse its discretion in deciding to award no terms in the October 22 order.

Under RCW 2.24.050, a party may request a revision of a superior court commissioner's order 'upon demand made by written motion, filed with the clerk of the superior court, within ten days after . . . entry.' The 10- day requirement is mandatory; as a statutory mandate it may not be ignored by superior court, and it is not subject to the substantial compliance rule. In re Marriage of Robertson, 113 Wn. App. 711, 714-15, 54 P.3d 708 (2002).

When the order granting the motion to vacate was entered on October 22, the terms ordered had no value. The terms contemplated at the time that order was entered were only those as were 'just.' CP at 59. It could be that no terms would be just. Mr. Duda submitted a brief after the first order issued arguing just that. Ms. Quinlin's motion for terms was also filed on October 22, but the order to vacate was entered first, at least insofar as the order in which the filing occurred. It is unclear what occurred at the hearing on the motion to vacate during which terms were contemplated, and no determination

can be made on this record.

The report of proceedings can take the form of a 'verbatim report of proceedings,' a 'narrative report of proceedings,' or an 'agreed report of proceedings.' RAP 9.1(b), 9.3, 9.4. Neither party provided any report of proceedings to clarify these matters. It is unclear what the commissioner intended with respect to her October 22 order when taken in context with the pleadings subsequently filed. The record is insufficient to determine when the 10-day period should begin.

b. Revision on Contempt Order re: Parenting Plan

'Parents are deemed to have the ability to comply with orders establishing residential provisions and the burden is on a non-complying parent to establish by a preponderance of the evidence that he or she lacked the ability to comply with the residential provisions of a court- ordered parenting plan or had a reasonable excuse for noncompliance.' In re Marriage of Rideout, 150 Wn.2d 337, 352-53, 77 P.3d 1174 (2003) (citing RCW 26.09.160(4)). 'If a trial court finds after a hearing that a parent has 'not complied with the order establishing residential provisions' of a parenting plan in 'bad faith,' the court 'shall find' the parent in contempt of court.' Id. at 349 (quoting RCW 26.09.160(2)(b)). If the contempt finding is made by a court commissioner, it is subject to revision by the superior court within 10 days of the entry of the order. RCW 2.24.050.

When considering a commissioner's ruling on revision, the superior court reviews the commissioner's findings of fact and conclusions of law de novo on the record. State v. Ramer, 151 Wn.2d 106, 113, 86 P.3d 132 (2004); RCW 2.24.050. The appellate court reviews the superior court's findings of fact to determine whether they are supported by substantial evidence and then determines whether the findings support the conclusions of law. Rideout, 150 Wn.2d at 350.

Ms. Quinlin seems to argue that the superior court misunderstood that Mr. Duda had an obligation to prove by a preponderance of the evidence that he had a reasonable excuse for his failure to comply with the parenting plan and that the court ignored the evidence presented. The superior court found 'an agreement signed by the parties is not the law of the case, which only occurs if the agreement is signed by the court. . . . {However,} to find contempt and impose attorney fees for following the agreed plan is another matter.' CP at 82. Implicit in this finding is the determination that Mr. Duda's adherence to the parties' agreed plan was not in bad faith and constituted a reasonable excuse for his noncompliance with the parenting plan filed with the court. See also In re Marriage of Maxfield, 47 Wn. App. 699, 737 P.2d 671 (1987) (holding that contemnor must have knowledge of the existence and substantive effect of the order). This finding is supported by Mr. Duda's declaration in which he asserted that he and Ms. Quinlin followed their October 2003 agreement, but Ms. Quinlin used it when it benefited her and disregarded it when it did not. Further, the finding supports the legal conclusion that the finding of contempt should be stricken and the attorney fees, costs, and civil fine associated with it should also be stricken.

c. Revision on Contempt Order re: Support Order

Ms. Quinlin contends that the superior court lacked jurisdiction to strike the finding of contempt regarding the day care expense issue because Mr. Duda did not dispute that he owed the expenses and specifically removed that issue from consideration. Contempt actions for child support obligations are governed by chapter 26.18 RCW. The court retains continuing jurisdiction in child support matters until all obligations have been satisfied. RCW 26.18.040(3). This case presents no jurisdictional issue. Instead, Ms. Quinlin questions the superior court's authority to revise an issue because Mr. Duda failed to place it before the court.

A party may initiate a contempt action when 'an obligor fails to comply with a support or spousal maintenance order.' RCW 26.18.050(1). The court may issue an order to show cause if it finds reasonable cause to believe the obligor has failed to comply with the order and require the obligor to appear and show cause why the relief requested by the obligee should not be granted. RCW 26.18.050(1). The obligee must show that the payments were not made under the support order and the obligor may then argue that he could not comply with the support order, if he can establish that he 'exercised due diligence in seeking employment, in conserving assets, or otherwise in rendering himself . . . able to comply with the court's order.' RCW 26.18.050(4). The 'preponderance of evidence' rule applies in contempt proceedings as in other civil proceedings. State v. Boren, 44 Wn.2d 69, 73, 265 P.2d 254 (1954). The prevailing party in an action to enforce a support order is entitled to reasonable attorney fees. RCW 26.18.160. In order for the obligor to be a prevailing party under this statute, the obligee must be found to have acted in bad faith in connection with the enforcement proceeding. RCW 26.18.160; In re Marriage of Cummings, 101 Wn. App. 230, 235, 6 P.3d 19 (2000).

'{T}he revision court's scope of review is not limited merely to whether substantial evidence supports the commissioner's findings. Instead, the revision court has full jurisdiction over the case and is authorized to determine its own facts based on the record before the commissioner.' In re Marriage of Dodd, 120 Wn. App. 638, 644, 86 P.3d 801 (2004) (citation omitted). Mr. Duda placed the record before the superior court to examine the attorney fees as it related to the contempt on the support order for day care expenses. The court's finding of contempt is independent of its finding that the expense is owed. The court need not find an obligor like Mr. Duda in contempt if he establishes a reason he is unable to pay. RCW 26.18.050(4). That would not, however, relieve him of his responsibility to ultimately pay the obligation. He simply would not be punished for his present good faith inability to do so.

Here, the court found that Ms. Quinlin had the responsibility of informing Mr. Duda of his share of the day care expenses in a timely fashion as the expenses were being incurred. This is supported by Mr. Duda's declaration in which he stated that Ms. Quinlin was to forward the day care bills to him each month and he was to remit his share of the obligation within 10 days. Instead, he received six months of day care expenses at once that he was, understandably, unable to pay considering his income of $8 per hour. The court's finding supports the conclusion of law that the contempt finding

be stricken because the court accepted Mr. Duda's reasons for his untimely payment.

Ms. Quinlin also contends that the superior court used an impermissible basis for the award of attorney fees on revision of the contempt order for support. The court found that it 'is not going to award attorney fees unless the moving party is totally without fault.' CP at 82. Ms. Quinlin argues that the court's insistence that the moving party be without fault places an extra burden outside of the statutory basis set forth in RCW 26.09.160(4). This is improper, she argues, because attorney fees for contempt of a child support order under RCW 26.09.160 are mandatory. In re Marriage of Wolk, 65 Wn. App. 356, 359, 828 P.2d 634 (1992). As noted, however, the basis for attorney fees for failure to comply with a child support order is chapter 26.18 RCW. The statutory basis Ms. Quinlin cites, chapter 26.09 RCW, concerns residential orders. Unlike attorney fees for a finding of contempt of a residential order under RCW 26.09.160, attorney fees for contempt of a child support order under RCW 26.18.160 are not mandatory. Ms. Quinlin's claim that the superior court used an impermissible basis is therefore without merit.

d. Attorney Fees

Mr. Duda requests attorney fees for having to defend a frivolous appeal. A party is entitled to reasonable fees and costs if an applicable law grants that right. RAP 18.1(a). RAP 18.9 authorizes an award of terms or compensatory damages against a party who files a frivolous appeal. See, e.g., Kearney v. Kearney, 95 Wn. App. 405, 417, 974 P.2d 872 (1999). In determining whether an appeal is frivolous, we consider the following: '(1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.'

Delany v. Canning, 84 Wn. App. 498, 510, 929 P.2d 475 (1997) (quoting Streater v. White, 26 Wn. App. 430, 435, 613 P.2d 187 (1980)).

Although we affirm the trial court, Ms. Quinlin's appeal was not frivolous.

CONCLUSION

The record is insufficient to review the timeliness of the revision of the terms on the order to vacate. The revising court had jurisdiction and the authority to examine and revise the child support and residential placement orders before it, and it did not employ impermissible standards in its review. The revising court's findings are supported by substantial evidence and the conclusions of law are supported by the findings. We affirm, but we decline to award attorney fees.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Schultheis, A.C.J.

WE CONCUR:

Brown, J.

Kato, J.