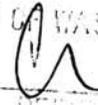


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STATE OF WASHINGTON

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No. 43948-4-II

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

In re:

Joseph Chaussee

VS.

Bree Ann Feil

**APPELLANT'S RESPONSE TO
MS. FEIL'S REPLY BRIEF OF THE CASE**

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Joseph Chaussee**

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I. APPELLANT'S REPLY
TO
MS. FEIL'S STATEMENT OF THE CASE

Ms. Feil's Statement of the case referencing Paragraph 3.16 of the November 21, 2011 Order of Child Support is quoted accurately, and she references that paragraph as of particular importance to this appeal. However, Ms. Feil's Statement of the Case fails to reference an even more compelling provision of the same Order. That part of the Order [CP 8, Lines 13-15] provides:

"3.14 POST SECONDARY EDUCATIONAL SUPPORT.

The right to petition for post-secondary support is reserved, provided the right is exercised before support terminates

The "Motion and Declaration for Adjustment of Child Support" filed by Ms. Feil on May 21, 2012 was made pursuant to (and on forms referencing) RCW 26.09.170 [See Footer and Caption of Ms. Feil's Motion [CP 28], where her pleading requested an Adjustment in Child Support; not to Modification of the Child Support Order as authorized under RCW 26.09.175.

Ms. Feil's Statement of the Case indicates that the June 20, 2012 Order of Child Support at issue in this Appeal referenced tuition rates and housing expenses published by Highline Community College [CP 116]; however, the record shows Tanner Chaussee never planned on attending that school and never planned on living in an apartment or boarding in Seattle.

Rather, Ms. Feil's Declaration dated May 22, 2012 indicated that Tanner would "be attending Wenatchee Valley College ... while living at home with me."

[CP 52, Lines 19-20]

The Court Order of June 20, 2012 used the "costs of attendance at Shoreline Community College [CP 116, Lines 22-23] or in the alternative "If room, board, transportation and personal expenses are not published by Shoreline Community College then Highline Community College's rate shall be used." [CP 116, Lines 23-24]

II. ARGUMENT

1. Standard of Review.

Ms. Feil argues in her Reply Brief that this Court should review the Superior Court Order on an abuse of its discretion standard; relying on In Re Marriage of Dodd, 120 Wn. App. 638, 644, 86 P.3rd 801 (2004). However, the Dodd case dealt with a Petition to modify a child support order. The Order Ms. Feil sought and obtained was an Order Adjusting Child Support. Moreover, the essence of Mr. Chaussee's argument on appeal is that Judge Tollefson erred in his interpretation of the Order of November 22, 2011 as applied to RCW 26.09.175, not that there was an abuse of discretion.

In short, the discretion of the Trial Court had virtually nothing to do with the issues raised in Mr. Chaussee's appeal.

When a trial Court misinterprets a Court Order or misapplies the law, *de novo* review of those errors is required, not whether the Court set an appropriate level of support.

Finally, Ms. Feil's Reply Brief fails to address the cases discussed between pages ten and twelve of Mr. Chaussee's Opening Brief which are persuasive to the issue of the proper Standard of Review.

This Court should review the ruling below *de novo*, because its review necessarily involves the interpretation of that dissolution Order as well as statutes at play in connection with the Order.

III. LAW OF THE CASE DOCTRINE

A. Revision.

Part II(A) of Ms. Feil's Brief suggests that Mr. Chaussee's failure to seek revision of the Commissioner's Order of November 21, 2011 has some significance to his appeal. Ms. Feil is correct in assertion that Mr. Chaussee didn't seek to revise that Order. However, the primary focus of that Order was to set a "Transfer Payment" effective January 1, 2012. [CP 6, Lines 18-21] The periodic adjustment provision appears to have been after-thought. [CP 8, Lines 19-21] Nothing in the record

suggests that Ms. Feil had even made such a request part of her request to the Court.

Ms. Feil's suggestion that Joe Chaussee's failure to seek to modify the November 21, 2011 Child Support Order is a red-herring.

B. Revision-Law of the Case.

Ms. Feil next suggests that there existed sufficient "litigation" over how and when she could request to adjust future post-secondary Child Support and that such litigation below should "preclude re-litigation of legal issues previously 'resolved.'" [See **Page 8** of Respondent's Brief] Once again a red-herring breaks the surface.

Nothing in the record supports Ms. Feil's assertion that the essential issue now before the Court had been litigated or resolved in the proceedings on November 21, 2011.

C. Failure to Appeal.

Ms. Feil argues in Section C, at page 10 of her Brief, that Appellant didn't seek to revise or appeal the November 21st Order. That is true, but totally irrelevant. Indeed, the Order issued on

November 21, 2011 most likely could not have been appealed.

Had Mr. Chaussee sought interlocutory review by the Court of Appeals, he would have had to seek Discretionary Review under RAP 2.3 because nothing in the November 21, 2011 proceeding involved a decision "reviewable as a matter of right" under RAP 2.2. The November 21st Order wasn't a "final judgment" under RAP 2.2(a)(1) nor did it "determine the action" so as to "prevent[ed] a final judgment" or "discontinu[ed] the action". None of the other eleven subsections of RAP 2.2(a) would have given Mr. Chaussee an ability to appeal "as a matter of right" under RAP 6.1. [Tense Changed in Brackets]

Assuming then that an appeal "as a matter of right" wasn't available to Mr. Chaussee; his only other alternative (assuming either he wanted to appeal the Order or that Ms. Feil is correct in arguing that he should have appealed the Order; he would have needed to request Discretionary Review under RAP 2.3.

However, as with the case of RAP 2.2, Mr. Chaussee would have needed legitimate basis to

request discretionary review. Nothing in RAP 2.3(b)(1)-(4) would have enabled Mr. Chaussee to ask this Court to grant a Motion for Discretionary Review of the November 21, 2011 Order - assuming he had first sought to have that Order revised at the Superior Court.

Indeed, the likelihood that an appeal pursuant to RAP 2.3(b) would be accepted for Discretionary Review is so thin that CR 11 and RAP 18.9 would likely have been violated had Mr. Chaussee done what Ms. Feil suggests he should have done to avoid the application of "the law of the case" doctrine.

Imagine how massive the case load would be at the Court of Appeals if a litigant risked having any portion of a Superior Court Order deemed the "law of a case" for failure to file an Interlocutory Appeal or seek its Discretionary Review of a Superior Court Order.

Once again, Ms. Feil's suggestion that the failure of Mr. Chaussee to appeal the 2011 Order (which the trial court decided) became "the law of the case" is a red herring.

IV. TIMELINESS OF MS. FEIL'S REQUEST BELOW

Section III of Respondent's Reply Brief misstates Appellant's argument that Ms. Feil failed to properly seek to modify the Child Support Order and assumes that a Motion to Adjust Child Support is equivalent to a Petition to Modify a Support Order.

While it is true that in May of 2012 Ms. Feil filed pleadings in the Superior Court which made reference to post-secondary support; Mr. Chaussee's essential argument is that Ms. Feil failed at any time (even after the jurisdictional issue had been raised) to file a "Summons" and "Petition for Modification" of the Child Support Order; pay the \$20.00 filing fee and ensure that the Petition she filed was "in the form prescribed by the administrator for the courts" before Mr. Chaussee's obligation to pay child support "terminat[ed] as set forth in Paragraph 3.13" of the Support Order. [Tense Changed in Brackets]

Accomplishing those relatively simple requirements would not have been very difficult to do or too much to expect. In fact, pursuant to RCW 4.16.170, Mrs. Feil would have had ninety days

after filing an appropriate Petition under RCW 26.09.175 to serve Joe Chaussee with the required Summons and Petition, See In Re the Marriage of Sagner, 159 Wn. App. 741, 744, 247 P.3d 444 (2011).

Ms. Feil also cites the Sagner case as authority in her Reply Brief but fails to indicate that in that case Mr. Sagner had properly filed a "Summons" and "Petition for Modification" pursuant to RCW 26.09.175 and then had served the correct pleadings upon Mrs. Sagner within ninety days of filing, relying upon the tolling provisions of RCW 4.16.170.

Had Ms. Feil taken the same steps Mr. Sagner did; Joseph Chaussee would have no basis to appeal the decision below. Unfortunately for her she failed to follow the steps Mr. Sagner took in his successful Petition to Modify the Child Support Order after his daughter reached majority.

In fact, Page Twelve of Ms. Feil's Reply Brief even supports the issue Joe Chaussee has raised in his appeal. On Page 12, Paragraph 1 of her Brief, Ms. Feil argues:

"Bree requested post-secondary support by filing her Motion and Declaration for Adjustment of Child Support on May 21, 2012, which was prior to Tanner's graduation from high school."

[Emphasis Added]

As Mr. Chaussee argued below and argues again on appeal, a "Motion . . . to Adjust" under RCW 26.09.170 is fundamentally different from a "Petition to Modify" an existing Child Support Order under RCW 26.09.175.

The statutory scheme clearly shows that while the level of support under a Child Support Order may be adjusted (up or down) under RCW 26.09.170; essential provisions relating to the term or duration of a Support Order can only be done by way of Modification under RCW 26.09.175.

V. SPECULATION IN SUPPORT ORDER

Ms. Feil cites RCW 26.19.090(2) in suggesting that the Superior Court properly established the adjusted Child Support Joe Chaussee was ordered to pay.

Without conceding that his arguments above (as well as those raised in Assignments of Error 1, 2, 4, and 5) are not dispositive in his appeal; Mr.

Chaussee argued to the Trial Court as well as in his Opening Brief, and points out again in this Brief, Ms. Feil's Declaration in support of her requests didn't accurately address Tanner's "needs" or "the nature of the post-secondary education sought" as required under RCW 26.19.090(2); because she failed to clearly show the needs Tanner had for board and room while attending Community College and living at home.

Further her statements about the nature of the education Tanner was seeking was speculative. For example, the Child Support Order entered below was based on "a percentage of educational costs" at Community College(s) Tanner would not be attending in the Fall of 2012. The alternative paragraph dealt with his possible relocation to North Seattle some time in 2013 to live with his grandparents if he decided to transfer to Shoreline Community College.

Speculation and difficulty abounds in the Support Order's method of addressing a precise amount of child support Mr. Chaussee might be required to pay while Tanner was living with his

mother in Wenatchee or his grandparents in Seattle and attending Wenatchee Valley Community College or Shoreline Community College.

VI. ATTORNEY'S FEES

A. At the Trial Court.

Joseph Chaussee concedes Ms. Feil's argument that RCW 26.09.140 furnishes a trial court discretion in deciding to make an award of fees and costs in actions under Chapter 26 of the Revised Code.

Appellant's opening brief even cited In Re Leslie, 90 Wn. App. 796, 807, 954 P.2d 325 (1998) in support of the existence of discretion a Trial Judge had as regard the discretion to award or deny fees to either Mr. Chaussee or Ms. Feil.

Appellant's position is that Judge Tollefson abused his discretion under Leslie, and In Re Thorensen, 46 W. App. 493, 730 P.2d 1380 (1987) when he failed to award attorney's fees to a father whose wife was expecting a baby in the Summer of 2012 whose spouse had ceased working so as to raise their baby **[CP 70, Lines 3-14]**; while Mrs. Feil lived in a household where her husband Douglas had

a gross monthly income of \$3,144.00 [CP 23] and she earned between \$10,333.00 [CP 21] and \$11,455.00 [CP 38] [CP 44] per month versus Appellant's spotty (construction) monthly income of between \$3,177 (in November of 2011) [CP 7] and \$6,023.00 in June of 2012 [CP 123].

Appellant asserts that where the trial court failed to account for Mr. Chaussee's marriage and parental status in June of 2012 and his household's income of \$6,023.00 at that time versus the household income of \$14,599.00 at Mrs. Feil's three person household, he abused his discretion in denying Mr. Chaussee the fees he requested.

B. Fees on Appeal.

Mrs. Feil argues in Section V(b) of her brief that Joseph Chaussee should not be awarded the fees he requested on appeal, because he cited only RCW 26.18.16 as the basis for his request; but Ms. Feil then argues she should be awarded the fees she has incurred on appeal pursuant to RCW 26.09.140. Although the following phrase is not necessarily authority in the legal sense, "What is good sauce for the goose is good sauce for the gander."

Under notions of equity and reciprocity, Ms. Feil's assertion of a right to fees under RCW 26.09.140 has become a second basis for Mr. Chaussee's request for an award of fees on appeal.

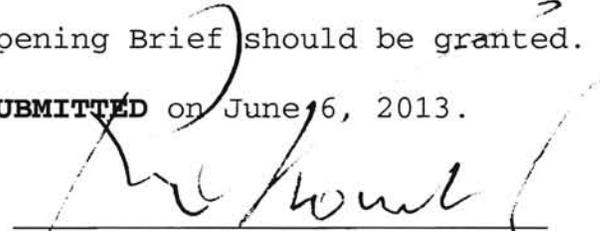
C. Frivolous Appeal.

Other than commenting that when a Respondent such as Ms. Feil simply recites RAP 18.9 as a basis for an award of fees; Mr. Chaussee's counsel has unnecessarily had to include this paragraph in his brief in order to address Section v(c) of Ms. Feil's Reply Brief. Ms. Feil's suggestion that fees and costs be awarded to her under RAP 18.9 is disingenuous at best and insulting or frivolous at worst.

VII. CONCLUSION

All requests made in Joseph Chaussee's Appeal of Judge Tollefson's Order, as summarized in the Conclusion of his Opening Brief should be granted.

RESPECTFULLY SUBMITTED on June 6, 2013.


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Attorney for **JOSEPH CHAUSSEE**

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No. 43948-4-II

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

JOSEPH CHAUSSEE,

Appellant,

vs.

BREEN ANN FEIL,

Respondent.

No. 43948-4-II

DECLARATION OF
SERVICE

DECLARATION OF SERVICE

RAINIER LEGAL CENTER, INC.

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1 **BARRY KOMBOL**, hereby declares as follows:

2 That I am now and at all times herein mentioned a citizen of the
3 United States and a resident of the State of Washington, over the age of 18
4 years, not a party to the above-entitled action and competent to be a
5 witness therein.

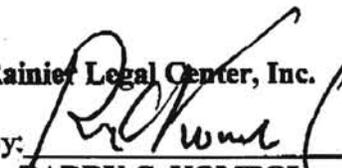
6 That on the 6th day of June, 2013, I placed a true copy of the
7 "Appellant's Response to Ms. Feil's Reply Brief of the Case" with cover
8 letter to Barbara McInville in a PRIORITY MAIL envelope and
9 delivered to Black Diamond Post Office, said envelope addressed to
10 Barbara McInville (for service) at the address set forth below:

11 **Barbara McInville**
12 **The Law Office of Robert Helland**
13 960 Market Street
Tacoma, WA. 98402-3605

14 Also, on the 6th day of June, 2013, I faxed to Barbara McInville
15 at Facsimile No. 253.627.1913 the "Appellant's Response to Ms. Feil's
16 Reply Brief of the Case" with cover letter. Attached as Exhibit "A" to this
17 Declaration of Service is a copy of my cover letter, Facsimile
18 Transmission Verification Report, and Priority Mail Envelope.

19 **DATED:** June 7, 2013
PLACE: Black Diamond, WA.

20 Rainier Legal Center, Inc.

21 By: 
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Exhibit - "A"

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June 6, 2013

Via Facsimile - 253.627.1913
and Via First Class U.S. Mail

Ms. Barbara McInville
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960 Market Street
Tacoma, WA. 98402-3605

Re: **Chaussee v. Feil**
Appeal Cause 43948-4-II

Dear Ms. McInville:

Enclosed with this letter please find Mr. Chaussee's response to the Reply Brief which was filed on behalf of Bree Feil on May 7, 2013. Mr. Chaussee's Original Brief was filed with the Clerk of the Court of Appeals this afternoon.

I remain,

Very truly yours,

Barry C. Kombol

Rainier Legal Center, Inc. P.S.

BCK:sjb

Enclosure

cc: **Joseph Chaussee**

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