IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN RE THE MARRIAGE OF: McKAYLA SMITH, Appellant, And MATTHEW SMITH, Respondent.	No. 40300-5-II UNPUBLISHED OPINION

Hunt, J. – McKayla Smith challenges the superior court's authority to act on a motion to modify an existing parenting plan. She argues that the trial court judge erred when he determined that her affidavit of prejudice was untimely and declined to remove himself from the hearing the motion to modify. Because we find this issue dispositive, we do not address her

other arguments.[1] We vacate the modified parenting plans[2] and remand for further proceedings before a different judge.

FACTS

McKayla and Matthew Smith[3] married in Hoquiam on August 16, 2003. They had two sons, CS, born in 2004, and RS, born in 2007; McKayla was their primary caretaker.

I. Original Parenting Plan, Judge Edwards

In 2006, McKayla filed to dissolve the marriage. On August 15, 2008, Judge David L. Edwards entered a final parenting plan setting the children's residential schedule, designating McKayla as the primary residential parent, and establishing Matthew's visitation schedule.

II. Superior Court Motions, Judge Edwards

In 2008, Matthew filed a contempt motion alleging that McKayla had interfered with his

[1] Smith also raises several arguments related to the trial court's authority to amend the August 7, 2009 parenting plan without first requiring the parties to file a new motion to modify the parenting plan and to enter a February 5, 2010 temporary order. She challenges most of the trial court's findings of fact and conclusions of law and the trial court's award of costs to children's father.

[2] In this appeal, McKayla appears to challenge only the April 30, 2010 modified parenting plan; she does not appear also to challenge the agreed final parenting plan entered on August 7, 2009. Because McKayla's filing her affidavit of prejudice divested Judge Edwards of authority to modify the original August 15, 2008 plan when she brought her affidavit to his attention, in our view, her affidavit divested him of authority to enter the 2009 plan as well as the challenged 2010 plan.

[3] Because the parties share the same last name, we refer to them by their first names for clarity. We intend no disrespect.

visitation.[4] The contempt hearing was set for October 27, 2008.

On October 24, Matthew moved to modify the August 15, 2008 parenting plan, alleging in a supporting declaration that he was concerned for his sons' safety because McKayla had twice been the victim of domestic violence by a boyfriend and that at least one of these incidents had occurred after the trial court had entered the August 15, 2008 parenting plan. Matthew asked for a temporary parenting plan designating him as the primary residential parent, giving him sole decision-making authority, and requiring that all visitations with McKayla be at her parents' home. The adequate cause hearing on this motion to modify the parenting plan was noted for November 3.

A. Contempt Hearing; McKayla's Affidavit of Prejudice Against Judge Edwards

On October 27, the day of the contempt hearing, McKayla filed a motion and written affidavit of prejudice, asking Judge Edwards not to hear "this matter." Clerk's Papers (CP) at 32. Her affidavit of prejudice did not specify whether it related to Matthew's contempt motion, his motion to modify the parenting plan, or both. McKayla apparently also presented an oral "affidavit of prejudice" at the hearing.[5] CP at 35. Although Judge Edwards' order on Matthew's motion included no specific findings on the contempt issue, it (1) ordered McKayla to comply with the August 15, 2008 parenting plan under penalty of contempt; (2) gave Matthew the next

[4] In her Brief of Appellant, McKayla states that she would supplement the record with this contempt motion. But the contempt motion is not in the record on appeal; thus, we do not know what grounds for contempt Matthew alleged or whether it might have generated some confusion with the simultaneously pending motion to modify.

[5] The record on appeal does not include a transcript of this proceeding.

three weekends with their sons; (3) acknowledged McKayla's written affidavit of prejudice and apparently denied McKayla's oral motion and affidavit of prejudice to remove him from hearing the contempt motion; and (4) acknowledged McKayla's written affidavit of prejudice against him with respect to Matthew's motions to modify child parenting plan, without granting or denying this request to remove him.[6]

B. Motion to Modify Parenting Plan; Adequate Cause Hearing

On October 29, McKayla submitted her declaration in response to Matthew's October 24, 2008 declaration of adequate cause for modification of the parenting plan. She contested Matthew's assertion that the boys were in danger of harm and raised issues about Matthew's ability to care for the boys.

1. Adequate Cause Hearing Begun by Judge McCauley

The record does not reflect whether Judge Edwards transferred the motion to modify to a different judge in response McKayla's affidavit of prejudice. The record does show, however, that on November 3, a different judge, Judge F. Mark McCauley, presided over the adequate cause hearing on Matthew's motion to modify the August 15, 2008 parenting plan. Matthew asked Judge McCauley to "revers[e]" the existing residential schedule in the August 15 parenting plan and to place the boys with him (Matthew) until McKayla "starts making some better choices and not putting herself at risk." Verbatim Report of Proceedings (VRP) (Nov. 3, 2008) at 3.

[6] Although Judge Edwards ruled on the contempt motion, his order did not suggest that he took any action on the motion to modify the parenting plan during the October 27, 2008 contempt hearing. *See* CP at 35. Moreover, McKayla does not challenge on appeal Judge Edwards' authority to rule on the contempt motion. Thus, we assume her affidavit of prejudice was aimed solely at his authority to rule on the motion to modify the parenting plan.

McKayla responded (1) that Judge McCauley should not punish her for having been the "victim of violence,"[7] and (2) that placing the children with Matthew was a safety risk because a month earlier they had returned from their weekend with them "with bruises and welts." VRP (Nov. 3, 2008) at 3.

Judge McCauley advised the parties that, although he believed their information provided "kind of just enough here for [the court] to be concerned about the children," he was not going to make an adequate cause determination at that time. VRP (Nov. 3, 2008) at 6. Instead, he appointed a guardian ad litem (GAL), whom he directed to "do . . . an investigation . . . to assist the Court in determining whether or not there is adequate cause to have a full-blown trial," including an investigation of the assault(s) against McKayla and the bruising incident, both of which had at least partially arisen since the original parenting plan's entry a few months earlier. VRP (Nov. 3, 2008) at 6. Waiving the written report requirement, Judge McCauley continued the hearing for 30 days to allow the GAL to provide an "oral[ ] report."[8] VRP (Nov. 3, 2008) at 7.

2. Adequate Cause Hearing Completed by Judge Edwards

The record is silent about how the November 3, 2008 motion to modify hearing, which Judge McCauley had continued for 30 days, came to be heard by Judge Edwards on May 8,

[7] Apparently McKayla was the victim of an assault during the fall of 2008.

[8] Neither party objected to Judge McCauley's requiring only an oral report.

[9] The parties have not included a transcript of this proceeding in the record on appeal. We have derived these facts from the court clerk's minutes for this hearing.

2009.[9] At this May 8 hearing, McKayla reminded Judge Edwards that she had filed an affidavit of prejudice asking him to remove himself from this matter. Judge Edwards denied the affidavit of prejudice as "not timely," apparently because he had made "[o]ral orders."[10] CP at 42. The GAL gave her oral report to Judge Edwards, who required both parties to cooperate with the GAL; he also set a "[r]eview" hearing for August 7. CP at 42.

Thereafter, Judge Edwards twice modified the parenting plan, first on August 7, 2009, and later on April 30, 2010, when he entered a new parenting plan changing the primary residential parent from McKayla to Matthew. Judge Edwards also awarded reasonable attorney fees to Matthew and ordered McKayla to undergo a psychological or psychiatric evaluation and to complete any recommended treatment. On June 1. 2010, Judge Edwards also entered an order ordering McKayla to pay Matthew $8,348.49 in attorney fees.

McKayla appeals.

ANALYSIS

McKayla contends that Judge Edwards acted without authority when he refused to honor her affidavit of prejudice and request to remove himself and, instead, presided over the hearing on Matthew's motion to modify the original August 15, 2008 parenting plan. We agree.

We review for abuse of discretion a trial court's refusal to recuse in response to an

[9] The parties have not included a transcript of this proceeding in the record on appeal. We have derived these facts from the court clerk's minutes for this hearing.

[10] Again, because the record on appeal does not include a transcript of this proceeding, we cannot tell whether these "[o]ral orders" referred to the contempt motion on which Judge Edwards had earlier ruled or whether they referred to some oral order Judge Edwards may have made on the motion to modify, which oral order is not part of the record before us on appeal. CP at 42.

affidavit of prejudice. *In re Marriage of Farr*, 87 Wn. App. 177, 188, 940 P.2d 679 (1997), *review denied*, 134 Wn.2d 1014 (1998). RCW 4.12.040[11] and RCW 4.12.050[12] allow each party to file a timely motion and affidavit of prejudice to remove one superior court judge without substantiating the claim of prejudice. "Prejudice is deemed to be established by the affidavit and the judge to whom it is directed is divested of authority to proceed further into the merits of the action." *State v. Dixon*, 74 Wn.2d 700, 702, 446 P.2d 329 (1968) (citing *In re Welfare of*

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[11] RCW 4.12.040(1) provides in part:

> No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established as hereinafter provided that said judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause.

The legislature amended this statute in 2009, after McKayla filed her affidavit of prejudice; but this amendment is not relevant here. Laws of 2009, ch. 332, §19.

[12] RCW 4.12.050(1) provides in part:

> Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial before such judge: PROVIDED, That such motion and affidavit is filed and called to the attention of the judge before he or she shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, and before the judge presiding has made any order or ruling involving discretion, but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso; and in any event, in counties where there is but one resident judge, such motion and affidavit shall be filed not later than the day on which the case is called to be set for trial: . . . AND PROVIDED FURTHER, That no party or attorney shall be permitted to make more than one such application in any action or proceeding under this section and RCW 4.12.040.

The legislature amended this statute in 2009, after McKayla filed her affidavit of prejudice; but this amendment is not relevant here. Laws of 2009, ch. 332, §20.

McDaniel, 64 Wn.2d 273, 391 P.2d 191 (1964); *State ex rel. Mauerman v. Superior Court*, 44 Wn.2d 828, 271 P.2d 435 (1954)).

Even when one judge previously settled a child custody issue and entered a parenting plan during a dissolution trial, these statutes entitle the parties to disqualify that judge from hearing a later petition to modify the parenting plan based on a change of conditions because such modifications are deemed new proceedings. *Mauerman*, 44 Wn.2d at 830 (citing *State ex rel. Foster v. Superior Court*, 95 Wash. 647, 653, 164 P. 198 (1917); *Bedolfe v. Bedolfe*, 71 Wash. 60, 61, 127 P. 594 (1912)); *see also McDaniel*, 64 Wn.2d 273 at 275-76 (citing *Mauerman* with approval). In this context, filing a timely affidavit of prejudice similarly divests the judge of authority to pass on the merits of the case. *LaMon v. Butler*, 112 Wn.2d 193, 201-02, 770 P.2d 1027 (quoting *Dixon*, 74 Wn.2d at 702), *cert. denied*, 493 U.S. 814 (1989). In other words, although here, Judge Edwards entered the parties' original August 15, 2008 parenting plan, these statutes operated to divest him of authority to hear Matthew's motion to modify that parenting plan when McKayla filed her timely affidavit of prejudice.

To be timely, the party must file the affidavit of prejudice "before the judge presiding has made any order or ruling involving discretion." RCW 4.12.050(1).[13] The mere existence of an affidavit of prejudice in the court file, however, is not sufficient to divest a judge of authority to proceed; the party bringing the affidavit of prejudice must bring the affidavit of prejudice to the trial court's attention and failure to so do constitutes waiver. *Bargreen v. Little*, 27 Wn.2d 128,

[13] The statute does not compel a change of judge when the motion is untimely. *Rhinehart v. Seattle Times Co.*, 51 Wn. App. 561, 578-79, 754 P.2d 1243, *review denied*, 111 Wn.2d 1025 (1988).

132-133, 177 P.2d 85 (1947); *State v. Smith*, 13 Wn. App. 859, 860-861, 539 P.2d 101, *review denied*, 86 Wn.2d 1002 (1975). McKayla filed her affidavit of prejudice on October 27, 2008, three days after Matthew filed his motion to modify the parenting plan and before any judge took any action on this motion, which, as we have noted above, was a new matter for affidavits of prejudice purposes. *Mauerman*, 44 Wn.2d at 830.

Although Judge Edwards considered Matthew's contempt motion on October 27, 2008, the record does not show that he made any discretionary rulings on Matthew's motion to modify the parenting plan at that time. Consistent with this observation, Judge Edwards' October 27, 2008 order on the contempt motion acknowledges that McKayla had advised him that her affidavit of prejudice against him pertained to the motion to modify; this order does not contain any ruling on his recusal. *See* CP at 35. In addition, McKayla later reminded Judge Edwards about her pending affidavit of prejudice against him on May 8, 2009, when he first began to preside over matters related to the motion to modify, six months after Judge McCauley had begun to preside over the same motion to modify and had ordered a GAL report in November 2008.

Because Judge Edwards had made no rulings on Matthew's motion to modify the parenting plan before McKayla filed her affidavit of prejudice, her request for Judge Edwards' recusal was timely under the statute. RCW 4.12.050(1). She further complied with the statute by bringing her affidavit of prejudice to Judge Edwards' attention at both the contempt hearing and the hearing on the motion to modify,[14] clarifying for him that her affidavit pertained to the motion to modify. Therefore, the law required him to remove himself from the motion to modify

[14] The record does not support Judge Edwards' later ruling on May 8, 2009, that McKayla's affidavit of prejudice was untimely.

proceedings, over which he lacked authority to rule. *LaMon*, 112 Wn.2d at 201-02.

Holding that McKayla's timely affidavit of prejudice divested Judge Edwards of authority to rule on the motion to modify the original August 15, 2008 parenting plan, we vacate the August 7, 2009 and April 30, 2010 parenting plans and the June 1, 2010 order on attorney fees and costs, and remand for further proceedings before a different judge.

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 pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Penoyar, C.J.

Johanson, J.