

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

---

---

In re the Marriage of

AMY S. DEVARGAS  
Appellant

and

JOSHUA D. KLEIMEYER  
Respondent

---

---

ON REVIEW FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

---

---

REPLY BRIEF OF APPELLANT

---

---

PATRICIA NOVOTNY  
ATTORNEY FOR APPELLANT  
3814 NE 65<sup>th</sup> Street, Suite A  
Seattle, WA 98115  
(206) 525-0711

TABLE OF CONTENTS

I. STATEMENT OF ISSUES IN REPLY ..... 1

II. ARGUMENT IN REPLY..... 2

    A. THE STANDARD OF REVIEW..... 2

    B. THE STATUTE DOES NOT GRANT THE COURT  
    AUTHORITY TO IMPUTE INCOME TO A PARENT WHO IS  
    “INVOLUNTARILY UNEMPLOYED” BUT EMPLOYABLE. . 2

    C. THE COURT’S DEVIATION ANALYSIS WAS INCORRECT  
    AS A MATTER OF LAW..... 3

    D. THE REDUCTION OF THE FATHER’S BASIC SUPPORT  
    OBLIGATION, WHETHER OR NOT PURSUANT TO 1, ,  
    REQUIRES THE COURT TO CONSIDER THE TOTAL  
    CIRCUMSTANCES OF BOTH HOUSEHOLDS AND INSURE  
    SUPPORT MEETS THE BASIC NEEDS OF THE CHILDREN. . 7

    E. A PARENT CANNOT BE BANKRUPTED TO PUT A CHILD  
    THROUGH COLLEGE. .... 11

    F. THE COURT ERRONEOUSLY CONCLUDED IT COULD NOT  
    ORDER THE FATHER TO SHARE IN THE LEGAL EXPENSES  
    FOR THE OLDEST SON THAT WERE REASONABLE AND  
    NECESSARY. .... 13

    G. HEALTH INSURANCE PREMIUMS FOR THE FATHER AND  
    HIS WIFE ARE NOT CHILD RELATED EXPENSES. .... 15

    H. THE FATHER DID NOT PROVE HE WAS ENTITLED TO AN  
    IRA DEDUCTION. .... 16

    I. THE CONTEMPT ORDER WAS IMPROPER. .... 18

    J. MOTION FOR ATTORNEY FEES. .... 22

III. CONCLUSION ..... 24

TABLE OF AUTHORITIES

**Washington Cases**

*Berger Engineering Co. v. Hopkins*, 54 Wn.2d 300, 308, 340 P.2d 777 (1959)..... 6

*Brandli v. Talley*, 98 Wn. App. 521, 525, 991 P.2d 94, 97 (1999)..... 5

*Clallam Cnty. v. Dry Creek Coal.*, 161 Wn. App. 366, 255 P.3d 709 (2011)..... 6

*Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 808, 828 P.2d 549 (1992)..... 3

*In re Marriage of Arvey*, 77 Wn. App. 817, 894 P.2d 1346 (1995)..... 1, 7, 8, 9,10, 11

*In re Marriage of Casey*, 88 Wn. App. 662, 967 P.2d 982 (1997)..... 10, 11

*In re Marriage of Crosetto*, 82 Wn. App. 545, 562, 918 P.2d 954, 962 (1996)..... 5, 23

*In re Marriage of Goodell*, 130 Wn. App. 381, 392, 122 P.3d 929, 935 (2005)..... 15, 16, 17

*In re Marriage of Holmes*, 128 Wn. App. 727, 734, 117 P.3d 370, 373 (2005)..... 14

*In re Marriage of Jacobson*, 90 Wn. App. 738, 744, 954 P.2d 297, 299 (1998)..... 9

*In re Marriage of Mattson*, 95 Wn. App. 592, 600, 976 P.2d 157, 162 (1999)..... 14

*In re Marriage of Scanlon and Witrak*, 109 Wn. App. 167, 34 P.3d 877 (2001)..... 15

*In re Marriage of Schneider*, 173 Wn.2d 353, 363, 268 P.3d 215, 220 (2011)..... 13

|   |         |
|---|---------|
| <i>In re Marriage of Shellenberger</i> , 80 Wn. App. 71, 84, 906 P.2d 968 (1995).....       | 12      |
| <i>In re Marriage of Tahat</i> , 182 Wn. App. 655, 334 P.3d 1131 (2014).....                | 22      |
| <i>State ex rel. J.V.G. v. Van Guilder</i> , 137 Wn. App. 417, 154 P.3d 243 (2007).....     | 4       |
| <i>State ex rel. M.M.G. v. Graham</i> , 159 Wn.2d 623, 632, 152 P.3d 1005, 1009 (2007)..... | 1, 2, 9 |
| <i>State v. Petrich</i> , 94 Wn.2d 291, 296, 616 P.2d 1219 (1980) .....                     | 20      |

**Statutes, Rules, & Other Authorities**

|                          |      |
|--------------------------|------|
| 42 U.S.C. § 654.....     | 9    |
| RAP 18.1(c). .....       | 23   |
| RAP 9.11.....            | 22   |
| RCW 2.24.050 .....       | 17   |
| RCW 26.09.140 .....      | 23   |
| RCW 26.09.160 .....      | 20   |
| RCW 26.18.160 .....      | 22   |
| RCW 26.19.035 .....      | 9    |
| RCW 26.19.071(5)(g)..... | 17   |
| RCW 26.19.075 .....      | 4    |
| RCW 26.19.075(1).....    | 4, 5 |
| RCW 26.19.080. ....      | 14   |

## I. STATEMENT OF ISSUES IN REPLY

1. Where the issue requires interpretation of a statute, the court reviews the issue as a matter of law (*de novo*).
2. The statute requires imputation of income to an unemployed parent; a rare exception exists for when a parent is proven unemployable (i.e., “not acceptable for employment as a worker”).
3. The court has authority to deviate upwards for any reason that serves the purpose of the statute and, when requested to do so, must consider the total financial circumstances of both households.
4. *Marriage of Arvey* approves a particular method for calculating child support, which only applies, under *Marriage of Oakes* and *M.M.G.*, when the court deviates on the basis of split custody. The court must still insure the children’s basic needs are met.
5. A parent cannot be ordered to pay college expense where the parent’s expenses for meeting his or her own needs and obligations, including toward minor children, exceeds the parent’s income.
6. Contrary to the court’s analysis, a court has authority to order a parent to share in the reasonable and necessary expense of legal defense of a child.
7. Contrary to the court’s holding, a parent may not receive a credit against child support for health insurance premiums for himself and

his wife because they are not child related expenses.

8. The contempt order was improper in many respects and the challenges are properly raised in this appeal.

9. The father cannot supplement the record without this Court's permission.

10. The mother should receive her fees.

## II. ARGUMENT IN REPLY

### A. THE STANDARD OF REVIEW.

As is made clear by Kleymeyer's brief, the issues in this case mostly boil down to questions of statutory interpretation. Review of these questions is *de novo*. *State ex rel. M.M.G. v. Graham*, 159 Wn.2d 623, 632, 152 P.3d 1005, 1009 (2007) ("Statutory meaning is a question of law that we review *de novo*"). Further, as noted in the opening brief, a trial court's failure to apply the correct legal standard is an abuse of discretion. Br. Appellant, at 22-23.

### B. THE STATUTE DOES NOT GRANT THE COURT AUTHORITY TO IMPUTE INCOME TO A PARENT WHO IS "INVOLUNTARILY UNEMPLOYED" BUT EMPLOYABLE.

Kleymeyer cites no authority in support of his claim that the court may evade the statute where it finds a parent "involuntarily unemployed." Br. Respondent, at 6-8. This court does not consider arguments that are not supported by any reference to the record or by any citation to

authority. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

In any case, there is no authority because there is no such category in Washington child support law of “involuntarily unemployed.” The law presumes the parent to be employable, whatever the circumstances of his or her termination from previous employment. DeVargas, pro se at the time, pointed this out to the court. 4RP (01/31/14) 8-14. Perhaps that is because the law presumes a parent to be strongly motivated to support his or her children, but the Oregon court has previously noted that appears not to be the case with Kleymeyer. CP 338 (Kleymeyer “appears absolutely unwilling to make use of resources available to him to provide his children with the basic necessities of life.”). In any case, the court is bound by the statute. It cannot relieve the father of his obligation because he is unemployed. (Again, it bears noting, that Kleymeyer’s separation from Rand occurred when he failed to justify his continuing absence.) Nor should it do so when, obviously, the father is employable. CP 320-321.

C. THE COURT’S DEVIATION ANALYSIS WAS INCORRECT AS A MATTER OF LAW.

The standard calculation establishes what the legislature views as the level of support necessary to meet a child’s basic needs. Accordingly deviations from the standard calculation are prohibited if they undermine that fundamental purpose. Likewise, deviations upward may be granted if

necessary to meet the basic needs of the children. On this issue, the court here failed to do the proper analysis and reached the wrong conclusion, one that deprives the children of the support they need.

First, the mother's request for a deviation upward in the father's obligation was based both on the disparate household wealth and on the fact of her having three children to support in her household. CP 103. *See* RCW 26.19.075(1)(e). Accordingly, the court was obligated, as a matter of law, to consider "the total circumstances of both households..." *State ex rel. J.V.G. v. Van Guilders*, 137 Wn. App. 417, 427, 154 P.3d 243 (2007). Kley Meyer does not point to anything in the record to establish the court undertook this mandatory analysis (let alone findings supporting its conclusion).

Rather, he argues DeVargas "did not have standing to request a deviation based on the father's household wealth" because Kley Meyer had not requested a deviation. Br. Respondent, at 9. As earlier argued, and addressed below, Kley Meyer did ask for and receive a downward deviation. *See* Br. Appellant, at 30-32. Under the statutory scheme, there is no other way to conceptualize the court's downward departure from the father's presumptive obligation.

In any case, Kley Meyer ignores that the trial court is not limited to the "reasons" listed in RCW 26.19.075 "when deciding whether to deviate

from the presumptive schedule amount.” *In re Marriage of Crosetto*, 82 Wn. App. 545, 562, 918 P.2d 954, 962 (1996) (deviation based on significant disparity in parent’s earning capacities). Rather, by its terms, the statutory list of reasons is nonexclusive and the court has the discretion (perhaps the duty) to deviate when necessary to meet the children’s basic needs. *See* RCW 26.19.075(1) (“reasons for deviation ... include but are not limited to ...”).

Kleymeyer also fails to distinguish the cases that apply directly here. For example, the facts here are identical, for the relevant purposes, to *Brandli v. Talley*, 98 Wn. App. 521, 525, 991 P.2d 94, 97 (1999). There, the father had primary residential care of the children and the mother’s child support was based on her low wages until she remarried a wealthy man. At that point, the father sought to modify on the basis of the wealth in mother’s new household, a request the trial court denied on the basis that it could not look to the mother’s household wealth, an error the court here likewise committed. This Court reversed, holding that the statute requires a court to consider “consider all the income and resources of each parent's household before deciding what each parent's actual child support obligation will be.” 98 Wn. App. at 524 (emphasis added). Indeed, this Court declared it “unreasonable” to exclude the consideration of new household wealth from a child support determination. *Id.*, at 525.

Here, the trial court was “unreasonable” in that same way, yet Kleymeyer tries to distract from the court’s errors by arguing the facts as if it is this Court’s job to determine whether a deviation is justified. Br. Respondent, at 1-13. However, this Court “is not a fact-finding branch of the judicial system of this state.” *See Clallam Cnty. v. Dry Creek Coal.*, 161 Wn. App. 366, 255 P.3d 709 (2011) *citing Berger Engineering Co. v. Hopkins*, 54 Wn.2d 300, 308, 340 P.2d 777 (1959).

In any case, Kleymeyer does not reliably report the facts; in fact, he misreports them. For example, he argues DeVargas is trying to get him to support the children from her marriage. Br. Respondent, at 12. He complains she is “silent” as to “what amount of support” she receives for her other children. Br. Respondent, at 11-12. Actually, DeVargas states plainly in her financial declaration that she receives \$1,000 in monthly support for the two children. CP 477. Ironically, as a consequence of the orders challenged here, it is the father of those children whose support must be stretched to include Kleymeyer’s minor son.

Kleymeyer also complains DeVargas “omits to mention she has a college degree.” Br. Respondent, at 13 (citing to CP 1165, which does not seem to provide any support for the accusation). In fact, DeVargas states plainly in her financial declaration that she has a B.A. CP 475.

Kleymeyer claims “she made no showing that she had made any attempts

to improve her income or job status...” Br. Respondent, at 10. In fact, DeVargas completed a small business training course in 2011 and has been growing her own small business. CP 469-470, 500.

Kleymeyer makes a great many other allegations, tautologically citing for support the allegations he made in the trial court. See, e.g., Br. Respondent, at 10 (citing CP 1272, where he alleges the mother has made no showing of any effort to become fully employed or her financial straits: see, contra, CP 590-591, 918-921, 922, 923, 979-983, 984, 985). This tactic is not helpful to the court or fair to the opposing party and may help to explain the many errors here.

In any case, the point Kleymeyer is trying to obscure is that the trial court, when considering the mother’s requested deviation, failed to consider the total circumstances of both households and did not apply the correct legal standard. This is a legal error.

**D. THE REDUCTION OF THE FATHER’S BASIC SUPPORT OBLIGATION, WHETHER OR NOT PURSUANT TO *ARVEY*, REQUIRES THE COURT TO CONSIDER THE TOTAL CIRCUMSTANCES OF BOTH HOUSEHOLDS AND INSURE SUPPORT MEETS THE BASIC NEEDS OF THE CHILDREN.**

After arguing DeVargas cannot even ask for a deviation upward, Kleymeyer attempts to justify the deviation downward granted to him as something other than a deviation. What matters here is the substance:

does the court's calculation deviate from what the legislature declares to be the presumptive amount necessary to meet the children's basic needs?

First, to clarify, this issue applies to the year the oldest child spent living with his father before college. CP 717.

Second, the authority on which the father requested the reduction in his support obligation is narrower than he claims. Br. Respondent, at 14. He argues this Court mandated an alternative to the standard calculation in split custody arrangements in *In re Marriage of Arvey*, 77 Wn. App. 817, 894 P.2d 1346 (1995). In fact, *Arvey* addressed itself to a narrow question of what "the appropriate method of calculation is for apportioning the total amount of child support owed in a split-custody arrangement." *Id.*, at 825. The *Arvey* court did not depart from the court's previous holding that a deviation analysis applies in split-custody arrangements. In other words, the court declared:

[if] strict application of the Table would result in a significant disparity in the amount of support available for the children in each household .... the court may then exercise its discretion to order an appropriate deviation that will assure that both children are protected with adequate, equitable and predictable child support as required by RCW 26.19.001.

*Arvey*, 77 Wn. App. at 824-825, citing *In re Marriage of Oakes*, 71 Wn. App. 646, 861 P.2d 1065 (1993). This only makes sense, first, because the primary concern is the children's welfare, and, second, because the statute

mandates “[t]he child support schedule shall be applied: ... [i]n all proceedings in which child support is determined or modified ...” RCW 26.19.035.

Compliance with the statute is not only a good idea, it is mandatory under state and federal law. *See, e.g.*, 42 U.S.C. § 654 (federal government's mandate that States establish mandatory guidelines for determining child support awards). The court simply does not have the authority to disregard this mandate, as DeVargas argued. 4RP (01/31/14) 14-15. Indeed, the child support order itself describes what the court did as a deviation. CP 813, 829. That is the only way it fits into the scheme. In short, the schedule applies in all child support determinations, meaning that departures must be justified under the deviation analysis even if based on split custody.

In sum, *Arvey* and *Oakes* must be read together and consistent with the statute's purpose, which is to serve the child's interests. *In re Marriage of Jacobson*, 90 Wn. App. 738, 744, 954 P.2d 297, 299 (1998) (“[i]n interpreting statutory language, the statute must be construed in the manner that best fulfills the legislative purpose and intent”). This reading also comports best with *State ex rel. M.M.G. v. Graham*, 159 Wn.2d 623, 633, 152 P.3d 1005 (2007), which did not address itself to the split custody question but did decline to extend the *Arvey* calculation method to

a shared custody arrangement. Rather, the court emphatically hewed to the statutory scheme, requiring a deviation analysis whenever a court considers a departure from the presumptive amount. For these organizational purposes, the split-custody and shared-custody arrangements are indistinguishable and both should be treated as the deviations they are. Certainly, *Arvey* should not be read to justify a reduction in child support beyond what is necessary to meet the child's basic needs, because that subverts the legislative purpose.

Whether you call the *Arvey* calculation a deviation or not (though, as noted, in the order it is called precisely that), the trial court erred when it mechanically applied the *Arvey* calculation because it neglected to inquire into the effect on the children. Both the father's and mother's requests focus on the children's needs. *Arvey* simply does not relieve the court from a consideration of the effect on the children of reductions in the presumptive amount of child support.

Although not relevant to these plain legal errors, DeVargas makes some mention of Kleymeyer's continuing misrepresentation of the facts. For example, he attempts to distinguish *In re Marriage of Casey*, 88 Wn. App. 662, 967 P.2d 982 (1997) on the basis that there is no "great disparity" in the parties' incomes. Br. Respondent, at 15-16. He declares the Oregon court in 2000 found DeVargas to have income of \$1900 and

Kleymeyer to have income of \$2358. *Id.* (citing CP 219, which says nothing about income). In fact, in 2001, the court found the parties' incomes to be \$1,039 (DeVargas) and \$2,798 (Kleymeyer). CP 429. More recently, in 2010, the Oregon court found their incomes to be \$1,455 (DeVargas) and \$5,268 (Kleymeyer). CP 348. While not quite as disparate as in *Casey* (\$500/\$5848), the point holds.

In short, throughout their history, these parties' incomes have consistently been disparate, with Kleymeyer receiving three times the income of DeVargas. (This is income only, not counting consideration of other wealth.) That is, until the trial court in this cases set his income according to his unemployment benefits, the parties have consistently been shown to have substantially disparate income, again, without consideration of the father's trusts and retirement income and his new household wealth. This disparity does not militate in favor of reducing the father's obligation.

In any case, because the court erred as a matter of law when it applied *Arvey* and denied the mother's requested deviation without performing the requisite analysis, the orders must be reversed.

**E. A PARENT CANNOT BE BANKRUPTED TO PUT A CHILD THROUGH COLLEGE.**

Kleymeyer does not seem to dispute that Washington law forbids ordering a parent to pay for postsecondary education if to do so jeopardizes the support needed for minor children or would imperil the

parent's economic security. Br. Respondent, at 16-17. See *In re Marriage of Shellenberger*, 80 Wn. App. 71, 84, 906 P.2d 968 (1995) (support needs of minors take precedence over college expense). Kleymeyer simply attempts to distinguish *Shellenberger* on the basis that DeVargas is not disabled, as was Shellenberger. This misses the point. The disability was the cause of Shellenberger's problem, but the problem was that the college expense caused him to run a deficit: his expenses exceeded his income. 80 Wn. App. at 83. That is the problem here. Here, as in *Shellenberger*, before ordering postsecondary educational support, the court is required to "make specific findings" that the obligated parent has the "ability to pay while still meeting his own reasonable needs and obligations." *Id.* at 84. Here, Certainly the court failed to make the kind of specific findings required, and cannot, because the mother cannot afford it, which is what, of course, the Oregon court previously held.

Even Kleymeyer observes that DeVargas's income was imputed at minimum wage, which makes the mother's point. Not many minimum wage workers are carrying one-third of the burden for putting their children through private college. Finally, he claims DeVargas "made no showing that payment of post secondary support would impact her minor children." Br. Respondent, at 17. Again, not so. The court found the mother's income to be less than \$1600 monthly (gross). With deductions,

debt service, and living expenses, it would take a magician to find funds left over to contribute to college. In any case, DeVargas repeatedly described for the court her financial constraints and the effect on her minor children of ordering her to pay for her oldest son's private college. See, e.g., CP 708, 709, 741-742, 743, 995-996.

Again, also, the Oregon court dealt with most of these same arguments and entered orders providing for the post-secondary expense. Two aspects of the 2010 agreement (tax exemptions to father for his assuming sole responsibility for post-secondary education) are described as a "buy out" in the pleadings. CP 369; see, also, CP 502-503. The issue was settled until the father acted like it was not.<sup>1</sup>

F. THE COURT ERRONEOUSLY CONCLUDED IT COULD NOT ORDER THE FATHER TO SHARE IN THE LEGAL EXPENSES FOR THE OLDEST SON THAT WERE REASONABLE AND NECESSARY.

Here, again, the father tries to distract from legal error with another unreliable recitation of facts. Br. Respondent, at 17-18. The mother's version is in the record. CP 510-512, 563-566.

---

<sup>1</sup> Given the many issues in play here, it remains unclear what authority the Washington court had to modify the post-secondary education aspect of the Oregon order. This issue was not apparently developed below, but raises questions of the court's authority that should be explored on remand. See *In re Marriage of Schneider*, 173 Wn.2d 353, 363, 268 P.3d 215, 220 (2011) (cannot modify aspect of order from another state unless law of other state permits modification of that aspect).

In any case, the main point here again is the trial court's legal error, which Kleymeyer defends as correct. Br. Respondent, at 17. The trial court believed it did not have the authority to order the father to contribute to the legal defense fees. CP 791. In fact, Washington law expressly confers on the trial court the discretion to order "special child rearing expenses" to be shared, so long as they are reasonable and necessary. RCW 26.19.080. The statute does not exclude any particular kind of expense and has not been read to limit the expense categorically. *See, e.g., In re Marriage of Holmes*, 128 Wn. App. 727, 734, 117 P.3d 370, 373 (2005) (requirement payment for private school costs, including tuition, books, lunch, and field trips, Jack's medical costs, agreed summer camps and extracurricular activity cost). The only requirement is that the expense relate to the overall goal of child support, which is to serve the best interests of children. *In re Marriage of Mattson*, 95 Wn. App. 592, 600, 976 P.2d 157, 162 (1999) (interpreting "reasonable and necessary"). Here, the mother showed the child's need for an attorney was reasonable and necessary. CP 510-512, 563-566.

Not only did the court misunderstand its own authority, it seemed constrained further by the fact that the children of these parties are the product of an unmarried union. CP 791 ("child of a committed intimate relationship"). Washington treats all its children with the same respect

and concern for their well-being. The commissioner had this issue right, legally and factually.

G. HEALTH INSURANCE PREMIUMS FOR THE FATHER AND HIS WIFE ARE NOT CHILD RELATED EXPENSES.

The father claims the court could order the mother to share the expense for his and his wife's health expense premiums because he was unable to prorate them. Br. Respondent, at 18. In fact, this Court has made clear "a credit may not include . . . any portion of premium not covering the child at issue." *In re Marriage of Goodell*, 130 Wn. App. 381, 392, 122 P.3d 929, 935 (2005), citing *In re Marriage of Scanlon and Witrak*, 109 Wn. App. 167, 175. 34 P.3d 877 (2001).

The father's claimed impediment to compliance with this rule is illusory. The commissioner accomplished the apportionment of the \$293 premium by dividing the total by the number of people covered. CP 14, 702; see, also, CP 675 (credit for "actual expense of the premium for the children"). This is the method used in *Goodell*, which this Court approved as "not unreasonable." 130 Wn. App. at 392. What is not permitted is the failure to apportion altogether, which is what the judge's revision accomplished.

This error was compounded in two of the three orders entered by the judge where the premium is increased from \$293 to \$343. CP 806, 838. Kley Meyer had not included any evidence of this increase in the

proceedings before the commissioner, and, when his attorney asserted it in a hearing before the commissioner, it was correctly disallowed. 3RP (01/07/14) 24 (commissioner limiting evidence to that which was properly before him). It is not clear how the higher amount ended up in the worksheets, though it appears Kleymeyer prepared the worksheets. This is similar to the reversible error in *Goodell, supra*.

Finally, though not directly pertinent, the record raises some questions regarding whether Kleymeyer misrepresented this cost to the Oregon court. In Washington, he submitted an apparent generic schedule of insurance premiums for various plans offered in 2010 through the Motion Picture Industry. CP 1297. This appears to be the same premium amount of \$293 used by the Oregon court in 2010, which Kleymeyer appears to have then declared to be the amount paid only for the children. CP 348. He received a reduction in his support obligation on the basis of this amount. CP 349.

In any case, the court was wrong as a matter of law to credit the father for his and his wife's health insurance premiums.

#### H. THE FATHER DID NOT PROVE HE WAS ENTITLED TO AN IRA DEDUCTION.

The statute permits a deduction from gross monthly income for up to \$5000 in "voluntary retirement contributions actually made," unless made for the purpose of reducing child support, and the requesting party

must show “a pattern of contributions during the one-year period preceding the action establishing the child support order...” RCW 26.19.071(5)(g). Kleymeyer failed even to satisfy the one-year contributions prong of this test, contrary to his assertion. Br. Respondent, at 18. The documents he cites as support were untimely. *Id.*, see CP 1250, 1298. They were filed on September 9, 2013, but the hearing on these matters occurred on August 20, 2013. The hearing on presentation of orders occurred on September 10, 2013, and it appears Kleymeyer attempted to use presentation to insert new evidence. Although the commissioner acknowledged receiving and reviewing the late submission, he also noted the papers were not timely and could not be considered. 2RP (09/10/13) 4, 23.<sup>2</sup>

Because the proof was not properly before the commissioner, it was not properly before the judge. RCW 2.24.050 (revision authorized “upon the records of the case”); *see, also, Goodell*, 130 Wn. App. at 389 (error to consider facts outside that record). The child support order should not include this credit because of Kleymeyer’s failure to prove it. The trial court need not reach the question of whether the voluntary retirement contributions by a parent on unemployment were made to reduce his child support payment.

---

<sup>2</sup> The commissioner excluded the IRA contribution for another reason (double counting). CP 14.

I. THE CONTEMPT ORDER WAS IMPROPER.

It is difficult to see Kleymeyer's contempt motion, filed July 22, 2013, months after he sought modification in the Oregon court, as anything other than retaliation. CP 485-487, 490. He could not ask for this relief in Oregon, since the Oregon court had already settled the issue of transportation expense in 2010. CP 349, 351, 377, 505-508. The fact of this preclusion eliminates the amounts ordered for expenses incurred prior to the 2010 order. And the fact that the same order requires the rather to pay all the costs of transportation going forward (giving him a credit for doing so), eliminates any claims on that basis after the 2010 order. Moreover, the remedy for the alleged interference in residential time is prescribed by statute and does not include reimbursement for this claimed expense. For these and many other reasons, the contempt order is improper.

Claims for costs incurred before the 2010 Order are precluded.

Kleymeyer offers no legal authority to support the court ordering reimbursement for expenses incurred prior to entry of the 2010 order by the Oregon court. He asked for transportation expense reimbursement for 2001-2009 (including interest) totaling \$10,907.64. CP 507. He claims he made efforts to collect this expense while the mother was in the U.K. CP 1000. He also requested reimbursement for "forfeited travel due to

noncompliance and/or interference with court ordered parent-child visitation” for 2009-2011 in the amount of \$3851.01 (including interest). CP 507, 1000-1001. He also requested reimbursement for out-of-pocket medical expense of \$643.57 for 2009. CP 486.

The parties dispute the facts behind these claims, but the controlling fact is that in the 2010 modification in Oregon, the parties “reached agreement on all issues.” CP 349. This is after the parties debated these same issues. See, e.g., CP 361-362 (“forfeited” travel). The 08/30/10 Oregon order, entered by stipulation, obligates Kleymeyer to “continue to pay” all transportation costs, for which he receives a \$100 monthly credit against his child support obligation. CP 349. A provision on back support refers only to the support Kleymeyer owes DeVargas. CP 354. By its terms (“agreement on all issues”), the reimbursement matter was settled. If not, it should have been. Kleymeyer is precluded from raising it now.

Order on contempt does not state what order DeVargas violated.

Kleymeyer concedes the order of contempt does not specify the order violated. Br. Respondent, at 19; see CP 7 (finding DeVargas “intentionally failed to comply with a lawful order of the court dated on [left blank]”). He argues this Court should ignore that defect or allow the trial court to fix it nunc pro tunc. Id. In fact, this case provides an

excellent example of why contempt orders must be precisely drawn. See, Br. Appellant, at 28-39.<sup>3</sup>

Reference to the orders makes clear that DeVargas cannot be liable for expenses before the 2010 stipulated order, since it addressed all issues. Likewise, reference to the orders makes clear that Kleymeyer is solely responsible for transportation costs after the 2010 order. CP 1029.

Finally, reference to the order reveals that nowhere does it authorize reimbursement for travel that did not occur.<sup>4</sup> (If Kleymeyer identifies where the Oregon orders entitle him to reimbursement for this claimed expense, undersigned counsel could not find it.) In fact, in Washington, the remedy for violation of residential provisions (e.g., failure to make a child available for residential time with the other parent) is controlled by statute and does not include the expense claimed here. RCW 26.09.160. The statute allows for make-up time, enforcement costs (attorney fees and costs), and a civil penalty (\$100 to \$250). *Id.* The court used the form mandated by this statute but did not otherwise comply with the statutory requirements. The monetary sanction cannot hold.

---

<sup>3</sup> As an aside, this is not an error the *nunc pro tunc* doctrine can fix. See *State v. Petrich*, 94 Wn.2d 291, 296, 616 P.2d 1219 (1980) (nunc pro tunc order “records judicial acts done at a former time which were not then carried into the record.”). The judicial act here was done, but not correctly.

<sup>4</sup> DeVargas denies ever refusing to comply with the visitation order and disputed any obligation for an expense she argues Kleymeyer could have avoided or mitigated. CP 507-508.

Ability to Pay:

Without any citation to the record, Kleymeyer claims DeVargas has the ability to pay the \$20,000 (rounded) contempt order. Br. Respondent, at 40. The court's findings state simply that DeVargas had and has the ability to comply because she had received funds in her divorce, is capable of earning income, and has income to pay the judgments. CP 7-8. The record does not support these findings, or that her ability to earn income can absorb this sanction. This money has to come right out of the money she uses to support her household. Moreover, DeVargas met her burden under the statute to show she diligently pursued employment (training for and starting a business) and was doing her best to support her children, while also having to fund litigation with Kleymeyer. See, e.g., CP 266-267, 362-363, 500, 590-592.<sup>5</sup>

The challenge to the contempt order is properly before the court.

The mother does not dispute the case law cited by the father in regards to statutes of limitation, etc. Br. Respondent, at 22. Her main

---

<sup>5</sup> RCW 26.18.050(4) provides:

If the obligor contends at the hearing that he or she lacked the means to comply with the support or maintenance order, the obligor shall establish that he or she exercised due diligence in seeking employment, in conserving assets, or otherwise in rendering himself or herself able to comply with the court's order.

point is that the revision clock did not start running until the commissioner entered orders resolving all matters. Br. Appellant, at 41-43. The letter ruling and the contempt order, issued the same day, are interlocutory events, just as was found in *In re Marriage of Tahat*, 182 Wn. App. 655, 334 P.3d 1131 (2014). As observed in that case, CR 54(f) requires five days notice of presentation before entry of any “order or judgment” unless notice is waived. That did not happen here. CP 13 (no waiver). The notice requirement is one mechanism for insuring due process and protecting against the inequitable outcome Kleymeyer seeks. Any other reading of the facts here leads to the constitutional violation.

For all manner of reasons, this Court should vacate the contempt order.<sup>6</sup>

#### J. MOTION FOR ATTORNEY FEES.

In his response, the father inserts evidence not in the record related to the mother’s new business. Br. Respondent, at 24-25. The rules require him to seek permission by motion before including these facts in his brief. RAP 9.11. None of the criteria are met here.

In any case, the evidence he offers seems to undercut his arguments that the mother has made no efforts to improve her financial circumstances. Certainly, too, the mother will submit a financial

---

<sup>6</sup> DeVargas concedes she misinterpreted RCW 26.18.160 in her opening brief. Br. Appellant, at 40.

declaration in support of her request for fees, and provide all the requisite current information, as the rules require. RAP 18.1(c).

By the same token, while the father attacks the mother for not making a better living (see, also, CP 1160-1161, 1255-1256), he insists he should be relieved of his obligations because he is “involuntarily unemployed.” Br. Respondent, at 24. Earlier, when he was advocating for ordering post-secondary educational support, he extolled his many marketable skills. CP 997 (“I have a Masters Degree and over 15 years work experience on three different continents”). This posturing, read against the Oregon court’s early observations of the father’s unwillingness to support his children, helps make the litigiousness of this case somewhat comprehensible. The parties cooperated in a trial period for the son relocating to Los Angeles, an agreement the father violated by seeking modification prematurely. Rather than a relatively straightforward matter of adjusting child support accordingly, the father enlarged the scope of litigation to include many matters settled in 2010 in Oregon. The mother’s efforts to streamline the litigation were fruitless. See, e.g., 1RP (08/20/13) 6 (agreeing to imputation of income). An award of fees to the mother is justified both by RCW 26.09.140 and intransigence. See, e.g., *Crosetto*, 82 Wn. App. at 583. The relitigation of issues settled in Oregon

and other of Kleymeyer's conduct noted above has unnecessarily increased the cost of this litigation.

Finally, the father seems to misapprehend the scope of the appeal, arguing that if remanded he should be permitted discovery all over again, as if the remand hearing would be a new proceeding. Br. Respondent, at 25. The mother does not have any problem being forthright about her financial circumstances (struggling small business owner with business partners), but the remand hearing would be limited to correcting the errors made on the record that was before the trial court and entry of an order on the issues presented by the petitions and motions filed previously. Given the volumes already filed, it does not seem this case needs an expanded scope.

### III. CONCLUSION

For the reasons stated above and in Appellant's Opening Brief, Amy DeVargas asks the trial court's orders of child support for be vacated and remanded and that she be awarded her fees.

Respectfully submitted this 26th day of January 2015.

/s Patricia Novotny, WSBA #13604  
3418 NE 65<sup>th</sup> Street, Suite A  
Seattle, WA 98115  
Telephone: 206-525-0711  
Fax: 206-525-4001  
Email: novotnylaw@comcast.net  
Attorney for Appellant

**NOVOTNY LAW OFFICE**

**January 26, 2015 - 3:54 PM**

**Transmittal Letter**

Document Uploaded: 5-457695-Reply Brief.pdf

Case Name: Marriage of DeVargas and Kleymyer

Court of Appeals Case Number: 45769-5

**Is this a Personal Restraint Petition?** Yes  No

**The document being Filed is:**

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

**Comments:**

No Comments were entered.

Sender Name: Patricia Novotny - Email: [novotnylaw@comcast.net](mailto:novotnylaw@comcast.net)

A copy of this document has been emailed to the following addresses:

[wmkogut@rainierconnect.com](mailto:wmkogut@rainierconnect.com)

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

In the Matter of:

AMY S. DE VARGAS  
Petitioner/Appellant

vs.

JOSHUA D. KLEIMEYER  
Respondent

NO. 45769-5-II

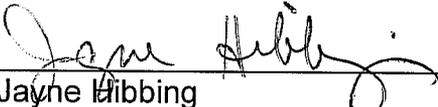
DECLARATION OF  
SERVICE

Jayne Hibbing certifies as follows:

On January 26, 2015, I served upon the following true and correct copies of the Reply Brief, and this Declaration, by email:

William Pattison Kogut  
57 W. Main Street  
Williams & Johnson P.S.  
Chehalis, WA 98532-4815  
wmkogut@rainierconnect.com

I certify under penalty of perjury that the foregoing is true and correct.

  
Jayne Hibbing  
3418 NE 65<sup>th</sup> Street, Suite A  
Seattle, WA 98115  
Tel: 206-682-1771  
Fax: 206-525-4001

**NOVOTNY LAW OFFICE**

**January 26, 2015 - 3:54 PM**

**Transmittal Letter**

Document Uploaded: 5-457695-POS 1.26.15.pdf

Case Name: Marriage of DeVargas and Kleymyer

Court of Appeals Case Number: 45769-5

**Is this a Personal Restraint Petition?** Yes  No

**The document being Filed is:**

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: \_\_\_\_\_

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: Proof of Service

**Comments:**

No Comments were entered.

Sender Name: Patricia Novotny - Email: [novotnylaw@comcast.net](mailto:novotnylaw@comcast.net)

A copy of this document has been emailed to the following addresses:

[wmkogut@rainierconnect.com](mailto:wmkogut@rainierconnect.com)