

No. 21818-0-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

APRIL D. KIMPEL
Respondent

v.

GREGORY SCOTT KIMPEL
Appellant

Brief of Respondent

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STATEMENT OF THE CASE:

FACTS

The facts set forth in Appellant's brief are generally correct. Chronologically, the parties were initially divorced in 1996. At that time, acting *pro se*, a parenting plan was entered that designated the mother as the party receiving the majority of residential time and designating her the 'custodian.' [CP 2] The plan remained in force until 2000.

In 2000 a modification was filed by APRIL KIMPEL under the 'minor modification' statute. [CP 36] The minor modification was granted. [CP 77] At a review hearing in late 2001 the parties discussed application of the 'minor modification' statute, and the court approved a parenting plan which again gave the father more residential time. [CP 148]

GREGORY KIMPEL then proposed a final Parenting Plan that included redesignation of GREGORY as the "custodial" parent under § 3.12. [CP 171, 173] APRIL

KIMPEL objected to that change only. [CP 189]

The Superior Court, the Hon. Tari Eitzen, declined to order the disputed modification based upon the major vs. minor modification issue, and waiver. [RP 21, CP 209] A Parenting Plan was entered without that designation, and this appeal ensued.

ARGUMENT

I. The Superior Court Correctly Recognized it Lacked Power to Modify Designation of Custodian Under “Minor Modification” Statute

As a starting point, there is no dispute that this modification was brought under RCW 26.09.260(5)(b),¹ the

¹(1) Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child.

(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:

- (a) The parents agree to the modification;
- (b) The child has been integrated into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan;
- (c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child; or
- (d) The court has found the nonmoving parent in contempt of court at least twice within three years because the parent failed to comply with the residential time provisions in the court-ordered parenting plan, or the parent has been convicted of custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070.

...

(5) The court may order adjustments to the residential aspects of a parenting plan upon a showing of a substantial change in circumstances of either parent or of the child, and without consideration of the factors set

“Minor Modification” statute. Such modifications require a much lower threshold showing of change in circumstance, and as such are limited in scope. *In re Marriage of Payne*,² held that:

The Parenting Act focuses on the importance of stability in the child's relationships with its parents. The Act therefore provides for the creation of a residential schedule in the parenting plan, and regulates its alteration by providing limited bases for modification.

forth in subsection (2) of this section, if the proposed modification is only a minor modification in the residential schedule that does not change the residence the child is scheduled to reside in the majority of the time and:

- (a) Does not exceed twenty-four full days in a calendar year; or
- (b) Is based on a change of residence of the parent with whom the child does not reside the majority of the time or an involuntary change in work schedule by a parent which makes the residential schedule in the parenting plan impractical to follow; or
- (c) Does not result in a schedule that exceeds ninety overnights per year in total, if the court finds that, at the time the petition for modification is filed, the decree of dissolution or parenting plan does not provide reasonable time with the parent with whom the child does not reside a majority of the time, and further, the court finds that it is in the best interests of the child to increase residential time with the parent in excess of the residential time period in (a) of this subsection. However, any motion under this subsection (5)(c) is subject to the factors established in subsection (2) of this section if the party bringing the petition has previously been granted a modification under this same subsection within twenty-four months of the current motion. Relief granted under this section shall not be the sole basis for adjusting or modifying child support.

² 82 Wn. App. 147, 150-51, 916 P.2d 968 (1996).

Major modifications are reserved for more substantial alterations of the parenting plan. While the language does not explicitly restrict changes in the child's primary residence to occasions where major modification is warranted, that is clearly the result contemplated by the statute.... If a change in primary residence is a major modification, it would not be consistent to interpret the statute to permit such changes pursuant to a motion for minor modification. [Footnotes omitted]

RCW 26.09.250(5) limits minor modifications to changes that are “only a minor modification in the residential schedule that does not change the residence the child is scheduled to reside in the majority of the time.” It does not include modification of the designation of custodian in the list of things that may be changed by a minor modification, so such a change cannot be accomplished by a “minor modification.”

In essence what the Appellant now argues is that it should be allowed in a minor modification proceeding, to correct an ‘error’ that occurred when the couple agreed to its original parenting plan in 1996. For a number of reasons this court should decline to permit such a back-door modification.

II. The Court Should Not Permit a Change to the 1996 Parenting Plan at This Time as the Legislature Did Not Intend the Designation of “Custodian” to Invariably Apply to the Parent with the Most Residential Time.

In summary, the designation of “Custodian” was something that the parties had the right to allocate contrary to the statute in 1996. They did so, and GREGORY KIMPEL should not now be permitted to avoid his agreement on that issue without meeting the requirements for a major modification..

The heart of Appellant’s position is that the Legislature amended RCW 26.09.285 in 1989, and that amendment was intended to require that the parent who has the most residential time, be designated “custodian,” no matter what.

The original statute passed in 1987 read,

Solely for the purposes of all other state and federal statutes which require a designation or determination of custody, the court shall designate in a parenting plan one parent as the custodian of the child. However, this designation shall not affect either parent's rights and responsibilities under the parenting plan. In the absence of such a designation, the parent with whom the child is

scheduled to reside the majority of the time shall be deemed to be the custodian of the child for the purposes of such federal and state statutes.

In 1989 the statute was amended to read,

Solely for the purposes of all other state and federal statutes which require a designation or determination of custody, a parenting plan shall designate the parent with whom the child is scheduled to reside a majority of the time as the custodian of the child. However, this designation shall not affect either parent's rights and responsibilities under the parenting plan. In the absence of such a designation, the parent with whom the child is scheduled to reside the majority of the time shall be deemed to be the custodian of the child for the purposes of such federal and state statutes.

We must determine the intent of the Legislature in changing from “the court shall designate in a parenting plan one parent as the custodian of the child” to “a parenting plan shall designate the parent with whom the child is scheduled to reside a majority of the time as the custodian of the child.”

The process of statutory construction is well established.

Our goal in construing a statute is to give effect to legislative intent. ... To determine legislative intent, we review the disputed statutory language within the context of the statute as a whole. ... Absent ambiguity or a

statutory definition, the words in a statute are given their common and ordinary meaning. ... We may look to the dictionary to ascertain the common meaning of undefined terms. ... We should avoid "[s]trained, unlikely or unrealistic" interpretations. ...

A statute is ambiguous if it is susceptible to two or more reasonable interpretations. ... If a statute is ambiguous, we look to other sources of legislative intent, such as legislative history. [Citations omitted]

*Lacey Nursing Center, Inc. v. Department of Revenue.*³

The crux of Appellant's argument is that the Legislature intended to make the designation of "custodian" mandatory rather than discretionary. Although Appellant presents a detailed argument, there is no authority for that fundamental conclusion and no relevant legislative history is offered.

Appellant argues that the designation of "custodian" was changed from a substantive to a definitional term in 1989. The reasoning Appellant offers is this:

1. The 1987 version of 26.09.187 referred only to one household being designated a child's "residence," and

³ 103 Wn. App. 169, 175, 11 P.3d 839 (2000).

this was deleted in 1989.

2. The 1987 version of 26.09.285 then required one parent be designated ‘custodian,’ but “the court was simply directed to designate one parent or the other as such, without any apparent qualifying or directive criteria.”
[Brief of Appellant at 10]
3. The 1989 amendment to changed this to “a parenting plan shall designate the parent with whom the child is scheduled to reside a majority of the time as the custodian,” eliminating discretion.
4. The minor modification statute did not allow changes to ‘the parent with whom the child is scheduled to reside a majority of the time,” and has been further amended to clarify that notion.
5. Thus the legislature apparently assumed that the designation of custodian would follow the parent with most time, so the legislature didn’t make it subject to

minor modification because it didn't need to.

This argument fails for several reasons:

1. The definition of the term “residence” in the 1987 statute was limited to “jurisdiction, venue and child support,” *not* “for the purposes of all other state and federal statutes which require a designation or determination of custody.” As such the Legislature was clearly addressing a new issue altogether when it enacted RCW 26.09.285 and the change of the term “residence” is irrelevant.
2. The assertion that the 1987 version of 26.09.285 lacked criteria is incorrect: the provision “In the absence of such a designation, the parent with whom the child is scheduled to reside the majority of the time shall be deemed to be the custodian,” certainly provided guidance. Respondent agrees however that the 1987 version left this designation entirely in the Court’s

discretion.

3. Did the 1989 change from “one parent” to “the parent with whom the child is scheduled to reside a majority of the time” eliminate all discretion? Respondent submits not.

a. The Legislature continued to use the word, “shall.” “A parenting plan *shall* designate ...” The word “shall” is presumptively mandatory,⁴ but that presumption is subject to a determination of legislative intent⁵ and may be permissive.⁶ Here

⁴ *Erection Co. v. Labor & Industries*, 121 Wn.2d 513, 852 P.2d 288 (1993).

⁵ *State v. Krall*, 125 Wn.2d 146, 881 P.2d 1040 (1994) citing *State v. Huntzinger*, 92 Wn.2d 128, 133, 594 P.2d 917 (1979),
In determining the meaning of the word "shall" we traditionally have considered the legislative intent as evidenced by all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another.

⁶ *In re Elliot*, 74 Wn.2d 600, 446 P.2d 347 (1968) noted, The legislative intent to confer a judicial power is construed to mean "may" notwithstanding the use of the word "shall." This principle has been adopted in a long line of cases. It was applied in

for instance, if the best interests of the child demanded that the mother be designated for some reason, the court would have the power to do so since the overwhelming policy and purpose of the law is to protect the interest of the child.

- b. In this case the Legislature did not intend it to be mandatory because it retained the “In the absence of such a designation” language. That would not be needed if the designation was mandatory: were it mandatory, every plan would have such a designation and the provision would be useless. To avoid making that provision superfluous, the use of “shall” in this case should be read as permissive. Statutes should be read to avoid making portions of them superfluous.⁷

Clancy v. McElroy, 30 Wash. 567, 70 Pac. 1095 (1902), and has been repeatedly applied elsewhere.

⁷ *Jordan v. O'Brien*, 79 Wn.2d 406, 486 P.2d 290 (1971)

c. Additionally, there is nothing to suggest that the parties could not agree to vary this provision.

Parties may agree to any provisions which are not illegal or violative of public policy.⁸

i. Cases dealing with agreements that violate public policy have focused upon agreements that affect the rights of the minor children, such as foregoing future child support.⁹

Here the designation of “custodian” has no impact on the childrens’ welfare, or the other rights and duties under the Plan. It is a technical designation only. The court should not preclude the parties agreeing to a custodian different than that contemplated by state law. In fact here the parties did

⁸ *Kinne v. Kinne*, 82 Wn.2d 360, 510 P.2d 814 (1973)

⁹ *Marriage of Pippins*, 46 Wn. App. 805, 732 P.2d 1006 (1987)

agree to vary, and are allowed to do so.

ii. A contract that violates a statute or ordinance is illegal and unenforceable only where the contract is criminal or immoral and the statute or ordinance does not contain an adequate remedy for its violation.¹⁰ That is clearly not the case here, where the Appellant could seek a major modification.

4. The Minor Modification statute indeed does not allow changing the designation of “custodian” under 26.09.285. The Appellant needs to come up with some other basis for affecting a change to and 8 year old, unappealed judgment.
5. Finally, the leap of logic in Appellant’s argument is unsupported. The Legislature did not make any

¹⁰ *Evans v. Luster*, 84 Wn. App. 447, 928 P.2d 455 (1996).

assumption that a designation of Custodian would be present: if it did, why then put “in the absence of” language into the same section? The Legislature was aware that there might not be a custodian designated, and yet did not provide a means for correcting that problem via “minor modification.” Similarly, if the parties agreed to a designation at variance with the statute, the Appellant should not be heard to argue now that this ‘error’ must be corrected because the designation is automatic. In fact the designation is open to variance by the parties or the court for good reasons and the Legislature did not provide for minor modification correction.

III. The Court Should Not Alter the 1996 Designation of Custodian

A. The Parties Were Free to Agree to the Designation in 1996

As argued above, the parties were free to contract a

different designation of “custodian” and in fact they did so.

B. Public Policy Favors Enforcing That Agreement

Appellant argues in favor of a very insignificant public policy, that the custodian be the parent with the most residential time. It is not clear that there is any particular public policy goal served by this rule, other than to simply provide a measure of regularity in the drafting of parenting plans.

On the other hand, to enforce that policy the Appellant asks this Court to override a very strong public policy favoring the enforcement of agreements reached in open court. The compromise of litigation is strongly favored, and settlement agreements are to be enforced.¹¹ Mr. KIMPEL does not disagree that he agreed to the provision, but argues that he should not be bound by his agreement because it was in error

¹¹ *Lavigne v. Green*, 106 Wn. App. 12, - P.3d - (2001) citing *Bryant v. Palmer Coking Coal Co.*, 67 Wn. App. 176, 834 P.2d 662 (1992).

and errors should not be perpetuated.

Of course, it was not in error: it was permissible for the parties to so agree. Mr. KIMPEL elected to proceed without counsel, as did Mrs. KIMPEL, and neither foresaw this issue coming up later. But even if it was error, this Court should not change the 1996 Parenting Plan at this time upon a minor modification.

C. Law of the Case

Appellant argues that the Law of the Case doctrine doesn't apply where it would perpetuate an error. The Law of the Case doctrine is currently recognized as a discretionary rule that bars an appellate court from reconsidering a holding in a prior appeal of the same case unless (1) the holding is clearly erroneous and (2) application of the doctrine would work a manifest injustice on one party and the other party would not suffer a corresponding injustice if the erroneous holding were

overruled.¹² Since Mr. KIMPEL did not appeal the first Parenting Plan, arguably the failure to appeal invokes the doctrine, although its application is uncertain.

The Appellant cites cases that the Doctrine will not be applied to perpetuate error. Those cases,¹³ however, involve erroneous prior decisions by appellate courts whose decisions may have precedential value, not an unappealed error in a private transaction approved by a Superior Court. The policy of not perpetuating incorrect *reasoning* is eminently logical. Applying that policy to correct a party's *mistake* makes far less sense in light of the strong judicial policy favoring finality of decisions, and given the Legislature's provision of a mechanism to correct such error only if the criteria for major modification are present.

¹² *State v. Worl*, 129 Wn.2d 416, 918 P.2d 905 (1996)

¹³ *Greene v. Rothschild*, 68 Wn.2d 1, 8, 402 P.2d 356, 414 P.2d 1013 (1965) citing *Hutton v. Martin*, 41 Wn.2d 780, 252 P.2d 581 (1953): “the doctrine will not be applied in cases in which to do so would perpetuate error and in which no property rights would be affected by the overruling of the prior decision.”

Those who secure judgments at the trial level are entitled to have their judgments become final. Unless one dissatisfied with the judgment takes prompt action to challenge that judgment, the judgment holder is entitled to its finality.¹⁴

D. Waiver/Invited Error

Washington Courts have recognized that a party may waive his rights through inaction, and that waiver comprises invited error which precludes appellate review.¹⁵

Mr. KIMPEL argues that he could not waive a definition.

¹⁴ *Malott v. Randall*, 8 Wn. App. 418, 506 P.2d 1296 (1973).

¹⁵ *Pulich v. Dame*, 99 Wn. App. 558, 564-65, 991 P.2d 712 (2000): “In appropriate circumstances, a party may waive a known right. See *Wilson v. Horsley*, 137 Wn.2d 500, 510, 974 P.2d 316 (1999) (discussing waiver of right to jury trial). Here, Pulich's right to enforce the arbitration award was predicated upon proper filing of that award under MAR 6.2. Roberts, 137 Wn.2d at 90-91; MAR 6.2. By failing to have this defect corrected before the trial court rendered its verdict, Pulich waived any subsequent claim that the trial court lacked authority to hold trial for want of a properly filed award. See *Cook v. Von Stein*, 97 Wn. App. 701, 708, 985 P.2d 956 (1999) (holding that party who went to trial absent filing of proof of service request waived postverdict objection to MAR 7.1(a) defect); *Wright v. Miller*, 93 Wn. App. 189, 195, 963 P.2d 934 (1998), review denied, 138 Wn.2d 1017 (1999) (holding that under doctrine of invited error party waived postverdict claim of MAR 7.1(a) filing defect); *Westberg v. All-Purpose Structures, Inc.*, 86 Wn. App. 405, 413, 936 P.2d 1175 (1997) (holding that party waived right to jury trial by failing, without good cause, to participate in arbitration hearing).”

The predicate argument is discussed above: but in application, the definition confers a right upon one party which that party can waive. Being a custodial parent must have some importance to Mr. KIMPEL or he would not be expending the resources to pursue this appeal. Invited error cases have involved similar rights. Constitutional rights may be waived by invited error,¹⁶ even including improper *definitions* of criminal conduct contained in jury instructions.¹⁷ Mr. KIMPEL elected to act without counsel in the original dissolution, and elected to enter the parenting plan without appeal: he now should be bound by this invitation to the trial court to commit error.

While this was not the precise articulated basis for the lower court's decision, this Court may affirm the trial court on any grounds within the pleading and proof.¹⁸

¹⁶ *State v. Alger*, 31 Wn. App. 244, 640 P.2d 44 (1982)

¹⁷ *State v. Carpenter*, 52 Wn. App. 680, 763 P.2d 455 (1988)

¹⁸ *Schumacher Painting v. First Union Mgt.*, 69 Wn. App. 693, 850 P.2d 1361 (1993).

IV. Attorneys Fees

Respondent requests that she be awarded attorneys fees on appeal pursuant to RCW 26.09.140 and RAP 18.1.

Respondent has previously filed a financial declaration pursuant to her Motion on the Merits and will update that prior to hearing.

CONCLUSION

While the Legislature did change the language of RCW 26.09.285 in 1989 to state that the court 'shall' designate as custodian the parent with the most residential time, there is no indication that this change was intended to make such designation mandatory or to remove judicial discretion in making that determination. So when, in 1996, the parties agreed to a designation of custodian that was ostensibly incorrect, it was something they had the power to do. When the court approved that, it was within the court's discretion.

That being the case, there is no reason to permit Mr.

KIMPEL to now challenge the decision that he invited, and did not challenge in 1996. Strong judicial policies of finality and favoring settlements as well Legislative policies setting criteria for major parenting plan modifications argue against reopening that decree.

The only error being perpetuated here is Mr. KIMPEL's own error, which was in his control to avoid in 1996, and which can now be corrected if grounds for major modification exist. Otherwise this court should reject Appellant's request, affirm the trial court and award attorneys' fees to Respondent.

February 11, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on the ___ day of _____ 1999 I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to the following:

<input type="checkbox"/> U.S. Mail	To: Mary Schultz
<input checked="" type="checkbox"/> Hand Delivered	818 W. Riverside Ste. 660
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<input type="checkbox"/> U.S. Mail	To: Susan Embree
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<input type="checkbox"/> Overnight Mail	Spokane, WA 99205-4750
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