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STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION TWO

OF THE STATE OF WASHINGTON

No. 36341-1-II

RANDALL REAY MACALA, APPELLANT

V.

MARY LOUISE MACALA, RESPONDENT

APPELLANT'S REPLY BRIEF

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1. Introduction

This is an appeal from a contempt order requiring Mr. Macala to pay child support to two adult children during summer terms when they are working and not attending school. Three core issues are presented. The first is whether a 2003 Clarification Order established as a matter of law that post-secondary child support is determined by term rather than annually. The second is whether the trial court exceeded its authority on a contempt motion when it substantially increased the amounts of support that Mr. Macala must pay for the two adult children. The third is whether there is an implied summer term abatement clause in the 1996 Order of Child Support, one that is bolstered by the conduct of the parties for the five and a half year period between September 2001 when the first Macala child started college and January 2007 when the Motion for Contempt was heard. There are a number of secondary issues such as the question of attorney fees and whether Mr. Macala is entitled to receipts for textbook expenses. However, the questions of “law of the case,” contempt authority and the proper interpretation of the 1996 Order of Support are the three main issues to be decided on appeal.

Mr. Macala asserts that (1) there is no doubt that the 2003 Clarification Order necessarily determined that payments to any Macala child attending college full time is set by term rather than by year, (2)

there was no justification for ordering a substantial increase in support payments after the finding of contempt had been entered, and (3) the conduct of the parties between September 2001 and January 2007 precludes a finding that “attending full-time” includes summer terms where the adult child is not attending school.

2. Summary of Respondent’s Counter-Arguments.

In her Response Brief, Ms. Macala raises four counter-arguments on these three core issues. First, she asserts that the 2003 Clarification Order does not collaterally estop “the mother from claiming that the father’s child support obligation continues during the summer months ... so long as the children are enrolled and attending college fulltime.” Response Brief at 5-8, 21-23. Second, she argues that the 2007 Order was a clarification rather than a modification of the 1996 Order of Child Support and thus no motion for modification was needed. Response Brief at 9-12. Third, she asserts that the increase in support payments was justified as a necessary interpretation of the 1996 Order of Child Support’s post secondary support provision. Response Brief at 14-15. Fourth, she argues that In Re Jarvis compels a ruling in her favor on the summer term payment issue. Response Brief at 19-21. Each of these arguments is addressed separately below.

3. Clarification of Standard of Review.

Mr. Macala agrees with the Respondent that the question of interpretation of the 1996 Order of Child Support is a question of law subject to de novo review by the appellate court. Response Brief at 13. He also agrees that where the decree is ambiguous as is the case here, the appellate court seeks to ascertain the parties' intent by using general rules of construction applicable to statutes and contracts. Id.

4. The 2003 Clarification Order Necessarily Determined that the Post-Secondary Support Obligation is Triggered Term by Term Rather Than Annually for All Macala Children.

Ms. Macala has mischaracterized the parties' dispute over how the "attending full time" requirement of the post secondary support provision should be interpreted. She asserts that while "the father claims ... that 'fulltime' means attending every month of the year during which classes are offered," she "claims that one is a fulltime student without attending the summer session." Response Brief at 3. To the contrary, Mr. Macala does not argue that "fulltime" means attending every month of the year. Rather, he asserts that whether or not a child is "attending fulltime" should be determined on a term-by-term basis rather than on an annual basis, as the trial court has incorrectly done in the 2007 Contempt Order. His support for this interpretation is found not only in the parties' conduct between September 2001 and January 2007, but it is an issue that was

explicitly and previously litigated in the 2003 Clarification Order concerning what triggered his obligation to pay support for Hilary.

To the extent that the 2003 Clarification Order interpreted what the phrase “attending fulltime” meant in the 1996 Support Order, that interpretation applies to all three Macala children, not just Hilary. Two provisions in the 1996 Order of Child Support are at issue here. Paragraph 3.12.1 states that for the child support obligation to be triggered, the child must begin his or her course of study within two quarters following graduation from high school and must “be enrolled and attending fulltime [emphasis supplied].” Paragraph 3.12.4 states that the father’s obligation continues only until the child’s 24th birthday or until the child completes the course of study, whichever occurs first. CP 3. If the 2003 Clarification Order clarified what “attending fulltime” meant in the 1996 Order of Child Support, then that clarification becomes the “law of the case” for purposes of whether or not Catherine and Patrick are “attending fulltime” during the summers that they do not attend college. In Re Marriage of Trichak, 72 Wash.App. 21, 863 P,2d 585 (1993) (using both terms “collateral estoppel” and “law of the case” to describe when a party is precluded from relitigating an issue already decided).

Collateral estoppel is a means of preventing the endless relitigation of issues already actually litigated by the parties and decided by a

competent tribunal. It promotes judicial economy and prevents inconvenience, and even harassment, of parties. Hanson v. City of Snohomish, 121 Wn.2d 552, 561, 852 P.2d 295 (1993). The issue to be precluded must have been actually litigated and necessarily determined in the prior action. Shoemaker v. City of Bremerton, 109 Wn.2d 504, 508, 745 P.2d 858 (1987).

With regard to the meaning of “attending fulltime” in the 1996 Order of Child Support, the 2003 Clarification Order decided under “Findings of Fact and Conclusions of Law” that “Section 3.12 of the [1996] Order is a very comprehensive provision setting out the attendance requirements for post-secondary education that trigger the Petitioner’s obligations.” CP 200. It further states that “the clear intent of the Order is that Hilary be enrolled and attending full time to trigger the obligation by Petitioner” and that “full time at the University of Washington is 12 credits per quarter.” CP 200. The Order further concludes that the 1996 Order’s 24th birthday time limitation “construed together with RCW 26.19.090(3) 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. Thus, the 2003 Clarification Order established and necessarily determined that Mr. Macala’s post-secondary support obligations are triggered on a term-by-term basis with

the obligation on the child of proving “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.

Ms. Macala argues that because she never asked in 2003 for a determination about summer payments, because “there is nothing in the [2003] order about support during the summer,” there can be no “law of the case preclusion of this motion.” Response Brief at 22. Of course, the 2003 Clarification Order only applied to Hilary because she was the only Macala child attending college at that time. But the trial court’s conclusions about the court’s intent in entering the post-secondary provisions of the 1996 Order of Child Support apply as a matter of law. How could the parties and the court in 1996 have intended the post-secondary support provision to apply differently to each child? If the parties had intended the provision to apply differently to each child, they would have put different provisions in for each child separately. This they did not do. The parties’ intent to have the Section 3.12 support obligation triggered on a term-by-term basis for each child was “necessarily determined” as a matter of law in the 2003 Clarification Order and this court can rule that it is the “law of the case” here.

By citing certain University of Washington regulations regarding continuing student registration, Ms. Macala attempts to do an end run

around the clear meaning of the 2003 Clarification Order. Response Brief at 6-9. She asserts that these “Registration Policies” establish that a student does not need to attend summer sessions “to be considered full time.” Response Brief at 6. However, the Registration Policies are intended to clarify which students have continuing “fulltime status” for purposes of whether they have to re-enroll or re-apply as a returning student or whether they can simply register as a continuing student. Further, the policies are clear that “full-time” means being registered for “12 or more credits” during a quarter. The “summer quarter excepted” policy simply means that a student can skip summer quarter and then two more quarters in a row and still maintain continuing student status for purposes of registration. It says absolutely nothing about whether the “attending full time” requirement of the 1996 post secondary support provision applies to a summer term or not.

Thus, Ms. Macala’s argument that “the 2003 Order affected Hilary and only Hilary” cannot withstand close scrutiny. The 2003 Order necessarily determined as law of the case the parties’ and the court’s intent when the Order was entered that the post-secondary support obligation was to be triggered term-by-term rather than annually.

5. Based in Part on the Subsequent Conduct of the Parties, This Court Can Find that It was The Parties’ Intent to Trigger Post Secondary Support Term by Term with No Summer Exception.

Even if this court finds that the “law of the case” does not apply in this context, it can hold as a matter of law that it was the intent of the parties in 1996 that the post-secondary support provision was to be triggered term-by-term rather than annually as the trial court below interpreted it. When parties dispute the meaning in a decree, a reviewing court must ascertain and effectuate the parties’ intent. In re Marriage of Boisen, 87 Wash.App. 912, 920, 943 P.2d 682 (1997), review denied, 134 Wn.2d 1014 (1998). A decree is ambiguous if its terms are uncertain or susceptible to more than one meaning. Boisen, 87 Wash.App. at 922, citing Harding v. Warren, 30 Wash.App. 848, 850, 639 P.2d 499 (1999). In ascertaining the intent of the parties, the reviewing court may not only look to the language at issue but it may also consider subsequent acts and conduct of the parties. Berg v. Hudesman, 115 Wash.2d 657, 667, 801 P.2d 222 (1990). See also Smith v. Smith, 4 Wash.App. 608, 484 P.2d 409 (1971) (remanding back to trial court to take parol evidence on the question of whether the parties intended in the original decree that time limits be placed on the father’s post secondary support obligation).

That the 1996 post-secondary support provision was intended to be triggered term-by-term rather than annually is evidenced by the conduct of the parties over the five and a half year period prior to Ms. Macala’s bringing the motion for contempt at issue here. The record is clear that

during that time Mr. Macala only paid support during summer terms in which any of the three children was attending college full-time. CP 294-299 (Declaration of Randall Macala). The record before the trial court on the motion for contempt established that as to Hilary, Mr. Macala paid support during the summer of 2004 when she was attending school full time but that he did not pay support during the summers of 2002 and 2003 because she was working and also because no payment was requested of him. CP 296-297. The record established that as to Catherine, Mr. Macala did not pay support for the summers of 2004 and 2005 when Catherine was working but that he did pay support to her during the summer of 2006 while she was attending school full time. CP 296-298. The record established that as to Patrick, Mr. Macala did not pay support for the summer of 2006 when Patrick was working full time. CP 296-298. Neither the children nor their mother protested this situation until December 2006, some five and half years after the first child started college.

Based on these “subsequent acts and conduct,” this court can hold as a matter of law as the trial court did in 2003 that it was the parties’ intent to have the support obligation be triggered term-by-term rather than by year. That, as Ms. Macala argues, the trial court found “the 1996 OCS to be plain on its face” does not prohibit it from finding otherwise.

Response Brief at 15. If the 1996 post secondary support provision was so clear, why did a court commissioner from the same trial court find otherwise in 2003? The 1996 support provision at issue says nothing about summer terms and it is ambiguous as to how it is to be applied. This court can hold that the parties intended the 1996 post-secondary support provision to be triggered only during those terms that the adult child is actually attending school full-time with no summer term exception.

6. The Implied Abatement Provision in the 1996 Support Order and the Adult Children's Summer Work Situations Compel a Different Result From That in In Re Jarvis.

This court is thus also free to hold that there is an “implied abatement” provision for summer terms in the 1996 Order. Thus, contrary to Ms. Macala’s argument in her Response Brief at 19-20, this case presents different facts from those before the court in In re Jarvis and is distinguishable from it. Even if, as Ms. Macala points out, the language in the support provisions are similar, the facts surrounding what those provisions mean are not. Unlike the support provision here, the Jarvis support provision explicitly stated that “in no event shall support continue past said child’s 22nd birthday.” Jarvis, 58 Wash.App. at 343. It is clear in Jarvis that the parties intended the child to attend college continuously within the four years past the age of eighteen.

That is not the case here. Here, Section 3.12.4 in the 1996 Order provides that “Said obligation on the part of the Father shall continue until said minor child attains the age of twenty four (24) years or completes his/her course of study leading to a certificate or degree, whichever first occurs.” CP 3. Thus, the parties did not intend for the children to necessarily attend school continuously, although they had the option of doing so. The court can imply from this clause as the court did in the 2003 Clarification Order that there is an implied abatement clause here in effect for any time period, including summers, in which the child was not a full-time student. CP 201 (“... there was an expectation that the child might not attend continuously...”).

Furthermore, unlike the lack of such evidence in Jarvis, there was abundant evidence before the trial court that both Catherine and Patrick were working full time during the summer of 2007 and were not dependent on their parents for their livelihood. In her Response Brief, Ms. Macala argues that even if Catherine and Patrick were working “to support their educations,” there was nothing in the record to show “that they had achieved financial independence.” Response Brief at 21. But the Post Secondary Support statute, RCW 26.19.090(2), does not require a finding of total “financial independence” as Ms. Macala argues. Rather, it simply asks the court to determine whether the child is in fact dependent based on

the facts and circumstances before it. In making this determination, the court must take into consideration that the child is no longer a minor and that unless there is a disability, there is a presumption that the adult child is capable of supporting him or herself. Childers v. Childers, 15 Wash. App. 792, 796, 552 P.2d 83 (1976) (pointing out that children under 18 are “virtually helpless to affect their own economic future” but that “the distinction vanishes when the child becomes 18”). The court did not do so here. It rather came to the opposite conclusion and treated the children as if they were in need of total support year round, regardless of their ability to support themselves and whether or not they were in fact doing so.

7. Because the 2007 Contempt Order Increased Mr. Macala’s Support Payments to Include Summers Where He had Not Made Such Payments Previously, It Illegally Modified the 1996 Decree.

In Jarvis, the court explained the difference between a modification and a clarification. A decree is modified when a party’s rights are either extended beyond or reduced from those originally intended in the decree. A clarification “is merely a definition of the rights which have already been given and those rights may be completely spelled out if necessary.” Jarvis, 58 Wash.App. at 345-46. As argued above based in large part on the parties’ conduct between 2001 and the end of 2006, it was the intent of the parties with respect to the 1996 post secondary support provision that the support obligation is triggered term-by-term and that summer terms

were not automatically included regardless of whether or not the child was attending school. By annualizing the payments, by automatically including summers regardless of the circumstances, the trial court's 2007 Contempt Order extended Mr. Macala's post secondary support obligation beyond what was the original intent of the parties in 1996.

Furthermore, Ms. Macala's argument that counsel for Mr. Macala waived his right to challenge on appeal both the summer payments and the trial court's interpretation of the 1996 Order of Child Support misreads the record. Response Brief at 15-16. As noted repeatedly above, this court can re-interpret de novo the 1996 Order of Child Support regardless of what happened or did not happen at the trial court below. More importantly, counsel for Mr. Macala did not categorically agree to "accept" the annualization of the support amounts owed. All he agreed to was that for purposes of finalizing the 2007 Contempt Order, the \$528 monthly amount for Catherine was what the court was deciding was owed on an annual basis, not that he or his client agreed to the annualization or the amount owed. RP 11, 17.

Thus the court's ruling to annualize the support amounts (regardless of the circumstances presented) constituted a modification of the original order. In annualizing the support amounts to include summers where they had not been included before, the court went beyond the scope

of its contempt authority. That authority is limited to ordering a “remedial sanction” against a party who has intentionally refused or failed to pay past child support. Didier v. Didier, 134 Wash.App. 490, 495, 140 P.3d 607 (2006) (citing RCW 7.21.010 and 26.18.050 as statutory bases for authority). A remedial sanction is “imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform.”. RCW 7.21.010(3). How could Mr. Macala intentionally refuse or intentionally fail to pay summer term adult child support before 2007 when he had no way of knowing that he owed it since no one asked it of him and no court told him to do it? How could ordering him to pay summer term adult child support from 2007 forward be a “remedial sanction” when the court did not find contempt and in fact entered findings that he had not intentionally violated any past court order? CP 287 (Section 2.3 of Order on Show Cause re Contempt/Judgment stating that the “Court does not find Randall Reay Macala in contempt” since he timely paid all support as he understood his obligations but further interpreting the previous orders to “determine the manner and amount of future post secondary support that shall be owing for the January 2007 term forward”).

The court ordered a substantial annual increase in post secondary support amounts from “the January 2007 term forward” for two adult

children fully capable of working to support themselves and in fact doing so. This prospectively ordered increase should “have been based on a substantial change in circumstances after a hearing on a Motion for Modification. Jarvis, 58 Wash.App. at 346 (“[t]he modification of a decree must be supported by a substantial change in circumstances not contemplated when the decree was entered”). See also In Re Marriage of Shellenberger, 80 Wash.App. 71, 79-80, 906 P.2d 968 (1995) (...the support provisions in a dissolution decree are modifiable only on a showing of an unanticipated, substantial change in circumstances”).

Finally, the trial court’s automatic increase of the monthly payment amounts to those set forth in the 2002 Order of Child Support was not based on a required motion for modification. Once a child is past majority, his or her needs are distinctly different from a minor child and the court is obligated to consider numerous other factors set forth in RCW 26.19.090 to assess what amount per month is necessary for post secondary support. In re Marriage of Daubert, 124 Wash.App. 483, 99 P.2d 401 (2004). In holding that the post secondary monthly amount could not automatically be the same for an adult child as for a minor child, the Daubert court stated:

College and vocational training expenses are different from the expenses needed to support a minor child. Additionally, a child in college may have a responsibility to

assist in providing a post-secondary education. ... The support necessary to cover the post-secondary expenses differs from the expenses for minor children.

Daubert, 124 Wash.App. at 410 (holding that post-secondary support must be based on the requirements of RCW 26.19 rather than simply the standard amount assigned to the minor child). The trial court did not make those findings here and therefore the increase in monthly payments was an invalid exercise of its limited authority to order sanctions on a motion for contempt.

8. Attorneys Fees.

Ms. Macala argues that Mr. Macala's "law of the case" argument with respect to the 2003 Clarification Order is "frivolous." Response Brief at 21. She also asserts that his argument regarding modification is "meritless." Response Brief at 23. However, this is not a frivolous appeal and these arguments are not meritless. Even if this court does not agree with them, all of Mr. Macala's arguments raise at least debatable questions for consideration on appeal. The appeal is not frivolous under RAP 18.9(a). In Re Marriage of Kelly, 85 Wash.App. 785, 792, 934 P.2d 1218 (1997).

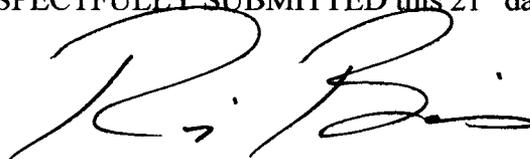
However, fees can be awarded to the prevailing party under RCW 26.09.140. It is the court's discretion to award such fees should be considered in light of the parties' needs and abilities to pay. Jarvis, 58

Wash.App. at 347-348. Mr. Macala will of course comply with the financial affidavit requirements of RAP 18.1(c)(requiring service of financial affidavit no later than 10 days prior to the date the case is set for oral argument).

9. Conclusion.

For all of the foregoing reasons, Mr. Macala respectfully submits that the trial court erred several respects, primarily in the core issues presented to this Court. First, the trial court erred by determining post secondary support annually, instead of by term, as established as a matter of law in the 2003 Clarification Order. Second, the trial court exceeded its authority within the context of a contempt proceeding when it substantially increased the amounts of support that Mr. Macala must pay for the two adult children. Lastly, the trial court ignored the fact that there is an implied summer term abatement clause in the 1996 Order of Child Support, one that is bolstered by the long term conduct of the parties. Mr. Macala also requests attorneys' fees and costs for this appeal.

RESPECTFULLY SUBMITTED this 21st day of December 2007.



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CERTIFICATE OF SERVICE

I certify that on the 24th day of December, 2007, I caused a true and correct copy of this Appellant's Reply Brief to be filed with the appellate court as well as served on the following in the matter indicated below:

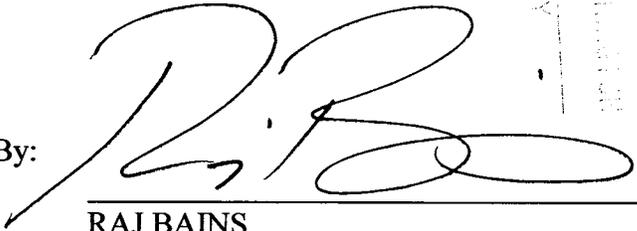
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