

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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DEPUTY

**COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON**

No. 36341-1-II

RANDALL REAY MACALA, APPELLANT

V.

MARY LOUISE MACALA, RESPONDENT

BRIEF OF APPELLANT

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ORIGINAL

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I. INTRODUCTION

This appeal concerns the trial court's erroneous and substantial increase in Petitioner Randall Macala's post-secondary educational support obligations to his two youngest adult children, Catherine and Patrick. The increase was entered as part of an Order on Show Cause re Contempt/Judgment ["2007 Contempt Order"] on April 27, 2007 rather than in an Order for Modification of Child Support. At the time the Motion for Contempt was heard, Mr. Macala was not in arrears in paying his share of support and tuition for both adult children. The trial court denied the Contempt Motion. Rather than simply doing so, it went further and without the benefit of a Petition for Modification, Motion for Adjustment or any other motion before it, ordered Mr. Macala to pay support for both Catherine and Patrick during summer months even though the record was clear that both children were neither in school nor dependent on their parents for support during that time. The trial court also increased the amounts of Mr. Macala's monthly support obligations, even though no motion was before it to be decided.

The initial 1996 Order of Child Support ["1996 Child Support Order"] clearly contemplated that each of the Macala's three children might take up to six years (until the child turned 24) to complete college and that there would be time gaps in that completion. It was thus interpreted in

October 2003 in an Order on Hearing for Clarification of Post-Secondary Support [“2003 Clarification Order”] to require monthly support payments from Mr. Macala for only those months in which the child was enrolled full time and attending school. Between October 2003 and April 27, 2007, Mr. Macala met all of his post-secondary support obligations as ordered and as they arose. He did not pay support during the summer months unless the adult child was fully enrolled in and attending college.

This appeal challenges those portions of the 2007 Contempt Order that change or otherwise increase Mr. Macala’s support obligations. It should be granted as those provisions (1) violate the law of the case doctrine, (2) violate RCW 26.19.090, (3) are contrary to the substantial evidence before the trial court that the children were not in school, were working full-time during the summer and not dependent on their parents for support, and (4) were not proposed to the trial court in a Petition for Modification that would have required it to enter findings regarding a substantial change in circumstances. Furthermore, the trial court exceeded its narrow authority in a contempt proceeding to broadly interpret and modify the Post Secondary Educational Support provisions in the 1996 Child Support Order.

II. ASSIGNMENTS OF ERROR

Assignments of Error

- No. 1 The trial court erred in entering those portions of the 2007 Contempt Order that increase Mr. Macala's post-secondary support obligations from January 1, 2007 onward to automatically include summer months.
- No. 2 The trial court erred in entering those portions of the 2007 Contempt Order that increase the amounts of the monthly post-secondary educational support payments from January 1, 2007 onward.
- No. 3 The trial court erred in entering Section 2.9 of the 2007 Contempt Order that eliminates the requirement that receipts for college text books be provided to Mr. Macala.
- No. 4 The trial court erred on June 27, 2007 in denying the Motion for Clarification of the 2007 Contempt Order.

Issues Pertaining to Assignment of Error

- No. 1 The 1996 Child Support Order contains a post-secondary educational support provision that is triggered only when a child is enrolled full-time and attending college. This provision was confirmed in the 2002 Modification Order and in the 2003 Clarification Order. Between 2004 and January 2007, Mr. Macala fully complied with the 1996 provision as it had

been interpreted in the previous orders and as it applied to the children then in college. Ms. Macala did not formally challenge his compliance until filing a Motion for Contempt in December 2006. The 2007 Contempt Order requiring Mr. Macala to automatically pay support during summer months regardless of the circumstances violates the law of the case. (Assignment of Error No. 1)

No. 2 The 2007 Contempt Order requiring Mr. Macala to automatically pay for summer months violates RCW 26.19.090 because it requires Mr. Macala to pay full monthly support even when a child is not enrolled full-time and is not attending school. (Assignment of Error No. 1)

No. 3 The 2007 Contempt Order requiring Mr. Macala to automatically pay for the summer months is not supported by substantial evidence where it is clear from the record before the trial court that Catherine and Patrick were working full time during the summer of 2007 and were not dependent on their parents for support. (Assignment of Error No. 1)

No. 4 The 2007 Contempt Order requiring Mr. Macala to pay \$528.50 per month for Catherine and \$680.86 for Patrick from January 2007 onward for post-secondary educational support is

an impermissible adjustment or modification of child support in violation of RCW 26.09.100 and RCW 26.09.170 since it was not based on a petition for modification or a motion for adjustment. (Assignment of Error No. 2)

No. 5 Section 2.9 of the 2007 Contempt Order eliminates the requirement set forth in the 1996 Child Support Order that the Macala children provide Mr. Macala with receipts for their college textbooks. This interpretation was made without the benefit of a full Petition for Modification required by RCW 26.09.100 and RCW 26.09.170. It also violates an explicit requirement in the 2003 Clarification Order and is thus invalid. (Assignment of Error No. 3).

No. 6 The trial court denied Mr. Macala's Motion for Clarification on June 27, 2007 that sought to eliminate the automatic summer months payment requirement. The trial court denied the Motion based on lack of jurisdiction because this appeal had accepted. RAP 7.2(e) clearly grants the trial court authority to rule on a "Postjudgment Motion and Action to Modify [a] Decision" so long as certain procedures are followed. (Assignment of Error No. 4)

III. STATEMENT OF THE CASE

A. The 1996 Child Support Order

Randall and Mary Louise Macala were divorced in 1990. The Macala's had three minor children: Hilary born in January 1983, Catherine born in October 1985 and Patrick born in March 1988. CP 1.

In 1996, the parties entered into a comprehensive child support agreement on Ms. Macala's Petition for Modification. The 1996 Child Support Order was entered on September 3, 1996. CP 1-10. It contained a clear provision about how college tuition and living expenses were to be paid for the three children. The "Post Secondary Educational Support" provision was intended to be applied equally as each child turned eighteen and entered college. CP 3.

Post Secondary Educational Support was defined in Section 3.12 of the 1996 Child Support Order. CP 3-4. The father was to pay the costs of tuition and room and board expenses with certain "conditions and limitations." CP 3. Paragraph 3.12.1 stated: "Each minor child must begin his/her course of study within two (2) quarters following graduation from high school and **be enrolled and attending fulltime.** [Emphasis Supplied]" CP 3:12-14.

Paragraph 3.12.3 set the amount to be paid for tuition as follows: "The maximum amount for tuition etc. for which the Father shall be held liable and responsible shall not exceed seventy-five (75%) percent of the

tuition then being charged at the University of Washington for an in-state undergraduate student.” CP 3:17-19. Paragraph 3.12.5 set the amount to be paid for room and board as follows: “During such time that the Father is obligated to pay any post-high school education, he shall also continue to provide support for said child by paying the lesser of his monthly child support payment or the monthly expense of said child for room and board currently being charged by the University of Washington for an in-state undergraduate student.” CP 3:22-24, 4:1.

B. The 2002 Modification Order

In March 2002, Ms. Macala filed another Petition for Modification of Child Support. CP 11. Ms. Macala petitioned to have the post secondary educational support provision modified but the court declined to do so. CP 212. Ms. Macala also asked for an increase in the monthly support payments for Hilary but the court declined to award such an increase. CP 12. However, in the 2002 Modification Order, although the court did find that the child support for Catherine and Patrick should be recalculated, it declined to extrapolate the support that Ms. Macala sought. CP 12. It advised Ms. Macala that she could come back to court “for a modification based on a change in circumstances.” CP 12.

In conjunction with the 2002 Modification Order, the court entered a detailed “Findings and Conclusions on Modification of Child Support”

["2002 Findings and Conclusions"]. CP 13-16. In a reaffirmation of the provisions in the 1996 Child Support Order, Paragraph 4(c) of the 2002 Findings and Conclusions states: "The parties negotiated a complex arrangement for post secondary support of their child which was entered into an order of the court dated 9/3/96. Father should not have a deviation on his child support for the other children based on his obligation under that order. Mother sought to change the designation of the tax exempts [sic] therein. **The court denies [sic] to make any alterations in that agreement.** [Emphasis Supplied.]" CP 16.

The court also entered an Order of Child Support on April 12, 2002 ["2002 Child Support Order"]. CP 17-47. Section 3.14 of the 2002 Child Support Order states: "The post-secondary educational support provisions are not modified from Section 3.12 in the Order of Child Support entered on September 3, 1996. For ease of reference, said provisions are attached hereto at Exhibit A, and are incorporated by reference as if fully set forth herein." CP 22. Thus, the 2002 Order on Modification did not modify in any way the original post-secondary support provisions in the 1996 Order.

C. The 2003 Clarification Order

On July 27, 2003, Ms. Macala filed a Motion for Clarification of Post Secondary Education Obligation. CP 48-50. The parties' eldest child

Hilary had been experiencing difficulties in her studies and personal life at the University of Washington. See, e.g., Hilary's statement at CP 60-62 (detailing panic attacks, depression, inability to complete studies, and need for psychological counseling). She had not completed her coursework as a full-time student for the 2002-2003 school year. CP 48-49. Hilary's psychiatrist stated that the "highest number of credits that she should take per semester is eight," less than what the University of Washington defined as "full-time." CP 49.

Ms. Macala sought clarification of Mr. Macala's support obligations with a specific request for clarification of the minimum credit hours required to qualify as "attending post-secondary education" as well as a judgment for unpaid monies due for the school year 2002 "through the present." CP 48. Extensive materials were provided to the court prior to deciding the motion. CP 51-198.

In her Motion for Clarification, Ms. Macala stated with respect to the post secondary educational support provisions of the 1996 order: "It is clear that there was an expectation that the children would not go through school in the minimum of four years as the order specifically continues education contribution up until age 24." CP 49:3-5. She asked the court "to clarify the court order to make it clear that absences due to illness does not terminate the court ordered support obligation." CP 49:15-16.

On October 23, 2003, the court entered Findings and Conclusions and Order on Hearing for Clarification of Post-Secondary Support and Setting Arrears ["2003 Clarification Order"]. The court explicitly found at Paragraph 3 that the "clear intent of the [1996 Child Support] Order is that Hilary **be enrolled and attending full time to trigger the obligation by Petitioner** [emphasis supplied]." CP 200. At Paragraph 9, the court also found that "The 1996 Order provided that the contribution of Petitioner to post-secondary education costs would terminate upon the child's 24th birthday. That provision and the statute, RCW 26.19.090(3) construed together make it clear that there was an expectation that the child might not attend continuously as if she did so, she would have completed her education prior to age 24." CP 201. At Paragraph 11, the court found: "It is not disputed that when the obligation is triggered, the amount owed is the lesser of the University of Washington board and room and \$367.04." CP 201.

The court found that the 1996 Child Support Order remained in effect for any period of time prior to Hilary's 24th birthday when she was "enrolled and attending full time as defined by the school attended." CP202:5-7. During any period of time that Hilary was not "so enrolled and attending full time, the obligation [was] suspended." CP 202:7-8. Furthermore, the court ordered that Hilary was "required to document at

the end of the first month of each term that she is in compliance with the terms of Section 3.12 of the Order and RCW 26.19.090.” CP 202:9-11. Hilary was ordered to provide Mr. Macala with “the required documentation by certified or registered mail which requires a return receipt.” CP 202:11-12. Mr. Macala was ordered within five days from the receipt of this information “to pay his obligation for the first month” and to make “timely further payments for that term.” CP 202:13-14.

D. Post-Secondary Support Payments During Summer Terms From 2003 to 2007

Based on the 2003 Clarification Order, Mr. Macala timely paid all tuition payments for Hilary, then Catherine and finally Patrick as each was enrolled in and attending college full-time. See, e.g., CP 220-221. Hilary requested emancipation during 2005 and 2006 and thus no payments were made during that time. CP 296. She turned 24 on January 5, 2007 and was in any event not entitled to further support under the terms of the 1996 Order. CP 296. Prior to her doing so and in compliance with the 2003 Clarification Order, Mr. Macala paid support to her for the summer months in 2004 as she was attending college full time and not working. CP 296.

Catherine began attending college in the fall of 2004. CP 296. During the summers of 2004 and 2005, Mr. Macala did not pay monthly

support to Catherine as she was working full-time and not attending school. CP 296. As he did with Hilary in the summer of 2004, Mr. Macala paid full support to Catherine during the summer of 2006 as she was attending school full time. He did not pay for the one month in the summer of 2006 that she was working as a camp counselor. CP 296. She is not attending school during the summer of 2007 and is working full time as a camp counselor. CP 296. Catherine does not turn 24 until October 9, 2009. CP 296. Prior to the Order challenged herein, Mr. Macala understood that he is thus obligated to pay her monthly support for any term that she is attending school full time for the next two years or completes her course of study, whichever occurs first. CP 296.

Patrick began attending college in the fall of 2006. CP 296. Mr. Macala made no support payments during the summer of 2006 as Patrick was employed full-time as a camp counselor. CP 296. Patrick is working full-time at his college during the summer of 2007 and also works additional part-time jobs. He is living in a tent during the summer months of 2007. CP 296. Patrick will turn 24 on March 5, 2012. CP 296. As is the case with Catherine and prior to the Order challenged herein, Mr. Macala understood that he is thus obligated to pay Patrick monthly support for any term that he is attending school full time for the next four

and a half years or completes his course of study, whichever occurs first.
CP 296.

Between the 2003 Clarification Order and December 2006, Mr. Macala paid child support and tuition as set forth in the 1996 Order and as clarified in the 2003 Clarification Order. CP 212. Ms. Macala never once complained or filed a Petition for Modification, Motion for Adjustment, Clarification or motion of any sort to change the methods that were during those years in place for compliance with the previous orders governing post-secondary support. CP 212.

E. The 2007 Contempt Order

On December 11, 2006, Ms. Macala filed a Motion and Declaration for Order to Show Cause Re: Contempt. CP 205-211. The only issue before the court on the Motion was whether the court should enter a finding of “contempt for failure to comply with the orders of child support entered on April 12, 2002, and September 3, 1996, in Kitsap County, Washington.” CP 205. Significantly, nowhere in the Motion does Ms. Macala ask to have the support payments increased, adjusted or modified. CP 205-206. Nowhere in the Motion does Ms. Macala ask to have summer months automatically included in the support calculations. CP 205-206. Conspicuously absent from the Contempt Motion was any reference to the 2003 Clarification Order. *Id.*

Ms. Macala did, however, allege that Mr. Macala owed at that point a total of \$2,546.53 for Catherine (February through August) and that he owed at that point a total of \$2,555.11 for Patrick (February through December). CP 208. A total amount of \$5,101.64 was sought as past due. CP 206. She requested “sanctions for contempt, including a forfeiture for each day the contempt of court continues, and establishing conditions by which the contempt may be purged” as well as attorneys fees and costs. CP 206.

Ms. Macala also alleged that Mr. Macala owed \$6,342 for Catherine’s monthly support for the upcoming school year 2006-2007 and that he owed \$8,001 for Patrick’s monthly support for the upcoming school year 2006-2007. CP 208. The support demanded was calculated by taking what she interpreted as the then-in-effect support payments (\$680.86 per month for Patrick and \$528.50 for Catherine), multiplying them by 12 months and then using the lower of the total yearly amount versus the yearly \$8,001 figure for University of Washington room and board. CP 208. The summer months were automatically included in this calculation whether the child was attending college or not. RP 14:1-2 (4/27/07) (explaining how the proposed calculations “annualized” the 1996 Order).

The Show Cause hearing was eventually set for January 19, 2007 at Kitsap County Superior Court, after being continued a number of times

due to inclement weather and holiday schedules. CP 209-210; RP 1-29 (1/19/07). Mr. Macala filed a responsive declaration on January 9, 2007, including a comprehensive set of attachments. CP 211-274. He also filed a supplemental declaration on January 9, 2007 that set out the procedural history (summarized above) of the original post-secondary support provisions in the 1996 Order and how he had complied with them over the previous eleven years. CP 275-283.

As to the monthly support amounts, Mr. Macala's position was that the amounts he owed for Catherine and Patrick for monthly post-secondary support were based on the original 1996 Child Support Order and that neither the 2002 Modification Order or the 2003 Clarification Order had changed that amount for purposes of post-secondary support. CP 277-279. The 1996 Child Support Order set his monthly support payments for both Catherine and Patrick at \$297.02. CP 276. Mr. Macala had chosen to pay \$367.04 in monthly post-secondary support rather than the \$297.02 in the 1996 Order as he did not want to pay less to any one child and \$367.04 was the monthly amount he paid to Hilary while she was attending college. CP 215.

Ms. Macala filed a second declaration on January 18, 2007 in which she restated her position that the 2003 Clarification Order applied to Hilary only. CP 284. Ms. Macala's position was that the monthly support

amount for Catherine is \$528.50 and that the monthly support amount for Patrick is \$680.86. CP 284. According to her, those figures were to be used when calculating the total figures that Mr. Macala owed. CP 285.

The Show Cause Hearing was held in Kitsap County Superior Court before Hon. Leila Mills on January 19, 2007. RP 1-29 (1/19/07). During oral argument, counsel for Ms. Macala summarized her position that the 2002 Modification Order set the post-secondary monthly support amount for Catherine at \$528.50 and for Patrick at \$680.86. RP 4 (1/19/07) referencing CP 20:8-9 and CP 23:2-3. He also stated her positions that the 2002 Modification Order changed the monthly support amounts from what they had originally been in the 1996 Child Support Order although she agreed that the post-secondary support obligations were as set out in the 1996 Child Support Order. RP 5 (1/19/07). Her position with regard to the post-secondary support was that it was the lesser of 12 times the 2002 support amounts or the current UW room and board charges. For Catherine, the full yearly amount was calculated at \$6,342 and for Patrick, the full yearly amount was calculated at \$8,001.

Id.

Counsel for Ms. Macala disputed Mr. Macala's setting the monthly amount at \$367.04 based on the 2003 Clarification Order as "throughout that order the whole context and the actual order is applied to Hilary

only.” RP 6:16-18 (1/19/07). He stated their position that Mr. Macala was in contempt as he had “willfully violated the Order of 2002 and 1996 and capped each child at \$367.04, times nine, for the school year, which is \$3,303.36” instead of paying \$6,432.00 for Catherine and \$8,001.00 for Patrick. RP 7:2-9 (1/19/07). He asked that the difference between what was allegedly owed and what Mr. Macala had actually paid should be reduced to a judgment. RP 7:14-22 (1/19/07). Attorneys’ fees were also requested. RP 7:23-24 (1/19/07).

Counsel for Mr. Macala responded that the 2003 Clarification Order did apply to the circumstances presented regarding Catherine and Patrick, that it was not limited in its scope to Hilary. RP 8:1-13 (1/19/07). The 2002 Modification Order in no way changed the post-secondary educational support provisions in the 1996 Child Support Order, even though Ms. Macala had repeatedly asked the court to do so. RP 9:22-24; 10:8-11 (1/19/07). Mr. Macala had specifically abided by the terms of the 2003 Clarification Order. RP 10:12-19 (1/19/07) referencing CP 215-217 (Randall Macala Declaration regarding compliance as to Hilary, Catherine and Patrick). Counsel for Mr. Macala pointed out to the court that Ms. Macala let three years go by before coming to court to say that Mr. Macala was not in compliance and should be found in contempt. RP 10:20-25; 11:1-2 (1/19/07). He stated: “Specifically, Mr. Macala has had an

established process that has had smooth operation with Patrick and Catherine. It's working. There is [sic] no delinquencies. There's no indication that he's behind whatsoever." RP 11:3-6 (1/19/07). Table 2 of Mr. Macala's declaration set forth exactly what tuition and room and board payments had been made for Catherine and Patrick for 2006-2007 college year. RP 11:7-12 (1/19/07) referencing CP 221 (Table 2).

Counsel for Mr. Macala argued that the 2003 Clarification Order was not strictly limited to Hilary, that the post-secondary educational support provisions in the 1996 Child Support Order were interpreted by the Court Commissioner in 2003 in a more general way. RP 11:16-22 (1/19/07). The Commissioner interpreted the word "currently" in 1996 Child Support Order post-secondary provision 3.12.5 to mean that the applicable support amount was the monthly support amount that was set in the 1996 Child Support Order. RP 12:16-21 (1/19/07). For Hilary, that amount was \$367.04. RP 12:21-25 (1/19/07). Based on the 2003 interpretation, Mr. Macala could have limited his post-secondary support payments to Catherine and Patrick at the \$297.02 amounts set in the 1996 Child Support Order but he decided on his own to not go lower than what he had paid for Hilary. RP 13:6-15 (1/19/07).

Counsel for Mr. Macala argued that the 2003 Clarification Order was drafted by Ms. Macala's attorney and was the result of full litigation over

the meaning of the post-secondary educational support provisions in the 1996 Child Support Order. As such, it represents “the law of the case, and this is how it has been interpreted.” RP 14:22-25; RP 15:1 (1/19/07). Mr. Macala should not be held in contempt for “abiding by a court order in this particular case, interpreting how the post-secondary educational support provision came about.” RP 15:2-5; 16:16-20 (1/19/07). Counsel for Mr. Macala asked the court to deny the contempt motion and to award attorneys’ fees and costs for “having to respond to what should really be a clear-cut case of a person complying with the 2003 Clarification Order.” RP 16:15-25 (1/19/07). He also argued alternatively that since the law of the case applied, that any ruling regarding Mr. Macala be made prospective. RP 27:19-25 (1/19/07).

The court ruled that the 2003 Clarification Order applied to Hilary only. RP 24:1-5 (1/19/07). The court found that the \$367.04 monthly amount for Hilary had been determined to be the appropriate amount because it had not been changed since 1996. RP 24:13-20 (1/19/07). The court further ruled that she “did not see any language in this order which creates the law of the case as to the numbers for the other two children” and that a determination of those numbers required looking at the amounts in the 2002 Modification Order where the amounts for Catherine and Patrick were increased. RP 24:21-24 (1/19/07). The court found,

however, that three years was “inexcusable” for Ms. Macala to wait to insist that the 2002 child support amounts applied. Mr. Macala was therefore not in contempt and the amounts to be applied would only be assessed prospectively, beginning January 2007. RP 28:9-22 (1/19/07). No attorneys’ fees were awarded to either side. RP 28:22-24 (1/19/07).

On April 27, 2007, a presentation hearing was held to finalize the language in the 2007 Contempt Order. RP 1-24 (4/27/07). The court stated that she wanted to “emphasize again that there is no contempt in this case” and that she thought it “worthwhile for there to be a fresh start.” RP 7:5-11 (4/27/07). Counsel for both parties agreed (for purposes of finalizing the order only) to use the monthly \$528 and \$680 figures from January 2007 for purposes of calculating support. RP 11:11-25 (4/27/07).

With reference to the summer payments, counsel for Mr. Macala made the following statement to the court regarding paragraph 3.9 of the proposed order: “The first problem is the annualization of the obligation that we see. That’s contrary to the language in the original order of 1996, that this is to be a monthly amount. It does make quite frankly the statutory provisions of 26.19.090 relatively moot regarding noncompliance if we have an annual obligation. The statute specifically requires periods of noncompliance.” RP 13:16-24 (4/27/07). He further stated: “We think that annualizing it does substantially change the 1996

order. It is a monthly obligation. He has been paying it. There is no reason to change it to an annual obligation.” RP 14:1-4 (4/27/07). The court decided, however, to use a monthly figure but to specify that it would be calculated “per month times 12 so there’s no question that it’s just the academic year.” RP 17:18-21 (4/27/07).

F. The Motion for Clarification of the 2007 Contempt Order

A Notice of Appeal was timely filed with the trial court on May 24, 2007. Also on that date, Mr. Macala filed a Motion for Clarification. CP 292-307. He requested that the court clarify the 2007 Contempt Order to “determine if room and board is required to be paid during the summer months” even when the children are not enrolled in school full-time. CP 292. He cited RCW 26.19.090 and provided the court with a chart explicitly showing the history of his support payments for summer months for each of the three children. CP 293, 296. On June 22, 2007, a hearing was held before the trial court on the clarification motion. RP 1-7 (6/22/07). Counsel for Mr. Macala pointed out that even though an appeal had been filed, the key issue being challenged was the annualization of the support payments that now included summers even if the child was not incurring room and board. If the court was able to clarify the matter, the appeal might be dismissed. RP 3:12-18 (6/22/07). In response, the trial court stated that the amounts set by section 2.9 of the 2007 Contempt

Order were multiplied by 12 and that she did not believe she had jurisdiction under RAP 7.2 to change that ruling. RP 5:20-21; 6:13-25 (6/22/07). This appeal challenges that ruling.

IV. ARGUMENT

A. Standard of Review

Mr. Macala appeals from certain portions of an order that was entered on a Motion for Contempt. The reviewing superior court judge considers contempt proceedings solely on written submissions, including declarations and affidavits. The trial court did not hear live testimony requiring it to assess the credibility of witnesses. The Washington Supreme Court has decided that in contempt proceedings arising in a domestic relations context “the substantial evidence standard of review should be applied” where “competing documentary evidence had to be weighed and conflicts resolved.” In re Marriage of Rideout, 150 Wash.2d 337, 351, 77 P.3d 1174 (2003).

This appeal does not arise from a Child Support Order. Had that been the case, the standard of review would have been the more stringent “abuse of discretion” standard. In re Marriage of Griffin, 114 Wn.2d 772, 776, 791 P.2d 519 (1990) (appellate court reviews child support modifications and adjustments for abuse of discretion). Under that standard, the appellate court upholds the trial court's child support

calculation unless there is a manifest abuse of discretion. In re Marriage of Mattson, 95 Wn. App. 592, 599, 976 P.2d 157 (1999). However, this is an appeal from a contempt proceeding and the “substantial evidence” standard is clearly the one that applies.

The standard of review is whether the trial court's findings of fact were supported by “substantial evidence” and “whether the findings support the conclusions of law.” Id. Substantial evidence is evidence in sufficient quantum to persuade a reasonable person of the truth of the premise. Holland v. Boeing Co., 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978).

B. The Trial Court Misused its Contempt Powers to Broadly Interpret the Prior Support Orders Against Mr. Macala When It Had Not Been Asked to Do So

Contempt hearings are unique proceedings whose only purpose is to determine whether an individual has **intentionally** violated a court order. Burlingame v. Consol. Mines & Smelting Co., 106 Wash.2d 328, 334, 722 P.2d 67 (1986). “The contempt of court power is used by courts to enforce or punish violations of a court order or judgment and to prevent or punish unlawful interference with the proceedings of a court.” Burlingame, 106 Wash.2d at 334, citing RCW 7.20.010(1)(b) (defining contempt or court in part as intentional “disobedience of any lawful judgment, decree, order, or process of the court”). Where the contempt

sanction being sought is based upon the alleged violation of a valid written order, the order must be strictly construed in favor of the alleged contemnor. In re Marriage of Humphreys, 79 Wash. App. 596, 903 P.2d 1012 (1995).

Here, the trial court correctly found that Mr. Macala was not in contempt. That should have been the end of the matter. Obviously, based on the extensive litigation in this case, Ms. Macala is experienced in how to file Petitions for Modification or Motions for Clarification. Had she wanted an increase in the monthly amounts or a clarification of which amounts applied, she was perfectly capable of seeking those remedies. Had she sought to have summer months automatically included, she could have done so using the proper channels. She did not. There is no question in this case that the trial court exceeded its authority when it reinterpreted the prior support orders to increase the monthly amounts and to order Mr. Macala to pay for summer months regardless of the circumstances. It only possessed authority to do so “on a showing of an unanticipated, substantial change in circumstances” that simply did not exist here. RCW 26.09.170(1); Wagner v. Wagner, 95 Wash.2d 94, 98, 621 P.2d 1279 (1980).

Mr. Macala has made the required increased payments, including paying for summer, under this Contempt Order. However, Mr. Macala

does not concede that the challenged provisions in the 2007 Contempt Order are valid. However, even assuming that the trial court had discretion to enter the challenged provisions, they are still for the additional reasons set forth below invalid and should be held to be unenforceable against Mr. Macala.

C. The Automatic Summer Months Payment Requirement Violates RCW 26.19.090

Section 2.9 of the 2007 Contempt Order calculates Mr. Macala's post-secondary support obligations based on the 2002 child support amounts for Catherine and Patrick **times twelve**. CP 291. It explicitly states that "the 2002 [Modification Order] affirmed, in toto, the Post-Secondary obligations and the Court finds that no portion of the 2002 [Modification Order] states that the amount to be paid will be limited to the 1996 figures. **Accordingly, the lesser of the University of Washington room and board or the post-secondary figures, which are $12 \times \$528.50 = \$6,342$ for Catherine and $12 \times \$680.86 = \$8,170.32$ for Patrick, apply [emphasis supplied].**" CP 291. Because the yearly calculation automatically includes periods of time during which the children are not in school, this provision violates RCW 26.19.090.

RCW 26.19.090 sets out the standards for postsecondary educational support awards in this state. RCW 26.19.090(2) states in

pertinent part: “When considering whether to order support for postsecondary educational expenses, the court shall determine **whether the child is in fact dependent and is relying upon the parents for the reasonable necessities of life [emphasis supplied].**” More importantly, RCW 26.19.090(3) requires that the “child must enroll in an accredited academic or vocational school, must be actively pursuing a course of study commensurate with the child’s vocational goals, and must be in good academic standing as defined by the institution. **The court-ordered postsecondary educational support shall be automatically suspended during the period or periods the child fails to comply with these conditions [emphasis supplied].**”

When read together, these provisions require that in ruling on a motion involving payment of post-majority support a trial court must at a minimum make findings regarding the child’s being (1) enrolled in school, (2) an active and academically competent student, and (3) dependent on the parents for the necessities of life. Here, the trial court made no findings of fact regarding any of these circumstances with respect to either Catherine or Patrick and simply ordered Mr. Macala to pay support for twelve months regardless of what child’s circumstances. To the contrary, the trial court actually had before it evidence to find that the children were in fact not dependent on the parents for support during the summer months

and that the parents anticipated that there would be breaks in the children's college educations, that they would not be automatically enrolled in school year-round. CP 296.

All Washington cases interpreting RCW 26.19.090 involve appeals from trial court decisions rendered after hearings on Petitions for Modification. See, e.g., In re Marriage of Daubert, 124 Wash.App. 483 (2004); In re Marriage of Kelly, 85 Wash.App. 785, 934 P.2d 1218 (1997); In re Marriage of Shellenberger, 80 Wash.App. 71, 906 P.2d 968 (1995). That was not done here. Rather than go through the process of filing and serving a Summons and Petition for Modification, Ms. Macala chose to file a Motion for Contempt alleging that Mr. Macala was intentionally behind in his support payments. He was not and the trial court was correct in finding that he was in compliance. The reality is that Ms. Macala was seeking an increase in the amounts of the support payments through the wrong procedure. The reality is that the support payments were substantially increased without her having to go through the more cumbersome but fairer statutorily required support modification process. Had she done so, the increase would not have been granted and this appeal would not have been filed.

Had Ms. Macala filed a Summons and Petition for Modification, she would have had to fill out and check certain boxes in the form Petition

stating the reasons for the modification. Specifically, she would have had to state that Catherine and/or Patrick were each “in fact dependent and relying upon the parents for the reasonable necessities of life,” that a modification was warranted due to some alleged deficiency in the original 1996 provisions created by a substantial change in circumstances. In re Marriage of Kelly, 85 Wash.App. 785, 787, 934 P.2d 1218 (1997) (summarizing same). This she did not do and the trial court correspondingly made none of the required findings that these circumstances existed prior to increasing the support payments. In re Marriage of Kelly, 85 Wash.App. at 787 (increase in father’s monthly support obligation from \$210 to \$462.95 upheld where based on standard calculations of parents’ incomes).

Any increase in a noncustodial parent’s support obligation must be based on **both** that parent’s ability to pay and the child’s support needs. Edwards v. Edwards, 99 Wash.2d 913, 918, 665 P.2d 883 (1983). Here, the trial court departed from the standard family law practice of having each party provide Financial Declarations for a decision concerning child support. It made no inquiry into Mr. Macala’s ability to pay the increased amount and made no corresponding inquiry into whether either Catherine or Patrick actually needed the increased payments during the summer months. The failure to make these findings is alone a basis to invalidate

the increase. In re Marriage of Scanlon, 109 Wash.App. 167, 34 P.3d 877 (2001) (striking post-secondary educational support order as “premature” where the trial court did not make findings of fact based on the statutory factors); In re Marriage of Kelly, 85 Wash.App. at 790 (upholding increase in postsecondary educational support obligation where the trial court considered each of the RCW 26.19.090(2) factors and made explicit factual findings in the support order).

One Washington case deals explicitly with whether or not a parent is obligated to pay post-secondary support to an adult child. In re Marriage of Jarvis, 58 Wash.App. 342, 792 P.2d 1259 (Div. 3 1990). Jarvis emphasizes the importance of the trial court’s basing its decision to increase support payments on what the child’s needs actually are. As is the case here, Jarvis involved a divorce decree containing a provision that obligated the noncustodial father to pay for postsecondary educational support so long as the student was enrolled full-time. In re Marriage of Jarvis, 58 Wash.App. at 343. However, the provision did not contain a suspension clause and postsecondary support was only provided up to the child’s 22nd birthday. The Jarvis’ oldest daughter Julie enrolled in community college after she turned 18. Id.

Mr. Jarvis filed a motion for clarification inquiring whether “support payments were required when Julie was on summer vacation.”

Id at 344. He had been paying \$450 per month in support. The trial court ordered him to continue the payments only when Julie was successfully enrolled as a full-time student and could provide to the Court an affidavit that she was so enrolled. Because Julie was not enrolled in school in the summer, the trial court ordered that she was not entitled to any educational support monies. Id at 345.

On appeal, the Court of Appeals reversed. It ruled that there was no “provision for abatement during the summer months” and that there was nothing in the record to suggest that she did not remain dependent on her parents for support during the summer months. In re Marriage of Jarvis, 58 Wash.App. at 347. Therefore, “she was a full-time student, even though on summer break.” Id.

For two reasons, the facts presented here are completely distinct from those presented in Jarvis, compelling the opposite conclusion. First, unlike the provision in the Jarvis decree, the post secondary education support provision at issue in this case extends up to the child’s 24th birthday and thus clearly contemplates breaks in each child’s college education. Thus, there is an implied “abatement” provision. This interpretation was confirmed in the 2003 Clarification Order that so interpreted it and ordered Mr. Macala’s obligation suspended during any term in which Hilary was not enrolled and attending full-time. CP 202.

Second, the record below clearly supports a finding that neither Catherine nor Patrick was dependent on their parents during the summer of 2006 since both were working full-time and had their room and board fully covered during that time. CP 296. It is also worth noting that the Jarvis court neglected to take into consideration the clear mandate of the Postsecondary Educational Support Awards statute that the “court-ordered postsecondary educational support shall be automatically suspended during the period or periods the child fails” to be enrolled in an accredited school. RCW 26.19.090(3) (originally effective in 1991). This court can confidently come to the opposite conclusion to that in Jarvis and rule that automatic summer support payments are invalid in the circumstances presented here, as there is no substantial evidence to support such a ruling.

D. The Automatic Summer Months Payment Requirement Violates the Law of the Case Doctrine Because It Contravenes the 2003 Clarification Order That Applies to the Facts Presented Here

The automatic summer support payments are also invalid because they violate the law of the case doctrine. Where a court has entered a ruling and a party accepts that ruling and does not appeal, the “law of the case” doctrine precludes that party from relitigating the issue. In re Marriage of Trichak, 72 Wash.App. 21, 863 P.2d 585 (1993). In a child support modification context, this doctrine applies unless a Petition for

Modification is brought “showing a substantial change in circumstances” pursuant to RCW 26.09.170(1)(b). Id.

In Trichak, the trial court initially determined that the husband was entitled to a pro rata offset in his child support obligation for the Social Security benefits received by the couple’s disabled child. The wife did not appeal this ruling. Two years later, she brought a petition for modification of child support that included a request to eliminate the pro rata offset. On appeal, the court concluded, based on collateral estoppel and the “law of the case” doctrine, that the wife was precluded from relitigating the issue. In re Marriage of Trichak, 72 Wash.App. at 23-24.

Trichak applies to the facts presented here. In July 2003, Ms. Macala sought a ruling from the trial court to clarify whether Mr. Macala was obligated to pay monthly post-secondary support to one of the couple’s children who was not enrolled full time for health reasons during some of the terms that she was in college. CP 49-50. The Motion for Clarification was brought by Ms. Macala and not by Hilary even though she was an adult. Any ruling based on the Motion was therefore binding on Ms. Macala as a party and the adult child was not a necessary party to the proceeding. In re Marriage of Kelly, 86 Wash.App. at 790 (adult child not a necessary party to support proceedings under CR 19(a)).

In her Motion for Clarification, Ms. Macala expressly requested that the post-secondary support obligation contained in Section 3.12 of the dissolution order be interpreted to mean that “there was an expectation that the children would not go through school in the minimum of four years as the order specifically continues education contribution up until age 24.” CP 49. She specifically asked the court “to make it clear that absences due to illness does not terminate the court ordered support obligation.” CP 49.

In the 2003 Clarification Order, the trial court interpreted as the “clear intent” of the “very comprehensive provision” for post-secondary educational support that the child must be enrolled and attending full-time college during any term that Mr. Macala’s obligation is triggered. CP 200-201. Hilary was ordered to provide documentation of such enrollment prior to the end of the first month of each term and Mr. Macala was to have five days from receipt of the documentation to make the first monthly payment and “to make timely further payments for that term.” CP 202. It is clear that the 2003 Clarification Order interprets section 3.12 to be triggered term by term and is explicit that support is not owed any term that a child is not enrolled and attending full-time. That means summer terms as well.

Because the 2003 Clarification Order was based on a motion brought by Ms. Macala after full litigation of all of the issues and was expressly binding on her as a party to the initial dissolution decree, she cannot come to court four years later and demand that the same issue be decided in her favor. She is collaterally estopped from doing so. Trichak is dispositive here. The summer months increase in support obligations is a violation of the law of the case. Based on the 2003 Clarification Order that is as binding on Ms. Macala as it is on Mr. Macala (it was **her** motion after all), the automatic summer months support payment increase in the 2007 Contempt Order is invalid.

E. The Increased Monthly Support Amounts Set in the 2007 Contempt Order Are Invalid As the Court's Decision Was Not Based on a Petition for Modification

In her Motion for Show Cause re: Contempt, Ms. Macala alleged that Mr. Macala was in contempt because he owed support payments for Catherine during 2006 at \$528.50 per month and support payments for Patrick for the 2006-2007 school year at \$680.86. CP 208. She did so knowing that Mr. Macala had been paying monthly support in the amount of \$367.04 for each child for every month that they were attending school full time. He did so pursuant to the 1996 Support Order and the 2003 Clarification Order. CP 214 [Declaration of Randall Macala]. Mr. Macala paid the \$367.04 for post secondary support for each child as he or she

entered college pursuant to the court's interpretation of the 1996 Support Order in the 2003 Clarification Order. CP 215.

The December 2006 Motion for Show Cause re: Contempt was the first time that Ms. Macala formally challenged Mr. Macala's payment amount even though he began paying Catherine \$367.04 in 2004. In the 2007 Contempt Order, the trial court increased the monthly payment amounts to those Ms. Macala assumed were applicable. The trial court determined that the higher figures applied based on increased amounts set in the 2002 Support Order. RP 24:21-25; 25:1-14 (1/19/07).

As argued above, the trial court's only decisional power in the contempt proceeding was to decide if Mr. Macala intentionally violated the post-secondary educational support order. While it may have been appropriate for her to assess the amounts due and owing in order to determine Mr. Macala's intent, she lacked authority to redetermine the monthly figures prospectively without the benefit of a full petition for modification. Doing so required that she make factual findings under RCW 26.19.090 and that she consider both Mr. Macala's ability to pay the higher monthly amounts plus tuition costs as well as each of the children's needs. In at least one Washington case, a court remanded a post-secondary educational support ruling back to the trial court with an express direction that in making this determination, the trial court must

consider “the adult children’s ability to contribute to their own educations through grants, scholarships, student loans and summer and/or part-time employment during the school term.” In re Marriage of Shellenberger, 80 Wash.App. 71, 84, 906 P.2d 968 (1995). See also In re Marriage of Daubert, 124 Wash.App. 483, 99 P.3d 401 (2004) (holding that post-secondary support determinations differ in important ways from support determinations for minor children).

F. The Trial Court’s Decision to Lift the Book Receipt Requirement Was Inappropriately Made in a Contempt Proceeding

The trial court also inappropriately waived a requirement that is explicitly contained in the 2003 Clarification Order that a child attending college provide Mr. Macala with text book receipts. CP 291. She decided that “Randall Macala is not responsible for the payment of books; accordingly, there is no further requirement that receipts for books be provided to him.” CP 291. The 2003 Clarification Order interpreted Section 3.12 of the 1996 Support Order to continue to require Hilary to provide “proof of registration, tuition statements, grades and book receipts.” CP 202. In the 2007 Contempt Order, the trial court simply waived that requirement which, as mentioned above is the “law of the case” as it was not appealed.

G. Under RAP 7.2(e) the Trial Court Had Authority to Change the Summer Months Payment Obligation in a Motion for Clarification

On June 27, 2007, the trial court refused to reconsider her automatic summer months payment decision on Mr. Macala's Motion for Clarification. In refusing to do so, she stated that once the appeal was filed she had no jurisdiction over the case, citing RAP 7.2. RP 6 – 7 (6/22/07). But RAP 7.2(e) clearly gives the trial court the authority to hear and determine “(1) postjudgment motions authorized by the civil rules, the criminal rules, or statutes, and (2) actions to change or modify a decision that is subject to modification by the court that initially made the decision.” The rule makes clear that the trial court should first hear the motion and “decide the matter.” Then “if the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision.” Obviously, the trial court had the power to decide to change her mind but she refused to do so. This court can find that she erred in so doing.

H. Request for Attorneys Fees and Costs

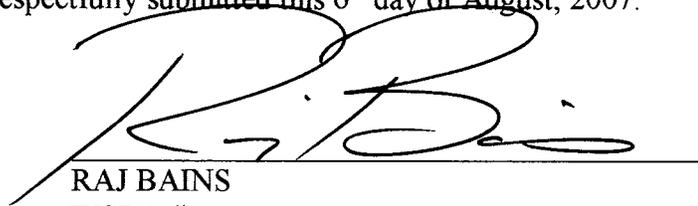
Randall Macala requests that this court in its discretion grant him costs and attorneys fees incurred in bringing this appeal. This request is explicitly based on RCW 26.09.140 which states that: “Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost

to the other party of maintaining the appeal and attorney's fees in addition to statutory costs."

V. CONCLUSION

For all of the foregoing reasons, Mr. Macala requests that the court hold as invalid those portions of the 2007 Contempt Order that require him to make monthly post-secondary educational support payments that automatically include the summer months, that increase his monthly payment amounts without having weighed all of the factors required under RCW 26.19.090 and that that waive the children's obligation to provide textbook receipts. All of the provisions were decided in the context of a contempt proceeding and exceeded the court's contempt powers. Mr. Macala also requests attorneys' fees and costs for this appeal.

Respectfully submitted this 6th day of August, 2007.

A handwritten signature in black ink, appearing to read 'R. Bains', is written over a horizontal line.

RAJ BAINS

WSBA # 22459

Attorney for Appellant Randall Macala

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STATE OF WASHINGTON
BY _____
JERRY

CERTIFICATE OF SERVICE

I certify that on the 6th day of August, 2007, I caused a true and correct copy of this Brief of Appellant to be filed with the appellate court as well as served on the following in the manner indicated below:

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