IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Marriage of DIANA SUSHAK, Respondent, and BOBBY BEASLEY, JR., Appellant.	No. 41562-3-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — In this parenting plan dispute, Bobby Beasley, Jr. appeals the trial court's order reducing his visitation schedule with his son, C.B. Beasley asserts that the trial court's order is a parenting plan modification rather than a clarification. Beasley also assigns error to the trial court's appointment of counsel to represent C.B. and its decision to reserve ruling on the issue of attorney fees. Because Diana Sushak's motion to clarify the parenting plan should have been a motion to modify the plan, we remand to the trial court to reconsider her motion under the standards applicable to a request to modify. And because the parties and their counsel appear to have been unwilling to resolve scheduling issues to further C.B.'s best interests, we hold that the trial court did not err by appointing C.B. counsel. We do not address the trial court's reservation of the issue of attorney fees because the reservation is not an appealable final

order or judgment subject to review. RAP 2.2.

FACTS

On March 17, 2009, the trial court entered a permanent parenting plan for C.B.[1] The trial court granted Beasley visitation every Wednesday afternoon from 2 pm until 5 pm, and every other weekend. To accommodate C.B.'s chronic kidney condition, the plan provided,

> If the child returns to dialysis or has any major changes in his medical routine, both parents will attend mediation by a court approved mediator or agency to make adjustments in parenting plan to accommodate the child's new routine. Mediation shall be scheduled immediately following the time that the parents become aware of the need for the shift in the child's medical routine.

Br. of Appellant, Ex. 1 at 7.

On December 1, 2010, Sushak filed a "motion to clarify" the parenting plan, requesting "an interim change to the visitation schedule of minor child because of critical changes in the child's medical circumstances" and an opportunity to give "oral testimony to clarify the urgency of the[] medical changes to the minor child." Clerk's Papers (CP) at 5. The trial court heard the parties on December 9, the same day C.B. restarted dialysis treatment. C.B. would receive four-hour dialysis treatments on either a Monday-Wednesday-Friday or Tuesday-Thursday-Saturday schedule; either would interfere with Beasley's visitation schedule under the existing parenting plan.

[1] Beasley did not include the parenting plan in the record for this court's review. RAP 9.6(a), 10.3(a)(8). We ordered Beasley to supplement the record on March 8, 2012. RAP 9.10. It appears that, following a file transfer from Mason County to Thurston County, Beasley's counsel's Clerk's Papers designation was insufficiently specific for the Thurston County Clerk to provide the requested pages to this court. RAP 9.7(a). Although we would normally refuse to address challenges presented by an appellant who fails to designate a record sufficient for our review, in this unique circumstance, justice is better served by accepting respondent's counsel's representation that we have a true and correct copy of the necessary document. RAP 1.2(c), 10.3(a)(8).

At the hearing, Sushak stated that the parents needed an "alternate parenting plan that addresses those times when [C.B.] is in need of critical care." Report of Proceedings (RP) at 12. The trial court appointed Kristen Bishopp[2] to represent C.B. over Beasley's objections. The trial court then ordered that while C.B. received dialysis treatment, Beasley's visitation schedule would be every other Wednesday and every other weekend. The trial court reasoned that the temporary reduction in Beasley's visitation was necessary because C.B. was "so busy going to his dialysis appointments." RP at 34. The trial court also ordered the parties to mediation "not for modification of the parenting plan, but . . . about accommodating the new issues with respect to [C.B.'s] dialysis and his upcoming kidney transplant and recovery."[3] RP at 35-36.

Beasley timely appeals.

DISCUSSION

Motion to Clarify

Beasley asserts that the trial court erred by modifying the parenting plan in its order clarifying residential time during dialysis and transplant. We agree. We review a trial court's rulings as to parenting plans for an abuse of discretion. *In re Marriage of Christel and Blanchard*, 101 Wn. App. 13, 20-21, 1 P.3d 600 (2000) (citing *In re Marriage of Wicklund*, 84 Wn. App. 763, 770, 932 P.2d 652 (1996)). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *Blanchard*, 101 Wn. App. at 21 (citing *Wicklund*, 84 Wn. App. at 770 n.1).

"A permanent parenting plan may be changed in three ways: by agreement, by petition to

[2] Bishopp agreed to represent C.B. pro bono.

[3] The parties mediated on December 27, 2010. The CR2A Agreement clarifies transportation arrangements between the parents' homes.

modify, and by temporary order." *Blanchard*, 101 Wn. App. at 22. To modify a parenting plan, the court must find a "substantial change of circumstances," even if the modification is minor. RCW 26.09.260(1), (4); *Kirshenbaum v. Kirshenbaum*, 84 Wn. App. 798, 807, 929 P.2d 1204 (1997). A "modification" occurs "when a party's rights are either extended beyond or reduced from those originally intended." *Blanchard*, 101 Wn. App. at 22. A "clarification," on the other hand, is "'merely a definition of the rights which have already been given and those rights may be completely spelled out if necessary.'" *Blanchard*, 101 Wn. App. at 22 (quoting *Rivard v. Rivard*, 75 Wn.2d 415, 418, 451 P.2d 677 (1969)).

Here, the trial court stated,

> So it is true that this matter is not before me for any modification of the parenting plan, and I am not going to modify the parenting plan, but these are critical times.
>
> . . . .
>
> I am going to make some orders that I consider to be clarifications and within the scope of this parenting plan first.

RP at 30. At oral argument before this court, Sushak was unable to identify which provision of the plan the trial court had "clarified." Our review of the record reveals none. The only relevant provision provides that if C.B. "returns to dialysis or has any major changes in his medical routine, both parents will attend mediation by a court approved mediator . . . to make adjustments in parenting plan to accommodate the child's new routine." Br. of Appellant, Ex. 1 at 7. This provision does not provide that the trial court will reduce Beasley's visitation if C.B. returns to dialysis. The provision also does not provide that the parties may circumvent mediation by filing motions with the trial court.

Despite the trial court stating the order was merely a clarification of the parenting plan required by "critical times," the effect of the order is a reduction in Beasley's weekly Wednesday

visits with C.B. As such, the order is a modification of the parenting plan and not a clarification of an ambiguous existing provision. *Blanchard*, 101 Wn. App. at 22 (citing *Rivard*, 75 Wn.2d at 418). Accordingly, because, here, Sushak should have filed a motion to modify the parenting plan, even if temporarily, we vacate the order and remand for reconsideration of her motion as a request to modify the parenting plan while C.B. receives dialysis treatment. RCW 26.09.260(1), (4); *Kirshenbaum*, 84 Wn. App. at 807. Because we vacate the order, we note that the parties may avoid further litigation by mediating their scheduling dispute as the parenting plan provides.

Counsel Appointment

Next, Beasley assigns error to the trial court's appointment of Bishopp to represent C.B.'s interest during the December 9 hearing. Beasley argues that Bishopp was biased in favor of Sushak because Sushak had contacted Bishopp regarding C.B.'s representation. We disagree.

A court may appoint an attorney to represent a child's interests in parenting plan provisions. *King v. King*, 162 Wn.2d 378, 387, 174 P.3d 659 (2007) (citing RCW 26.09.110). Here, the trial court found that neither the parties nor their attorneys were attempting to negotiate, mediate, or reconcile disputes in C.B.'s best interests. The trial court thus concluded that C.B. "needs a lawyer in this case" and appointed Bishopp, stating, "If I determine that she seems to be aligned with one side, we will do a different appointment." RP at 23.

Although Bishopp had not filed a written report, she offered orally that C.B. was "very tired" and struggled with the mid-week visitation with Beasley. RP at 25. Bishopp then conveyed other concerns C.B. had shared with her and recommended that the parties clarify short-term issues at mediation "until we can get back to resuming a completely normal parenting plan that we have in place." RP at 27-29. Beasley objected to Bishopp's statements on due process

grounds, arguing without citation to legal authority that he had a constitutional right to notice of his son's concerns before they were conveyed to the trial court.

At oral argument, both attorneys conceded to a lack of communication regarding mediation. The sparse record provided for our review also supports the trial court's finding that neither the parties nor their attorneys attempted to mediate or negotiate in C.B.'s best interests. RAP 9.2(a), 9.6. Indeed, the record shows one November 8, 2010 e-mail from Sushak to Beasley, stating, "I have contacted a mediation group in Olympia to mediate the parenting plan. They will be contacting you to arrange a date." CP at 30. Beasley responded eight days later, on November 16, stating only, "Please have your attorney contact my attorney regarding any mediation questions." CP at 31. Sushak responded that afternoon, stating, "I have contacted mediation about mediating the parenting plan to accomondate [sic] [C.B.'s] medical needs. I was informed that you felt there was no need at this time and wish not to mediate at this time. Could you verify this for me?" CP at 31-32.

The parents did not discuss mediation further and neither attorney contacted the other to facilitate mediation as required by the parenting plan. Instead, on December 1, Sushak filed the motion to clarify that should have been a motion to modify. Under these circumstances, where neither party nor attorney appears to have endeavored to mediate in C.B.'s best interest, the trial court did not err in appointing Bishopp to represent the child's interests. *King*, 162 Wn.2d at 387 (citing RCW 26.09.110). Moreover, we note that nothing in the record before us supports Beasley's allegation of Bishopp's personal bias against him.

Reservation of Attorney Fees

Next, Beasley assigns error to the trial court's reservation of the issue of his requested attorney fees. Because the reservation of attorney fees is not a final order or judgment subject to our review, we do not address the merits of this assignment of error. RAP 2.2.

Service

Last, we briefly note that Sushak's assertion that Beasley failed to properly serve and perfect his appeal is meritless. RAP 5.4(b) provides, "The party filing the notice of appeal . . . shall . . . serve a copy of the notice [of appeal] on each party of record." CR 5(b)(1) provides, "Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court." Here, Beasley served Sushak's attorney and, thus, complied with service requirements. Even if Beasley had not properly served Sushak, because Sushak does not argue she suffered prejudice by the allegedly deficient service as required by RAP 5.4(b), her argument fails.

We note that the parties are free, if not required, to mediate temporary scheduling adjustments while C.B. receives dialysis treatment. Especially in light of the apparent communication issues between the parties and their attorneys, we hold that the trial court did not err by appointing counsel to represent C.B.'s interests during the December 9 hearing. Accordingly, because Sushak should have moved to modify the parenting plan rather than file a

motion to clarify an unidentified plan provision, we vacate the trial court's order purporting to clarify the plan and remand for reconsideration of Sushak's motion in accord with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

HUNT, J.

WORSWICK, A.C.J.