

NO. 36341-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

Randall Reay Macala,

Appellant,

vs.

Mary Louise Macala,

Respondent.



BRIEF OF RESPONDENT

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INTRODUCTION

The father's appeal is an unfortunate waste of the parties' resources, which should be dedicated to educating their children instead of relitigating the interpretation of the 1996 Order of Child Support. The only real issue in this appeal is whether the father must pay support to Catherine and Patrick during the summer months when both are enrolled fulltime in college for the spring and fall semesters but do not attend summer school. The language of the 1996 order and the only published case on the issue, *Marriage of Jarvis*, both support the trial court's order that the father must continue paying support during the summer. The mother asks this court to affirm the trial court and to award fees to the mother for having to resist this misdirected appeal.

RESTATEMENT OF ISSUES

1. Was the trial court required to interpret the 1996 Order of Child Support in order to resolve the mother's contempt motion?
2. Is the 1996 OCS consistent with RCW 26.19.090?
3. Is the 2003 order--regarding whether Hilary can be considered a fulltime student if she is sick and unable to carry a fulltime load--the law of the case as to summer child support for Catherine and Patrick?

4. Did the trial court appropriately interpret or clarify the 1996 Order of Child Support instead of modifying it?

5. Did the trial court abuse its discretion in lifting the book receipt requirement where the cost of tuition alone exceeds 75% of the charge for tuition at the UW?

6. Was the trial court's refusal to clarify its earlier order within the scope of this appeal where the refusal was made after the notice of appeal was filed?

7. Should this court award attorney fees to the mother for the cost of defending this appeal?

RESTATEMENT OF THE CASE

A. The 1996 Order of Child Support defined the obligation of the father to pay post-secondary support to the three children.

This case involves construction of the 1996 Order of Child Support entered by the Kitsap County Superior Court (1996 OSC). The parties negotiated the post-secondary support provisions, which the trial court later characterized as "a complex arrangement" CP 16. The provisions of the OSC are relatively clear, but the father raises issues of construction (CP 3-4):

3.12 POST SECONDARY EDUCATIONAL SUPPORT. The Father shall pay for the post secondary education costs of the minor children, to include the cost of tuition, room and board, text books, and all other necessary or related

expenses, per the following conditions and limitations, to wit.,

3.12.1 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.

...

3.12.3 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.

...

3.12.5 During such time that the Father is obligated to pay for 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.

The construction of these obligations is fairly straightforward.

Under ¶ 3.12.1, to be eligible, the child must be “enrolled and attending fulltime.” The father claims, however, that “fulltime” means attending every month of the year during which classes are offered. The mother claims that one is a fulltime student without attending the summer session.

Under ¶ 3.12.3, the father’s maximum liability for “tuition, etc.” is 75% “of the tuition then being charged at the University of

Washington for an in-state undergraduate student.” There appears to be no dispute over the meaning of this paragraph.

Under ¶ 3.12.5, while the father “is obligated to pay any post-high school education,” he must continue paying child support at the lesser of “his monthly child support payment” or the current charge by the University of Washington for room and board. The father raises two disputes here: the amount of “his monthly child support payment” and whether child support continues if the child is not attending the summer session.

This appeal concerns the two younger children of the parties, Catherine and Patrick. In 1996, the father’s “monthly child support payment” was 54.7% of \$543 for each child. CP 7. That changed in 2002.

B. The father’s “monthly child support payment” for Catherine and Patrick was increased by the 2002 Order on Modification of Child support.

The mother moved for modification of child support in 2001. Following a hearing, the trial court declined to modify the post secondary provisions that had been negotiated and agreed by the parties in 1996. CP 15, 16. The court found that there had been a substantial change in circumstances in that the oldest daughter, Hilary, was now subject to the post secondary support order, and

the other two children, Catherine and Patrick, were now in higher age categories for child support purposes. CP 15.

The 2002 order required the father to pay child support for each of the remaining minor children in the amount of 55.9% of \$946 for each child. CP 35-36. This resulted in a transfer payment of \$1057.63. CP 20.

The court provided that when Catherine began post-secondary education, the support for Patrick would become a transfer payment from the father of \$680.86. CP 22-23.

C. Substantial evidence supports the trial court's finding that the 2003 Order only applied to Hilary, the oldest child, not to Catherine and Patrick, who are the concern of this appeal.

One of the father's arguments on appeal is that the 2003 Order collaterally estops the mother from claiming that the father's child support obligation continues during the summer months between the spring and fall semesters so long as the children are enrolled and attending college fulltime. BA 31-34.

The trial court found directly contrary to the father's argument: the 2003 order only concerned Hilary and was not "the law of the case." 1/19/07 RP 24.

The 2003 order was entered on the mother's motion for clarification (CP 48):

[The mother] moves the court for an order clarifying the obligations of the [father] to pay for post secondary education costs for the parties daughter, Hilary, to clarify the minimum credit hours that she must take to qualify as "attending post-secondary education"

The mother filed the motion because Hilary had had health problems that prevented her from completing the school year 2002-03 and she was unable to carry a fulltime load of classes. CP 48-49. The mother asked for a clarification that Hilary could be considered fulltime even if she took less than a fulltime load. *Id.*

The father responded by citing the University of Washington regulations, which require students to register for 12 credits to be considered a full time student. CP 87, 101, citing <http://www.washington.edu/students/reg/regpol.html>.

The father did not cite any UW regulations dealing with whether a student is considered full time if the student does not attend during the summer session because that was not really at issue in the motion. But the UW regulations do not, in fact, require a student to attend in the summer to be considered full time:

Registration at the University of Washington is a Web-based service, available on MyUW. All students¹ at the University who remain in good standing and in compliance with other

rules and regulations, with no outstanding financial obligations, are guaranteed the opportunity to register each quarter as long as they maintain ^{2,3}continuous enrollment.

¹ [exceptions not relevant]

²Summer Quarter Excepted

³see Quarter-Off Eligibility Policy

<http://www.washington.edu/students/reg/regrest.html> (accessed 11/15/07). The Quarter-Off Eligibility Policy, referred to in footnote 3 in the quotation above, similarly provides that a student need not attend in the summer to be eligible for registration: “Summer quarter enrollment is not required to maintain continuous registration eligibility.” <http://www.washington.edu/students/reg/wdoffleave.html#Q5> (accessed 11/15/07).

Following a hearing, the trial court entered findings of fact (CP 200-01):

1. The 1996 Order of Child Support which is at issue was drafted by former counsel for Petitioner, Dan Edwards.
2. Section 3.12 of that Order is a very comprehensive provision setting out the attendance requirements for post-secondary education that trigger the Petitioner's obligations.
3. The clear intent of the Order is that Hilary be enrolled and attending full time to trigger the obligation by Petitioner.
4. It is not disputed that full time at the University of Washington is 12 credits per quarter.

5. It is not disputed that for a time, Hilary Macala met that criteria and that for a time she did not.

6. Hilary Macala has suffered from an illness that has made it difficult for her to be continuously enrolled in school and to take a full load of credit hours.

7. It is not relevant that the illness from which Hilary suffered was a mental illness in that the Court will treat it the same way it would treat a physical injury or ailment.

8. The causation of the illness from which Hilary suffered is not relevant to the court.

9. 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.

Based on these findings, the trial court held (CP 202):

ORDERED that the provisions of the 1996 Order of Child Support remain in force for any period of time, prior to Hilary's 24th birthday, when she is enrolled and attending full time as defined by the school attended. During any period of time she is not so enrolled and attending full time, the obligation for Petitioner to pay is suspended.

Clearly, the 2003 order affected Hilary and only Hilary.

Since Hilary failed to complete the spring session of school, she could not be considered full time during the following summer, even though she returned to full time status during the fall.

D. The 2007 Order, from which the father appeals, clarified the 1996 OCS, it did not modify it.

Catherine began attending college at the University of British Columbia in 2004 and Patrick began attending St. John's College in New Mexico in 2006. CP 215-16.

The father paid partial tuition based on the 1996 OCS. But the 1996 order also required that he pay the lesser of his monthly child support payment or the cost of room and board at UW. CP 3. The father claimed that he was entitled to pay the amount ordered for child support in 1996 (eight years earlier). CP 214-15. But the father deviated from the 1996 order by paying the amount of support allocated for Hilary, the oldest child (whose child support was not at issue), of \$367.04 monthly for each child. *Id.* He based this on the fact that the 2003 Order had ordered him to pay \$367.04 per month for Hilary. *Id.*

The mother reasoned, of course, that the reference in the 1996 order to the father's "monthly child support payment" meant the child support ordered for Catherine and Patrick in the 2002 order, or \$528.50 for Catherine and \$680.86 for Patrick. CP 208, 284, referring to CP 20, 22-23.

The father paid the lower support figure (\$367.04) for Catherine from the fall 2004. The mother retained counsel to address this shortfall, but was never able to obtain action through her counsel. CP 285. In December 2006, she retained new counsel and moved to hold the father in contempt for the shortfall in his payments for 2006. CP 205.

The trial court rejected the father's argument that the 2003 order applied to Catherine and Patrick, and enforced the support levels set out in the 2002 modification order. 1/19/07 RP 24-25.

In addition to the issue of the amount of monthly support payment, the father excluded from his calculation of support the summer months when the children were not actually attending college classes. CP 220-21. But the issue was not actually argued by the father when the motion was heard. 1/19/07 RP 8-17, 19-22, 26-29.

The father waived the issue over summer support at presentation of a written order on April 27. The father initially objected that the support should be payable monthly instead of being stated as an annual sum. 4/27/07 RP 13-14. The mother responded that there must be twelve monthly payments, *id.* at 14, 16, because living expenses continue during the summer:

THE COURT: How does a periodic monthly situation not recognize that they're living even in the months they're not in school?

MR. PROVINCE [mother's attorney]: My understanding of what [the father] is trying to do is say, "Come June, in July, when they're not in school, no payment is made to them at all."

THE COURT: Well, does [the father] disagree that it's monthly times 12?

MR. BAINS [father's attorney]: We accepted that figure. I mean, we used that figure of \$528. Look at our calculation of back support.

THE COURT: So we will use a monthly figure but we can specify that it's per month times 12 so there's no question that it's just the academic year.

Id. at 17,

There was no further discussion of support continuing through the summer months, and the final order clearly calls for 12 months of support:

[T]he 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.

CP 291.

The father argued that there should be no arrearage because the mother had waited from fall 2004 to December 2006 to bring the contempt motion. CP 212, 01/19/07 RP 26. This

overlooks, of course, the fact that the mother was not seeking arrearages from 2004, but only for the year 2006.

The trial court declined to award judgment for an arrearage or find the father in contempt, even though the court considered the father's obligation to pay child support at the level of the 2002 to be clear (1/19/07 RP 28):

To require an arrearage, in my estimation almost becomes a punitive action by the court, and I'm not inclined to do that. This will be a prospective ruling, and to begin January of this year. So the amounts are as I've stated for January of this year forward.

I'm not finding that there is a willful contempt, although clearly my ruling stands as to what the reading is, and what I believe the plain language of the order is and should be read to be. I'm not going to impose attorneys fees on either side, you both bear your own attorneys fees.

Accordingly, the only arrearage ordered by the trial court was for the first four months of 2007, to make up for the difference between the \$367.04 that the father continued to pay and the correct amounts in the 2002 order. CP 288.

ARGUMENT

A. Standard of Review

Respondent mother agrees with the father that to the extent this appeal turns on factual issues, those issues are reviewed for substantial evidence. BA 22-23, citing *Marriage of Rideout*, 150

Wn.2d 337, 77 P.3d 1174 (2003). Any factual question arising out of the 1996 OCS is reviewed for substantial evidence. For example, whether Catherine or Patrick was a full-time student might well be a factual question.

But the mother submits that this case turns on interpretation of the 1996 OCS. To the extent that the appeal raises questions of interpretation of the 1996 OCS, this court reviews these de novo as questions of law:

The interpretation of a dissolution decree is a question of law. **Chavez v. Chavez**, 80 Wn. App. 432, 435, 909 P.2d 314, *review denied*, 129 Wn.2d 1016 (1996). Questions of law are subject to de novo review by the appellate court. **McDonald v. State Farm Fire & Cas. Co.**, 119 Wn.2d 724, 730-31, 837 P.2d 1000 (1992). If a decree is ambiguous, the reviewing court seeks to ascertain the intention of the court that entered it by using the general rules of construction applicable to statutes and contracts. See **In re Marriage of Gimlett**, 95 Wn.2d 699, 704-05, 629 P.2d 450 (1981); **Kruger v. Kruger**, 37 Wn. App. 329, 331, 679 P.2d 961 (1984).

Marriage of Thompson, 97 Wn. App. 873, 877-78, 988 P.2d 499 (1999).

B. The trial court appropriately interpreted the 1996 Order of Child Support, as it was required to do in order to decide the contempt motion.

The mother moved for an order finding the father in contempt. CP 205. The trial court could not decide whether there

was a contempt without interpreting the 1996 OCS and it appropriately did so.

The father's argument, while not entirely clear, seems to be that the trial court should not have interpreted the 1996 OCS. BA 23-25. But it was impossible to determine whether the father was in contempt without interpreting the 1996 order. Indeed, it would be an oxymoron to say that one could decide whether a party had disobeyed a court order without interpreting the order. The mother and the father had dramatically different interpretations of the 1996 OCS. The trial court was forced to interpret the order to determine whose interpretation was correct.

The father seems to be arguing that the trial court erred by modifying the 1996 OCS:

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 circumstances.

BA 24. The flaw in the father's argument is that the court did not modify the order, it merely interpreted the order. This distinction is made clear in a case cited elsewhere in the father's brief:

A decree is modified when a party's rights are either extended beyond or reduced from those originally intended in the decree. *Rivard v. Rivard*, 75 Wn.2d 415, 418, 451 P.2d 677 (1969). A clarification "is merely a definition of the

rights which have already been given and those rights may be completely spelled out if necessary." *Rivard*, at 418. Construction of a decree presents a question of law to be determined from examining the document itself to determine its intended effect. *In re Marriage of Gimlett*, 95 Wn.2d 699, 704-05, 629 P.2d 450 (1981).

Marriage of Jarvis, 58 Wn. App. 342, 345, 792 P.2d 1259 (1990).

The trial court clearly did not think she was modifying or reinterpreting anything. The court found the 1996 OCS to be plain on its face. 1/19/07 RP 28. It was entirely appropriate, indeed inescapable, for the trial court to interpret the order.

C. The 1996 OCS is consistent with RCW 26.19.090.

The father waived any argument about RCW 26.19.090 on two occasions: he agreed to the entry of the 1996 OCS and did not appeal from it; and, he accepted the child support figure when the 2007 order was entered. 4/27/07 RP 17. In any event, the 1996 OCS is consistent with RCW 26.19.090.

The father argues that the 1996 OCS, as interpreted by the trial court, is contrary to RCW 26.19.090. But the father agreed to the 1996 order eleven years ago and did not appeal from it. He cannot challenge the order now. He also waived any argument about the summer payments when the order was presented to the trial court (4/27/07 RP 17):

THE COURT: Well, does [the father] disagree that it's monthly times 12?

MR. BAINS [father's attorney]: We accepted that figure. I mean, we used that figure of \$528. Look at our calculation of back support.

In any event, there is no conflict between the 1996 OCS and the statute. The father argues first that the trial court erred by not making a finding that the children are dependent upon and relying upon the parents for the reasonable necessities of life. BA 25-26.

The father relies on RCW 26.19.090(2):

(2) 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. The court shall exercise its discretion when determining whether and for how long to award postsecondary educational support based upon consideration of factors that include but are not limited to the following: Age of the child; the child's needs; the expectations of the parties for their children when the parents were together; the child's prospects, desires, aptitudes, abilities or disabilities; the nature of the postsecondary education sought; and the parents' level of education, standard of living, and current and future resources. Also to be considered are the amount and type of support that the child would have been afforded if the parents had stayed together.

Subsection (2) applies “[w]hen considering whether to order support for postsecondary educational expenses” It mandates the consideration not only of dependency, but also the many other listed factors.

Subsection (2) applied in 1996 when the trial court entered the order in the first place. The father agreed to the provisions and did not appeal. These proceedings in 2007 interpreted and applied the 1996 order. It was no longer necessary or appropriate for the court to consider all of the statutory factors.

RCW 26.19.090(3) does apply to these proceedings:

(3) 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.

The heart of the father's argument is that during the summer months, Catherine and Patrick are no longer "actively pursuing a course of study" and apparently, are not in "good academic standing as defined by the institution."

It is readily apparent that one may be "actively pursuing a course of study" and in "good academic standing as defined by the institution" without attending summer school. The common experience of many college students is that they do not attend summer school, but take advantage of the summer break to earn money to subsidize their education and to recharge their academic batteries. As noted in § C of the factual statement above, the UW

does not require a student to attend during the summer in order to remain in good standing.

The father's argument leads to absurd conclusions. Under his reasoning, even a Christmas break or spring break would interrupt fulltime attendance. This cannot possibly be correct.

The University of British Columbia, which Catherine attends, does not appear to have any online explanation of "good academic standing", but the vast majority of students at UBC do not attend the summer session. In 2006, 30,170 students attended the winter session, while only 3357, or 11%, attended the summer session.¹ It defies reason to suggest that 89% of the full time students at UBC are not in "good academic standing." St. John's College in New Mexico, which Patrick attends, does not appear to offer summer classes to anyone except freshman who entered in January and graduate students.² Patrick, who entered the school in the fall term of 2006, is as full time as he could possibly be.

¹<http://www.pair.ubc.ca/statistics/students/coursefte02-06.htm>;
<http://www.pair.ubc.ca/statistics/students/courseftesummer02-06.htm>
(accessed 11/17/07).

² <http://www.stjohnscollege.edu/events/SF/academic.shtml>; see also
http://www.stjohnscollege.edu/admin/SF/reg_info.shtml (accessed
11/17/07).

The father argues that Catherine and Patrick could not be dependent on their parents because they worked for some period during the summer. BA 26-27. But they worked because the 1996 OCS requires them to bear a substantial portion of their own educational expenses, a fact the father ignores. Indeed, the father argued to the trial court that by attending a liberal arts college Patrick may be “digging a hole he will be filling for a very long time.” CP 216-17. Obviously, the father does not believe that Patrick is financially independent.

The father argues that the trial court found that the father was in compliance with the 1996 OCS. BA 27. This is absolutely incorrect. The trial court declined to find a willful contempt, despite the father’s failure to comply with the plain language of the order: “I’m not finding that there is a willful contempt, although clearly my ruling stands as to what the reading is, and what I believe the plain language of the order is and should be read to be.” 1/19/07 RP 28.

The father tries without success to distinguish ***Marriage of Jarvis***, *supra*, in which the appellate court rejected the same argument made here, that support is not owed when a college student is on summer break. BA 29-31. The obligation in the ***Jarvis*** decree was virtually identical to this case: *compare Jarvis*

requirement that support “shall continue for either child who is enrolled as a full time student in high school, college, university or vocational school”, 58 Wn. App. at 343, *with* the 1996 OCS that “Each minor child must . . . be enrolled and attending fulltime” in a “university, college, technical or trade school . . . acceptable to both parents” CP 3. Rejecting the father’s argument in **Jarvis**, the appellate court held:

The decree requires him to make support payments, *each and every month*. There is no provision for abatement during summer months. In the absence of a substantial change in circumstances, a modification of the decree is not justified. On the record before us, Julie remained dependent during the summer months and there is no finding to the contrary. She was a full-time student, even though on summer break. In these circumstances, the court erred in modifying the decree to eliminate the support payments during the summer months.

58 Wn. App. at 347 (underline emphasis supplied).

The father attempts without success to distinguish **Jarvis**. He notes that the **Jarvis** court relied on the fact that there was no “provision for abatement during the summer months.” BA 30. Nor is there here. The father argues that the “provision for abatement” is that the parents here agreed that support could extend up to the children’s 24th birthdays, which contemplates possible breaks in education. BA 30. Contrary to the father’s argument, this

contemplates breaks during which a child might not be a fulltime student; it does not contemplate the suspension of support payments during summer breaks while the child remains a fulltime student.

The father argues that here, in contrast to *Jarvis*, the record would support a finding that neither Catherine nor Patrick are dependent. BA 31. But as discussed above, Catherine and Patrick were working to support their educations and nothing in the record shows that they had achieved financial independence. The father artificially truncates the summer break, but the child's dependence or independence must be evaluated based on a broader time frame.

D. Nothing about the 2003 Clarification Order controls the 2006 motion or this appeal.

The father makes the frivolous argument that the 2003 order, which applied to Hilary alone and says nothing about payment of support during the summer months between school terms, controls this motion and appeal. BA 31-34.

The father's law of the case argument is contradicted by his own explanation of the 2003 motion and outcome. As the father says, the mother sought clarification whether the father was

obligated to pay support for Hilary, “who was not enrolled full time for health reasons during some of the terms that she was in college.” BA 32. The mother asked for clarification that “absences due to illness does not terminate the court ordered support obligation.” BA 33, quoting CP 49. She did not ask for a determination of the issue in this appeal—payment of support during summer months between sessions—and the trial court made no ruling on the point.

The 2003 order simply required Hilary, not Catherine or Patrick, 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. There is nothing in the order about support during the summer and no law of the case preclusion of this motion.

The father’s reliance on the law of the case doctrine is misplaced. BA 31, citing *Marriage of Trichak*, 72 Wn. App. 21, 863 P.2d 585 (1993). In *Trichak*, the same issue—offset against child support for the Social Security benefits received by the child—for the same child was resolved in the decree, from which neither party appealed. When the mother attempted to raise the same issue for the same child in a subsequent modification action, the

court appropriately held that the law of the case barred further consideration of the offset. Here, by contrast, the summer month support issue was not directly raised in 2003, the 2003 Order says nothing about the summer support issue, and only Hilary, not Catherine or Patrick, was involved in the 2003 order.

E. The trial court clarified the 1996 OCS and did not modify it.

The father argues that the 2007 order on appeal was improper because the mother never petitioned for modification of the 1996 OCS. BA 34-36. But as discussed in argument B, *supra*, the trial court clarified the 1996 OCS, it did not modify it. The father's argument is meritless.

F. The trial court did not abuse its discretion in lifting the book receipt requirement.

The father argues that the trial court should have required Catherine and Patrick to provide book receipts to the father because the 2003 order required Hilary to provide book receipts. BA 36 (citing CP 202). The requirement to provide receipts for books was imposed in the 2003 order regarding Hilary. CP 202. But if, as the trial court held, the father is not required to pay for books, 1/15/07 RP 29, CP 291, then he is not entitled to receipts for books.

The mother argued that the 1996 OCS clearly requires payment for books and other expenses:

The Father shall pay for the post secondary education costs of the minor children, to include the cost of tuition, room and board, text books, and all other necessary or related expenses

CP 3. The father's obligation was capped by ¶¶ 3.12.3 of the 1996 Order:

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.

1996 OCS ¶¶ 3.12, CP 3. The mother interpreted this to include 75% of the cost of books as well, since the cap applied to "tuition, etc." CP 208. The trial court rejected the mother's interpretation: "Further, the Court finds 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 father wants the receipts because under a peculiarity of the Internal Revenue Code, he can claim a tax credit for the books even though he doesn't pay them because he claims the exemptions for Catherine and Patrick. CP 125. There is no reason

for the father to receive a windfall tax credit for expenses he does not actually pay.

The court should not reverse the trial court on this point unless the court also holds that the father is obligated to pay for books and reverses the trial court on this point.

G. The trial court's refusal to clarify its earlier order was entered after the notice of appeal was filed and is not encompassed within the notice of appeal.

The father attempts to argue in this appeal that the trial court should have ruled on his motion to clarify the 2007 order on appeal. BA 36-37. But the proper mechanism for challenging the trial court's refusal to rule on the motion was to file a motion in this court or to file a new notice of appeal from the order. The notice of appeal filed by the father in May 24 does not bring up for review an order by the trial court entered on June 27. RAP 2.4(b).

H. The court should award attorney fees to the mother.

The mother requests an award of fees under RCW 26.09.140. She will timely file a declaration setting forth her financial condition pursuant to RAP 18.1.

One factor the court should consider in ruling on attorney fees, in addition to need and ability to pay, is that the mother brought this motion and defends the court's order on behalf of

Catherine and Patrick. This child support is not benefiting the mother and she should not be penalized by having to spend her own funds for attorney fees for the benefit of the children.

The court should also consider the wasteful nature of this appeal. The summer support at issue here totals approximately \$1200 per month. The issue will last only as long as both Catherine and Patrick are fulltime students who do not attend summer school. The attorney fees incurred by both parties will quickly exceed, or at least erode, the amount in dispute. This is wasteful litigation and the court should award fees for this reason alone.

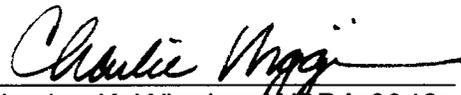
It is true that the trial court denied attorney fees to both parties. But the trial court interpreted the plain language of the 1996 OCS and concluded that fees were not appropriate. Now on appeal, the issues are different. The father has raised a series of meritless issues, the mother has a demonstrable need for an award of fees, and the father has the ability to pay.

CONCLUSION

Respondent Mary Louise Macala respectfully submits that the trial court correctly interpreted the 1996 OCS. The court should affirm and award fees and costs to respondent.

Respectfully submitted this 21 day of November 2007.

Wiggins & Masters, P.L.L.C.



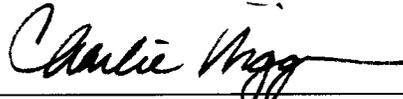
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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENT** postage prepaid, via U.S. mail on the 21 day of November 2007, to the following counsel of record at the following addresses:

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