

ORIGINAL

**COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON**  
Case No. 45608-7

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**ERIC R. BRADLEY, APPELLANT**

v.

**ANNE M. SPRUTE fka ANNE M. BRADLEY,  
RESPONDENT**

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**RESPONDENT'S OPENING BRIEF**

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**No.45608-7**

**RESPONDENT'S RESPONSE TO  
APPELLANT'S BRIEF**

**I. INTRODUCTION**

This appeal involves a determination of two parents' financial responsibilities toward their son's post-secondary education and their daughter's child support. The parties' older child Joshua graduated from Bellarmine Preparatory School in Tacoma, Washington, in June 2013, and commenced his college education at Colorado State University in Fort Collins, Colorado, in August 2013. The parties' most recent Order of Child Support entered in 2011 reserved the issue of post-secondary educational support. Ms. Sprute timely filed her summons and petition to

modify child support for the parties' younger child, Samantha, and to address the issue of post-secondary educational support for Joshua. The case was heard before a court commissioner and then by Judge James Orlando. The court entered final orders defining each party's responsibilities toward Joshua's post-secondary education and setting child support for Samantha. Mr. Bradley subsequently appealed the court's ruling.

## **II. STATEMENT OF THE CASE**

Ms. Sprute and Mr. Bradley entered into an agreed Decree of Dissolution, Final Parenting Plan and Final Order of Child Support on May 16, 2003, after filing a Joint Petition For Dissolution Of Marriage. CP 299, 554. The parties had two children, Joshua, who was eight-years-old, and Samantha, who was five-years-old at the time of the divorce. Ms. Sprute was designated the primary caretaker of the children. CP 247. Mr. Bradley was awarded daytime residential time with the children but no overnights. Mr. Bradley was required to pay child support in the amount of \$1,179.80 per month. CP 301. The child support worksheets included \$1,405.00 in monthly special expenses for the children, which included daycare, education, swim lessons, and baseball. CP308. Mr. Bradley was

ordered to contribute 45% towards these monthly expenses which were included in his monthly transfer payment. CP308. Ms. Sprute was awarded both tax exemptions for the children each year since she was the primary caretaker of the children. CP304. The Decree divided the property of the parties and awarded specifically to Ms. Sprute all of her military retirement benefits that she had accrued as a member of the United States Army.

After the divorce, as an active member of the United States Army, Ms. Sprute received PCS (Permanent Change of Station) Orders to report to Arlington, Virginia, in the Summer of 2004. She received subsequent orders to report to Kentucky in 2006, and then received orders to return to Fort Lewis in the Summer of 2007. CP 247-248.

Prior to Ms. Sprute's filing of her 2013 Petition to modify child support and set post-secondary support, child support had been most recently modified on March 4, 2011. CP 164. Mr. Bradley was then ordered to pay child support in the amount of \$2,100.00 for the two children. CP 166. Joshua was then 16 years of age and Samantha was then 13 years of age. CP 165. The child support worksheets included special expenses in the amount of \$1,954.16 a month for daycare and educational

expenses. CP 175. Mr. Bradley was ordered to pay 43% of this amount which was included in his monthly transfer payment. CP 174-175. The children have attended private school from pre-kindergarten through high school. CP 247.

#### **A. Parents Education**

Mr. Bradley and Ms. Sprute are both well educated. CP 248. Mr. Bradley has a Bachelors' Degree in Geology and is employed by the U.S. Government. CP 248. Ms. Sprute retired after 24 years in the Army as a field grade officer, qualified in three Army aircraft; UH-60 Blackhawk, OH-58 Kiowa Warrior and UH-1 Huey. CP 248. Ms. Sprute plans on returning to school to pursue a four-year degree. CP 408.

#### **B. Past Employment**

Ms. Sprute served in the Army for 24 years prior to her retirement in 2010. CP 248. Ms. Sprute enlisted in the Army in 1986 and applied for flight school. CP 248. She was accepted to and attended the Army Aviation Rotary Wing Flight School in 1988. CP 248. She graduated in 1989 as an Army officer and aviator. CP 248. Mr. Bradley also was an active duty Army aviator. CP 248. Shortly after leaving the service, he obtained a job working in the Environmental Department for the federal

government on Camp Murray, in Tacoma, Washington. CP 249. At the time of the divorce, he was a GS-11. CP 249.

After retiring from the military, Ms. Sprute accepted a position with Microsoft where she worked for approximately one year. CP 249. She then left Microsoft and subsequently founded a Washington State 501C3 corporation. CP 250.

### **C. Ms. Sprute's Current Employment**

Ms. Sprute's current role is Founder and CEO of RallyPoint/6, a 501C3 non-profit that began at the time of her departure from Microsoft in the Fall of 2011. CP 250. She established the first-ever military, veteran and military family one-stop center in Pierce County. CP 250. She became actively engaged in building this opportunity from a grass-roots level. CP 250.

### **D. Parties Income**

Ms. Sprute's salary with RallyPoint/6 is \$61,000 annually. CP 250. Mr. Bradley and Ms. Sprute have a combined income of over \$223,000 annually. CP 426. Mr. Bradley's annual income is \$115,733 as a GS14 and Ms. Sprute's annual income which includes her military retirement is \$108,000. CP 426.

**E. Joshua**

Joshua is an excellent student, graduating in June 2013 from Bellarmine Preparatory School with a 3.38 grade point average. CP 252. Joshua has attended parochial schools since pre-kindergarten. CP 247.

Unlike many of his peers, Joshua knew exactly what his passions were and chose to pursue a degree for a future career in landscape architecture and design. Joshua did his research and found three schools in which he would apply for acceptance that met his goals of attaining a degree in Landscape Architecture/Design. The three colleges he applied to and was accepted to were: Washington State University (WSU), Colorado State University (CSU), and University of Oregon (UO). CP 252-253.

Joshua and Ms. Sprute visited WSU in Pullman, Washington, during the spring of his junior year at Bellarmine. They toured the campus and met with the department head/professor of the Landscape Architecture program. Joshua learned that this program was new to WSU, only in place for one year; they did not have their own “designated” space at the time of his visit as they were in the ground stages of developing the program. The professor had attended college and became a professor with little

background working in the private sector. CP 253.

The second visit was made in December of 2012 to CSU in Ft. Collins Colorado. Joshua and his mother attended an orientation, a tour of the campus and met with the Department head/professor. The CSU program has been in place for over 40 years, has almost a 100% placement rate in the field of study, the opportunity to earn an additional minor in both business management and construction management with the BS in Landscape Architecture/design, the professor has his own landscape business and has won numerous awards in the field, the class size as opposed to WSU's 75+ students was only 20-25, opportunities for internships anywhere in the world and abroad study (the professor just returned from a semester in New Zealand with the previous class) –none of which were opportunities for Joshua if he had accepted the WSU offer to enroll. CP 253.

Joshua was so impressed with the potential and opportunities that CSU had to offer that after researching UO and learning it was more expensive than both CSU and WSU, and did not offer the same opportunities, Joshua narrowed his choice to CSU and WSU. Joshua realized the potential for him to graduate with a degree and two minors, the

linkage the program at CSU has to the business community, and the greater potential for him to start his career in his field upon graduation made CSU the clear choice. Joshua commenced his college career at CSU in the Fall of 2013. CP 253-254.

**F. Samantha**

Samantha will be 17 on November 12, 2014. Samantha is enrolled at Bellarmine Preparatory School and is thriving academically. Samantha has attended parochial schools since Pre-Kindergarten and her academics have been consistently straight A's. She finished her freshman year with a 4.0 at Bellarmine Preparatory, enrolled in honors English, Math, Sciences and she is taking French as her language elective. She also has been consistently ranked in the 98-99 percentiles in National tests. CP 254.

This school year, Samantha has set a goal of establishing a Military and Veteran Club to support military and their families. CP 254.

Samantha is extremely talented as an artist; she has written songs, plays the guitar (self-taught), and has competed and won several musical competitions; in the summer of 2011 she won the "Lakewood's Brightest Star" competition. Samantha is also passionate about riding; after trying several locations locally; she has found the right place for her to better her

riding abilities; she attends lessons twice weekly. CP 254-255.

Ms. Sprute provides medical and dental insurance for both children, auto expenses, including auto insurance, and cell phones for both children. CP 199-204.

#### **G. Child Support Modification Proceeding.**

Ms. Sprute filed her summons and petition to modify child support and determine post-secondary education on May 24, 2013, several weeks before Joshua graduated from Bellarmine Preparatory School. CP 182-185. The petition was filed after several weeks of negotiations between Mr. Bradley and Ms. Sprute in which they reached an agreement as to each of their financial responsibilities toward their children. CP 257-259. The parties actually exchanged and completed child support worksheets. CP 257-259. However, Mr. Bradley would not agree to reduce the agreement to writing. CP 259.

After the petition was filed Mr. Bradley served interrogatories and requests for production on Ms. Sprute. CP 218-221. After the answers and responses were submitted, a Motion to Compel was filed by Mr. Bradley. CP 206. Judge Orlando found that the interrogatories had been substantially answered; however, he ordered that Ms. Sprute provide copies

of additional bank statements and to supplement her financial declaration and worksheets to explain the extraordinary expenses on her worksheets. (i.e., educational expenses of the children). Ms. Sprute was also to provide her dates of employment and income at Microsoft and to provide complete copies of her complete tax returns. CP 238-239.

Less than one week after appearing before Judge Orlando, Mr. Bradley appeared in ex parte court asking for a court order authorizing the Employment Security Department of the State of Washington to release ten years' worth of employment records for Ms. Sprute. The court denied the request, but did authorize three years' worth of records. Mr. Bradley never submitted the requested records into the court record. CP 242-244. This would suggest that Mr. Bradley's subpoena confirmed the income information submitted by Ms. Sprute.

#### **H. Income and Child Support Worksheet Computations**

Child Support Worksheets were completed to compute each party's net monthly income to assist in determining the child support and post-secondary responsibilities for each party. CP 426-430.

Mr. Bradley's income was calculated by taking the annual salary rate on his paystub of \$115,731 and dividing it by 12 for a monthly gross

income of \$9,644, computing his federal withholding, social security deduction and his federal withholding, social security deduction, and pension plan contributions based on his pay stubs. Ms. Sprute's income was computed with her \$61,000 annual income with Rallypoint/6 divided by 12 and her military retirement of \$3,232 per month, for a total gross monthly income of \$8,315.33. Her deductions included Income tax withholding and FICA. Under Section 11 of the worksheets, education expenses and other special expenses of the children were included. CP 426-430.

Similar special expenses were included in the original worksheets entered on May 16, 2003. CP 307-311. The worksheets adopted by the court on March 4, 2011, included the following expenses under paragraph 11 of the worksheets: daycare at \$295 a month and educational expenses for the children at \$1659.16 per month. CP 175. Joshua was attending Bellarmine Preparatory School and Samantha was attending St. Francis Cabrini in Tacoma at the time. CP 179. The original transfer payment in 2003 was \$1,179.80. CP 301. In 2011, the transfer payment increased to \$2100 per month. CP 166. In the Fall of 2012, Mr. Bradley agreed to increase the transfer payment by \$450 per month in recognition of

Samantha's tuition increase when she enrolled at Bellarmine Preparatory School to begin her high school education. CP 90.

The most recent support worksheets included the Bellarmine monthly expense of \$1120 per month which included tuition and books for Samantha. CP 427.

**I. Final Order on Modifications of Support**

The court ordered Mr. Bradley to pay child support in the amount of \$1,501.44 per month commencing with the month of July 2013 for the support of Samantha. CP 418. In addition, the court ordered Mr. Bradley to pay 46% and Ms. Sprute 54% of Joshua's tuition and room and board for the annual expenses at Colorado State University of approximately \$39,200.00. CP 528-529. The court entered the following findings:

“The parties have a history of substantial financial support of their children's education. The children have attended private school for years. The father has a college degree.” CP 432.

The court divided the children's tax exemptions between the parties. CP 529. The court ordered that if Ms. Sprute utilizes her GI Benefits toward Joshua's college expenses, her benefits would apply toward her share only. CP 528-529. The court ordered that the issue of post-secondary education may be reviewed annually. CP 420. The court

ordered no further discovery but that the parties were to exchange copies of their tax returns in April 2014.

### III. ARGUMENT

#### A. THE STANDARD OF REVIEW IS AN ABUSE OF DISCRETION

Child support, extraordinary expenses, and postsecondary support orders are all reviewed for abuse of discretion. *In re Marriage of Griffin*, 114 Wn.2d 772, 776, 791 P.2d 519 (1990); *Childers v. Childers*, 89 Wn.2d 592, 601, 575 P.2d 201 (1978). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). Substantial evidence must support the trial court's factual findings. *In re Parentage of Goude*, 152 Wn. App. 784, 790, 219 P.3d 717 (2009). This court will not substitute its judgment for trial court judgments if the record shows the court considered all relevant factors and the award is not unreasonable under the circumstances. *Griffin*, 114 Wn.2d at 776.

RCW 26.09.100(1) requires the trial court, after considering “all relevant factors,” to order either or both parents to pay child support in an amount determined under Chapter 26.19 RCW. The trial court calculates

the total amount of child support, allocates the basic support obligation between the parents based on each parent's share of the combined monthly net income, RCW 26.19.080(1), then orders the parent with the greater obligation to pay the other a support transfer payment. RCW 26.19.011(9).

**B. THE TRIAL COURT WAS AUTHORIZED BY THE 2011 CHILD SUPPORT ORDER AND BY THE CHILD SUPPORT MODIFICATION STATUTE AND THE POST-SECONDARY EDUCATIONAL SUPPORT STATUTE TO MODIFY THE CHILD SUPPORT FOR SAMANTHA AND TO DETERMINE BOTH PARENTS' FINANCIAL RESPONSIBILITIES TOWARD THE POST-SECONDARY EDUCATIONAL SUPPORT FOR JOSHUA.**

1. **March 4, 2011 Court Order**: The March 4, 2011, Order granted the court the authority to modify child support and set post-secondary support. The Order of Child Support entered on March 4, 2011, states in Paragraph 3.14, as follows:

“Post-Secondary Educational Support

The right to request post-secondary support is reserved, provided that the right is exercised before support terminates as set forth in paragraph 3.13.”

Paragraph 3.13, Termination of Support, states as follows:

“Support shall be paid until the children reach the age of 18, for as long as the children remain enrolled in high school, whichever occurs last, except as otherwise provided

below in paragraph 3.14.”

Therefore, a petition to request post-secondary support must be filed prior to the child’s graduation from high school.

2. **Statutory Authority:** The court had statutory authority to modify child support and set post-secondary support.

a.) Summons and Petition to Modify Child Support. RCW 26.09.170 and .175 authorize the filing of a Petition to modify Child Support and to determine financial support for post-secondary education. The parties’ 2011 Order of Child Support requires that the petition must be filed prior to the child support terminating for a particular child. Ms. Sprute filed her Summons and Petition on May 24th, 2013, prior to Joshua’s graduation from Bellarmine Preparatory School in June, 2013. The filing of the Petition preserves the Court’s jurisdiction over the issue of post-secondary education. RCW 26.09.170(3).

Appellant argues that Ms. Sprute’s failure to file child support worksheets with her petition causes the court to lose authority to order post-secondary support. The child support modification statute does reference worksheets. The worksheets are normally not completed by counsel and submitted to the court until financial income is filed and

exchanged by the parties. Respondent did not fail to provide crucial information by not submitting blank worksheet forms when filing the petition. When proposal worksheets were completed by Ms. Sprute, they were served on Mr. Bradley and filed with the court on August 19, 2013. Amended proposed worksheets were submitted by Ms. Sprute, Mr. Bradley and to the court on September 9, 2013.

Division One of The Court of Appeals has held that the filing of a motion for adjustment of support to establish previously reserved post-secondary support maintains the court's jurisdiction, even without the filing of a summons and petition, filing fee, or worksheets. In re: Marriage of Morris, 176 Wn.App. 893, 309 P.3d 767 (2013). The Morris court found that filing a motion for adjustment to set post-secondary support rather than filing a petition for modification is harmless error and does not deprive the court of authority to determine post-secondary educational responsibilities. *Morris supra*. Appellant argues that Ms. Sprute's failure to include the filing of blank worksheets with her petition causes the court to lose authority to order post-secondary educational support. This argument is not credible and is not supported by statute nor case law nor by common sense. The worksheets are simply blank sheets that are

mandatory forms. (CSW/CSWP).

b.) Standards for Determining Post-Secondary Educational Support Awards.

RCW 26.19.090(2) sets the standards for determining post-secondary educational support awards. Section 2 of the statute states as follows:

(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.

RCW 26.19.090 (2)

The court was authorized both by the court order itself and by statute to modify the child support for Samantha and to determine an appropriate award of post-secondary educational support for Joshua.

**3. Cases cited by Appellant.**

a.) **In re: Marriage Gillespie.** Mr. Bradley cites the Gillespie case, filed in 1995, to support his position that Ms. Sprute's Petition to Modify Child Support was not filed timely. In the Gillespie case the existing child support order expired upon the child's 18th birthday. The Petition to modify child support was not filed until after the child's 18th birthday. Hence, the court had lost jurisdiction. This did not occur here. The Bradley/Sprute Child Support Order extended jurisdiction until Joshua's graduation from high school. The Petition to modify was filed prior to his graduation from high school.

b.) **In re: Marriage of Pollard.** Mr. Bradley correctly points out in his brief that the Pollard case stated: "We find no statutory mandate that all required documents must be attached before a motion for modification is deemed filed." The court went on to say that accurate worksheets must be filed eventually. *Pollard* at p.55. The Pollard court is consistent with the Morris case, cited above, which found that a simple filing for a motion for adjustment of support to establish previously reserved post-secondary support maintains jurisdiction, even without the filing of a summons and petition, filing fee or worksheets. Both the Pollard and Morris support Ms. Sprute's position that her summons and petition were filed timely and

that the court maintained jurisdiction over the issue of post-secondary educational support.

**C. POST 9/11 GI BENEFITS WHEN ASSIGNED TO JOSHUA BY MS. SPRUTE, SHOULD BE APPLIED ONLY TO HER PRO-RATA SHARE OF JOSHUA'S COLLEGE TUITION PURSUANT TO 38 U.S.C. § 3319(F)(3).**

1.) Summary

The Post 9/11 GI Bill is provided to eligible members of the Armed Forces on or after August 1, 2009 who have served at least 6 years of service in the Armed Forces. The service member may elect to transfer the benefits to an immediate family member. However on the date of election the service member agrees to serve 4 additional years in the Armed forces. This allows career service members the opportunity to share their education benefit with immediate family members while still maintaining full control of the benefit. See 38 U.S.C. § 3020.

The benefits provided by the Post 9/11 GI Bill include the cost of college tuition and fees, a stipend for books each semester, and a monthly housing stipend. 38 U.S.C. § 3313(c)(1). The service member entitled to the benefits may elect to transfer a maximum of 36 months of membership benefits to a spouse or a child. 38 U.S.C. § 3319(a)-(d). There is a

prohibition on treatment of transferred entitlement as marital property; if a service member elects to transfer his or her benefits, the entitlement transferred may not be treated as marital property, or the asset of a marital estate, subject to division in a divorce or other civil proceeding. 38 U.S.C. § 3319(h).

## 2.) History of the Post 9/11 GI Bill

On June 30, 2008, H.R. 2642, officially known as the Military Construction and Veterans and Related Agencies Appropriations Act, was signed into law. The law included what is known as the Post 9/11 Veterans Educational Assistance Act of 2008, 28 U.S.C. 501(a), 512, cbs, 33, 36. The law is commonly referred to as the Post-9/11 GI Bill.

Laws such as the Post-9/11 GI Bill have greatly expanded the benefits provided military service members that serve on active duty (fulltime). Congress provided these benefits to service members for their sacrifice and willingness to volunteer their time and lives for the security of our country. The law did not go into effect until August 1, 2009, four years before Joshua entered college, and six years after the parties' divorce was finalized.

One key difference in the Post-9/11 GI Bill and other educational

benefits for all of the military members is that there is a transferability clause, 38 U.S.C. 3319. Ravi Shankar, Recent Development, Post 9/11 Veterans Educational Assistance Act of 2008, 46 Harv. J. On Legis., 303, 306, (2009). Anyone who earns the benefit, with various restrictions, may transfer any or all of their benefits to a qualified dependent. The law requires most service members to agree to continued years of service if they utilize the transferability clause, thereby assisting with the retention of members of the military. Shankar at 311. In order to obtain the support for this expanded education benefit from the President George W. Bush administration, the Congressional authors included the transferability clause to offset a feared negative impact on retention. Shankar at 304, 315. In fact the law states the transferability clause is “to promote recruitment and retention of members of the armed forces [therefore, the Secretaries of the Military Departments] may permit an individual . . . to transfer to one or more of the family members specified, all or a portion of such individual’s entitlement to such assistance.”

Congress included three other important clauses in the law. The first is that if a military member, such as Ms. Sprute, transfers her benefit to a dependent, such as Joshua, she first has to give up any rights to any other

educational benefit that she has earned but not used. H.R. 2642 § 3322. Secondly, Ms. Sprute has the unquestioned right at any time to revoke any transferred benefit not utilized; "... an individual transferring entitlement under this section may modify or revoke at any time the transfer of any unused portion of the entitlement so transferred," 38 U.S.C. 3319. Shankar at 311. Therefore, the military member has constant control over his/her benefit that has not been utilized. Third, Congress said that any "[e]ntitlement transferred under this section may not be treated as marital property, or the asset of a marital estate, subject to division in a divorce or other civil proceeding." 38 U.S. C. 3319. Congress intended that this educational benefit be a personal entitlement of the service member. This is the exact opposite of when Congress passed the Uniformed Services Former Spouse's Protection Act (10 USCS § 1408(c)(1)) (USFSPA), specifically allowing state courts to allocate a portion of military retirement payments in a divorce proceeding. The purpose of USFSPA was to overturn that portion of *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), in which the United States Supreme Court ruled that Congress had not authorized the division of military non-disability retirement pay. Just as the Post-9/11 GI Bill was passed to promote

enlistment and retention, so was the non-disability retirement system, "... to serve as a recruiting and re-enlistment inducement." *McCarty* at 213, and 593. Congress has the ultimate right to provide these military and veteran benefits and the absolute right to determine who may or may not receive them. Congress also has the absolute right to determine whether state courts may utilize military and veteran benefits in family law matters. Congress clearly intended that a State court may not overrule the congressionally mandated Federal Law. U.S. C. § 3319.

### 3.) Ms. Sprute's Post 9/11 GI Benefits

Ms. Sprute is currently eligible for benefits under the Post-9/11 Educational Assistance, 38 U.S.C. § 3301 et seq. (G.I. Bill), which went into effect in August of 2009. Under this statute, the United States provides educational assistance to military members and veterans who served our country after the terrorist attacks on September 11, 2001. Ms. Sprute earned these benefits by having served on active duty for our country as a member of the United States Army between September 2001 and July 2010. Congress has found that it is in our country's best interest to provide members of the military and veterans who serve on active duty in the Armed Forces after September 11, 2001 with enhanced educational

assistance benefits. It also serves as a valuable recruitment and retention program. The program provides reimbursement for college tuition and fees, as well as providing a stipend for books and a monthly living stipend. See U.S.C. § 3319.

The G.I. Bill contains the specific language indicating express Congressional intent to preempt state law pertaining to division of property in divorces and other civil proceedings, such as the one here. The statute reads, “Entitlement transferred under this section may not be treated as marital property, or the asset of a marital estate, subject to division in a divorce or other civil proceeding.” 38 U.S.C. § 3319(f)(3). In addition to Congressional intent, application of state law over the federal statute would do substantial damage to the federal interest of providing the educational benefits solely to the veteran and keeping the transferability of the benefits solely within his discretion. Therefore, the statute meets the requirements for federal preemption of state law, and is the controlling standard for disposition of Ms. Sprute’s benefits.

In addition to federal law prohibiting the division of Ms. Sprute’s monthly stipend, state law also prohibits the division. RCW 26.09.080. The G.I. Bill benefits did not come into existence until years after Ms.

Sprute and Mr. Bradley divorced, which makes them non-marital property, not subject to division between the parties.

#### 4.) The Supremacy Clause

The Supremacy Clause of the U.S. Constitution provides Congress with the power to preempt state law. *Louisiana Public Service Com'n v. F.C.C.*, 476 U.S. 355 (1986). Federal law will only preempt a state law pertaining to domestic relations if: 1) Congress has positively expressed its intent to preempt the state law and 2) the state law does major damage to a clear and substantial federal interest. *Boggs v. Boggs*, 849 F.Supp. 462, 465 (E.D.LA. 1994) (citing *Hisquierdo*, 439 U.S. 572, 581 (1979)); *Clardy v. ATS, Inc.*, 921 F.Supp. 394 (N.D. Miss. 1996).

The critical question is whether Congress intended that federal regulation supersede state law. *English v. General Elec. Co.*, 496 U.S. 72, 78 (1990). Where a statute contains an express preemption clause, a court's task of statutory construction must in the first instance focus plain wording of the clause, which necessarily contains the best evidence of Congress's preemptive intent. *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 62-3 (1993). When Congress has made its intent known through explicit statutory language, a court's task is an easy

one. *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990).

In the case at hand, the court's task will be an easy one because Congress has expressly stated a clear intention that the provision of 38 U.S.C. § 3319(f) (3) supersede any state law allowing for the division of these benefits. The statute reads,

“Entitlement transferred under this section may not be treated as marital property, or the asset of a marital estate, subject to division in a divorce or other civil proceeding.”

Congress specifically states that the benefits of the GI Bill are not subject to division in any civil proceeding despite the fact that they might otherwise be deemed divisible by state laws. *Id.* Congress's intent is express and clear.

#### 5.) Case Law

Due to the Post 9/11 GI Bill being newly enacted in 2009, there is no Washington case law on this subject. However, the Mississippi Supreme Court recently issued an opinion as to the Post 9/11 GI Bill. See *Neville v. Blitz* No. 2011-CA-01613-SCT which was issued on September 26, 2013.

In *Neville*, the father became eligible for educational assistance through the Post 9/11 GI Bill, which included payment of college tuition, fees, books, and a monthly housing allowance. Having the option of

transferring his benefits to a family member, the father transferred his benefits to the parties' daughter. The daughter graduated from high school in 2010. She attended a private University, Southern Methodist University, in Dallas Texas; which is an out-of-state college for the daughter. In October 2010 the father filed a petition to modify the divorce Decree requesting that the court order the mother to pay half of the daughter's college expenses at SMU. The court did allow the father to take full credit for the GI bill benefits, but that the \$1200 monthly stipend from the GI Bill to be placed in a savings account. In effect, the father received full credit for all GI Bill benefits except the monthly housing allowance. So in effect, by taking the monthly stipend off the top of the daughter's college expenses, the court shared the father's GI Bill benefits with the mother as to the monthly stipend.

On appeal, the father contended that federal law preempted state law with regard to the appropriation of Post 9/11 GI Bill benefits and he asserted that the court violated federal law by dividing his GI Bill benefits. The Supreme Court found that the federal law preemption was not an issue since there were not any related state laws therefore the court applied federal law to the issue at hand. The *Neville* Court found that the instant issue was one

of first impression for the Court and that no cases in any jurisdiction directly addressing the specific issue at hand were found. The *Neville* Court found that the lower court had allowed the father to take full credit for all Post 9/11 benefits except the housing stipend. The father asserted that the court's treatment of the monthly housing stipend violated Title 38, Section 3319. The mother argued that since the father transferred the benefits to the daughter the benefits belonged to her much like her scholarships and therefore the court ruled appropriately in taking the benefits off the top before dividing the remainder between the parties. The appellate court found the father earned these benefits long after the parties divorced and that neither party claimed that the benefits were marital property. The court found that the lower Court's instruction to take the benefits off the top of the daughter's expenses gave the mother a credit that she otherwise would not have had and resulted in the father not getting full credit for all of the Post 9/11 GI Bill benefits. The Court concluded that the lower Court's allocation of the housing stipend amounted to a division of the benefits in a civil proceeding, which is prohibited by 38 U.S.C. Section 3319 (f) (3). The *Neville* Court found that the mother's argument that the GI Bill benefits belonged to the daughter lacked merit. When benefits are transferred the

service member has the option to revoke the transfer at any time; the Post 9/11 GI Bill Benefit is an asset of the father based on his military service; the father has control of the asset at all times; therefore this is an asset of the father, not the daughters or mothers property. 38 U.S.C. § 3319(f) (2). The court held that because the GI benefits still belonged to the father, he should be credited with all of them, and none of the benefits should be divided between the father and the mother. The court found the father had earned the GI bill educational benefits through active duty service, which occurred long after he and the mother divorced. The lower Court's allocation of the monthly housing stipend violated 38 U.S.C. § 3319 (f) (3), because it constituted a division of the benefit between parties in a civil proceeding.

Our case is exactly on point. The Court Commissioner allocated the GI Bill benefits which was a violation of 38 U.S.C § 3319(f) (3). Judge Orlando agreed and the Court Commissioner's ruling was revised.

b. Boisen. The *Boisen* case, filed in 1998, is distinguishable from the case at hand.

In the *Boisen* case, a step father paid for the entire post-secondary educational expenses for the parties' children. The court found that the

children's father did not have to reimburse the step father of the children for these payments. We do not have this situation occurring here. There is no new spouse nor other party that is willing to pay for the children's post-secondary education. Ms. Sprute does have Post 911 GI Bill Benefits that she earned during her military career. These are benefits that Ms. Sprute possesses and if she elects to utilize her benefits toward the post-secondary education for the children at her sole discretion, this should not impact Mr. Bradley's financial responsibilities for the children.

**D. THE COURT IS NOT REQUIRED TO CAP THE TOTAL COST OF ATTENDANCE TO THE AMOUNT CHARGED BY THE UNIVERSITY OF WASHINGTON IN SEATTLE.**

There is no per se prohibition against the award of private school tuition for a minor child. Factors such as family tradition, religion, and past attendance at a private school, among others, may present legitimate reasons to award private school tuition expenses in favor of the custodial parent. *In re Marriage of Stern*, 57 Wn.App. 707, 789, P.2d 807 (1990).

An award for private school tuition was supported by the evidence *In re: the Marriage of Vanderveen*, 62 Wn.App. 861, 815, P.2d 843 (1991).

Mr. Bradley cites the *Shellenberger* case, filed in 1995, in support of the proposition that the court cannot order a parent to make monthly

post-secondary educational support payments when combined with his debt service and living expenses exceed his income. This is not the case here.

Mr. Bradley states the court order is a hardship for him; however he is not being asked to pay substantially more than what he has historically been paying towards the children's education. His gross income had increased by \$906.00 per month since the entry of the last support order in 2011. He has increased his pension plan payments by \$200.00 per month since entry of the last support order. CP 174, 426.

The *Shellenberger* case deals with a private college education with parents of modest means. Joshua is attending Colorado State University, a public school, and both parents earn over \$100,000 annually. Both parents have proven their ability to support their children's education as evidenced by the Bellarmine Preparatory tuition they had paid of some \$25,000 per year.

**E. MS. SPRUTE PROVIDED ALL NECESSARY DOCUMENTS FOR THIS PROCEEDING.**

In a child support proceeding tax returns for the preceding two years and current pay stubs should be provided to verify income and deductions. RCW 26.19.071. Ms. Sprute provided these documents. CP 1-11. Each party is required to provide a financial declaration which discloses a party's income, available assets, and monthly expense information. RCW

26.18.220(1). Ms. Sprute provided her financial declaration. CP 199-204.

The statute for awarding post-secondary expenses requires factors which were in the record: Joshua's age, expectations of both parties, child's prospects, desires, aptitudes and abilities, parent's level of education, standard of living. The children have always attended private school and both parties have always been committed to providing them the best available education.

Mr. Bradley filed a motion to compel after interrogatories and requests for production were answered. Mr. Bradley filed the motion because questions such as "What are the addresses for the Credit Card Accounts" were not answered. Ms. Sprute did not have the answer since she paid her bills on line. Judge Orlando found that "The interrogatories have been substantially answered". CP 239. The court ordered her to provide additional bank statements and to explain some of the expenses on her financial declaration and worksheets. Though the parties had just been before Judge Orlando on this issue on August 30, 2013, early the following week, Mr. Bradley's counsel appeared in ex-parte to obtain a court order authorizing the employment security to release ten years of Ms. Sprute's

employment security records. The court declined his request. The court did order the past three years. Why wasn't this issue addressed before Judge Orlando? The case at hand deals with a modification of child support, not a complex divorce proceeding.

Ms. Sprute provided the following documentation to Mr. Bradley and to the court:

- Her 2011 Federal Income Tax Return
- Her 2012 Federal Income Tax Return
- Her W2s verifying Microsoft income for 2010 and 2011
- Validation of the non-profit work she founded
- Joshua's Academic history and Bellarmine Preparatory graduating GPA
- Joshua's acceptance letter to Colorado State University and program information
- Samantha's academic and future potential
- 2013 updated Child Support Worksheet
- Wells Fargo Bank Ledgers
- USAA Bank Ledgers
- Education, auto insurance and household expenses
- Travel expenses to Colorado for August 2013 and Freshman Dorm Expenses
- June 2013 Travel Expenses to Colorado for Required Freshman Orientation
- December 2012 Travel to Colorado to Preview Colorado State University
- Colorado State University Tuition and Fees
- Financial Declaration of Anne Sprute

These documents were provided to Mr. Bradley in discovery and provided to the court so that the court could make an informed decision regarding the financial responsibilities of the parties. RCW 26.19.090, cited above, requires this kind of evidence to be provided to the court to assist in determining appropriate post-secondary educational support awards. Ms. Sprute provided far more documentation than required by both RCW 26.19.071 and RCW 26.18.220. Ms. Sprute provided timely, substantially more than the required documentation needed for child support modification and post-secondary support action.

**F. THE COURT IS NOT BOUND BY A FORTY-FIVE PERCENT LIMITATION OF SUPPORT PAYMENTS**

RCW 26.19.065(1) reads:

(1) Limit at forty-five percent of a parent's net income. Neither parent's child support obligation owed for all his or her biological or legal children may exceed forty-five percent of net income except for good cause shown.

(b) Before determining whether to apply the forty-five percent limitation, the court must consider whether it would be unjust to apply the limitation after considering the best interests of the child and the circumstances of each parent. Such circumstances include, but are not limited to, leaving insufficient funds in the custodial parent's household to meet the basic needs of the child, comparative hardship to the affected households, assets or liabilities, and any involuntary limits on either parent's earning capacity including incarceration, disabilities, or incapacity.

(c) Good cause includes, but is not limited to, possession of substantial wealth, children with day care expenses, special medical need, educational need, psychological need, and larger families.

In the case *In re Marriage of Cota*, 177 Wn.App. 527, 312 P.3d 695

(2013), states as follows:

“We hold that post-secondary educational support is part of a parent’s child support obligation for the purposes of the Forty-five Percent limitation in RCW 26.19.065(1). . . however, RCW 26.19.065(1) allows the trial court to exceed the 45 percent cap (for good cause shown), which includes “educational need.” *In re Marriage of Cota*, page 542 *supra*.

Ms. Sprute and Mr. Bradley have a history of contributing substantially to their children’s educational needs. When the court modified child support on March 4, 2011, the court made the following findings on March 4, 2011:

“Both parties agreed to contribute toward the children’s private school expenses evidenced by the child support worksheets attached with the original child support order entered on May 16, 2003. The parties have both been contributing toward the private school expenses of the children for the past seven years . . . both parties should contribute pro rate to the following expenses:

A. Bellarmine Tuition, annually	\$ 11,865.00
B. Books for Bellarmine	\$ 500.00
C Sports for Bellarmine	\$ 400.00
D. St. Francis Cabrini Tuition	\$ 6,865.00
E. St. Francis Cabrini Uniforms	\$ 400.00
F. Daycare/Extended care, monthly	\$ 295.00

These expenses should be included in the child support

worksheets.” CP 178-180.

The current order requires Mr. Bradley to pay \$1,501.44 per month in child support for Samantha, and 46% of Joshua’s annual expenses at Colorado State University. CP 529.

RCW 26.19.065(1) (c), permits a court to exceed the 45 percent cap "for good cause shown," including for "educational need" or when one party possesses "substantial wealth." In his written findings of fact and conclusions of law, the court commissioner found that the parties have a history of substantial financial support of their children’s education, the children have attended private school for years, and the father has a college degree. CP 432. Judge Orlando, in his oral opinion stated as follows:

“In terms of whether or not the parties should be required to contribute the Colorado State University expenses, the tuition, room and board at Colorado State is comparable to many private schools. These kids historically have attended private schools. I think if they were to attend the University of Puget Sound or even Pacific Lutheran University, the cost for tuition, room and board, would be similar to that amount. So I am not going to cap the amount at the University of Washington level.”

Judge Orlando’s Verbatim Report of Proceedings, dated 25 October, 2013, pp. 18.

Further, Mr. Bradley never raised this issue at the trial level.

The general rule is that an appellate court *need not* consider an alleged error that has been raised for the first time on review. The applicable court rule, RAP 2.5(a), provides:

**Errors Raised for First Time on Review.** The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction.

An appellate court “will not” consider an issue raised for the first time on review. See, e.g., *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). (“RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them.”); *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978) (“An issue, theory or argument not presented at trial will not be considered on appeal.”).

#### **G. ONE CHILD/TWO CHILD WORKSHEET**

Mr. Bradley next argues that the court should have awarded child support on the basis of a two-child, not a one-child family. Presumably, if the court used the income figures for a two-child family, the total child

support obligation for Samantha would be reduced by approximately \$150.00.

The trial court used the economic table to calculate the basic support obligation for Samantha at \$1,844.00. This is the highest amount for a one-child family with parents having a combined monthly income of \$12,000.00 or more. Mr. Bradley's portion of the support obligation was \$848.24. The monthly health insurance paid by Ms. Sprute was \$300.00 and the education monthly education expenses for Samantha totaled \$1,120.00 per month. Mr. Bradley's pro-rata share of these two expenses were \$653.20, which added to the \$848.24 basic support amount totaled the gross child support monthly obligation of \$1,501.44. The court has the discretion to exceed the presumptive amount of support set for combined monthly net incomes of \$12,000.00 or more. RCW 26.19.020. This is what the court in affect did, when utilizing the one-child family rather than the two-child family economic table.

The trial court relied on the economic table for a one-child family and had the discretion to do so since the parties' combined income exceeded \$12,000.00 per month. RCW 26.19.020.

**H. MS. SPRUTE'S INCOME WAS PROPERLY COMPUTED BY THE TRIAL COURT.**

Mr. Bradley asks this court to impute income to Ms. Sprute but provides no authority for doing so. Ms. Sprute currently is employed fulltime as an executive director of a nonprofit agency and earns \$61,000.00 annually. In addition, she earns over \$45,000.00 annually from her military retirement.

Standards for determination of income are defined in RCW 26.19.071. “The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. RCW 26.19.071(6). Ms. Sprute is not voluntarily unemployed or voluntarily underemployed. She is employed full time at the non profit agency. Her total annual income is very similar to that of Mr. Bradley. CP 413.

Mr. Bradley argues that Ms. Sprute’s GI Bill benefits should be included as income. RCW 26.19.071(3) defines all income sources to be included in gross monthly income. GI Benefits are not included in the definition. The trial court properly computed Ms. Sprute’s income.

**I. THE TRIAL COURT HAD AUTHORITY TO ENTER A FINAL ORDER OF CHILD SUPPORT.**

Pierce County Local Rules authorize the court commissioner to hear family law motions including petitions to modify child support. PCLR

0.4(a)(1)(B). A party seeking to present oral testimony at a modification of order of child support must make a request to do so. RCW 26.09.175(7). Mr. Bradley did not make any such request. The court has authority to enter a final order on a petition to modify child support on a hearing by affidavits. PCLR 0.4(a)(1)(B)

**J. MS. SPRUTE IS ALSO ENTITLED TO ATTORNEY'S FEES ON APPEAL.**

Pursuant to RAP 18.1, Ms. Sprute asks for reasonable attorney's fees associated with her appeal. In Washington, a prevailing party may recover attorney fees authorized by statute, equitable principles, or agreement between the parties. *Thompson v. Lennox*, 151 Wn. App. 479, 484, 212 P.3d 597 (2009); *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001), review denied, 146 Wn.2d 1008 (2002). Generally, if such fees are allowable at trial, the prevailing party may recover fees on appeal as well. *Id.* (citing RAP 18.1). Here, Ms. Sprute has been forced to respond to an appeal attacking the correct decisions of the trial court. Upon prevailing, should recover associated appellate fees.

**IV. CONCLUSION**

Child support, extraordinary expenses and post-secondary support orders are all reviewed for an abuse of discretion. Ms. Sprute timely filed

her petition to modify child support for Samantha and to determine post-secondary educational support for Joshua. The parties have a history of providing substantial financial support for their two children who have attended private school since pre-kindergarten. Ms. Sprute retired from the United States Army after 24 years. Any allocation of her GI Benefits by a state court is a violation of 38 U.S.C. § 3319(f) (3). Ms. Sprute is currently eligible for benefits under the Post 9/11 educational assistance statute. The GI Bill contains specific language indicating express congressional intent to pre-empt state law pertaining to these benefits. If a service member elects to transfer her benefits, the entitlement transferred may not be treated as marital property, or the asset of a marital estate, subject to division in a divorce or other civil proceeding. Judge Orlando correctly ruled on this issue. The GI Benefits are not included as income to Ms. Sprute. The trial court has the authority to exceed the costs of the University of Washington annual college tuition when setting the parents' financial responsibilities toward their child's post-secondary education. Ms. Sprute provided more than required and necessary discovery and Mr. Bradley was not prejudiced in any way by her discovery responses. The court has authority to exceed the 45% Child Support Worksheet Cap for good cause shown, which

occurred in this case. The court has the discretion to utilize a one-child family support worksheet when the combined incomes of the parties exceed \$12,000.00 per month. The court did not impute income to Ms. Sprute since she was fully employed. The court had the authority to enter final Orders and did not abuse its discretion in doing so..

The trial court's rulings should be affirmed in all respects. Ms. Sprute should be awarded her costs and attorney's fees for responding to this appeal.

Respectfully submitted,

Dated: May 30, 2014

CAMPBELL, DILLE, SMITH & BARNETT, PLLC



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TACOMA, WASHINGTON

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

In re the Marriage of:  
ANNE SPRUTE,  
  
Respondent,  
And  
ERIC BRADLEY,  
  
Appellant.

No. 45608-7-II

**DECLARATION OF SERVICE**

The undersigned declares:

I declare that on the 2nd day of June, 2014, I caused a true and correct copy of this Respondent's Opening Brief to be served on the following parties in the manner indicated below:

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By *Donita G. Deck*  
Donita G. Deck

DECLARATION OF SERVICE