

FILED  
Court of Appeals  
Division II  
State of Washington  
8/13/2018 8:00 AM

NO. 51490-7-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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IN RE THE PARENTAGE OF A.D.

MARTIN DOMINGUEZ

Appellant

and

ANNA MARIE DEAN

Respondent.

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BRIEF OF APPELLANT

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## TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR and ISSUES .....	1
Assignments of Error .....	1
Issues Pertaining to Assignments of Error .....	1
B. STATEMENT OF THE CASE.....	2
C. SUMMARY OF ARGUMENT .....	6
D. ARGUMENT .....	8
I. IN WAIVING THE AUTHORITY OF COURT-ORDERED CHILD SUPPORT, AND FAILING TO AVAIL HERSELF OF THE COURT PRIOR TO THE CHILD’S EMANCIPATION, THE MOTHER DID NOT GIVE THE FATHER NOTICE OF HER INTENT TO SEEK POST SECONDARY SUPPORT ....	8
II. THE STANDARD OF REVIEW FOR ISSUES OF LAW IS DE NOVO.....	9
III. THE SUPERIOR COURT IS NOT LEGALLY AUTHORIZED TO MODIFY AN ADMINISTRATIVE ORDER OF CHILD SUPPORT .....	10
A. The relationship between the superior court and the administrative agency in matters of child support occurs in two ways— administrative appeal through the APA, chapter 34.05 RCW, and entry of a superseding order of support .....	10
1. Administrative appeal.....	10
2. An administrative order of child support may only be modified by hearings before former DCS .....	11
3. The superior court may supersede an administrative order of child support .....	12
4. What does not exist cannot be modified or superseded .....	12
B. The superior court lacked jurisdiction to enter a post secondary support order after the child turned 18 and was emancipated .....	13

IV. MR. DOMINGUEZ WAS NOT PROPERLY SERVED UNDER RCW 26.09.175 .....	14
V. APPELLANT IS ENTITLED TO ATTORNEYS FEES ON APPEAL.....	15
E. CONCLUSION.....	16
F. APPENDIX	
Email from clerk.....	Appendix A

## TABLE OF AUTHORITIES

### Washington Cases

Anthis v. Copland, 173 Wn.2d 752, 270 P.3d 574 (2012) . . . . .	10
Balch v. Balch, 75 Wn. App. 776, 880 P.2d 78 (1994) . . . . .	8
Cook v. Clallam Cy., 27 Wn.2d 793, 180 P.2d 573 (1947) . . . . .	15
In re MacGibbon, 139 Wn. App. 496, 161 P.3d 441 (2007). . . . .	10
In re Marriage of Aldrich, 72 Wn. App. 132, 864 P.2d 388 (1993) . . . . .	11
In re Marriage of Cota, 177 Wn. App. 527, 312 P.3d 695 (2013) . . . . .	9
In re Marriage of Fiorito, 112 Wn. App. 657, 50 P.3d 298 (2002). . . . .	10
In re Marriage of Gimlett, 95 Wn.2d 699, 629 P.2d 450 (1981) . . . . .	9
Marriage of Herridge, 169 Wn. App. 290, 279 P.3d 956 (2012). . . . .	10
Rains v. Dep't of Soc. & Health Servs., 98 Wn. App. 127, 989 P.2d 558 (1999) . . . . .	8
Thorgaard Plumbing & Heating Co. v. King Cty., 71 Wn.2d 126, 426 P.2d 828 (1967) . . . . .	15
Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 858 P.2d 1054 (1993). . . . .	10

### Washington Statutes

RCW 26.09 . . . . .	14
RCW 26.09.140 . . . . .	15
RCW 26.09.170 . . . . .	14
RCW 26.09.170(3) . . . . .	7, 13
RCW 26.09.175 . . . . .	14
RCW 26.09.175(2) . . . . .	14
RCW 34.05 . . . . .	10
RCW 34.05.574(1)(b). . . . .	10
RCW 74.20A.010 . . . . .	15

RCW 74.20A.055(7)..... 11  
RCW 74.20A.059(1)(a) ..... 11  
RCW 74.20A.05 9(8) ..... 11

**Washington Administrative Code**

WAC 388-14..... 14  
WAC 388-14A-3925(2) ..... 11

**Other Authorities**

BLACK'S LAW DICTIONARY 1479 (7th ed.1999)..... 12

## **A. ASSIGNMENTS OF ERROR and ISSUES**

### **Assignments of Error**

1. The court erred in ruling that the superior court had authority to modify (as opposed to supercede) an administrative child support order. CL 2, CP 135
2. The court erred in finding the Petition not the first action filed in this state withing the meaning of RCW 26.44.175. FF 9, CP 135
3. The court erred in ruling Petitioner's service of the Petition to Modify Child Support Order was proper under RCW 26.09.175. CL 1, CP 135
4. The court erred in ruling the Superior court has jurisdiction to modify an administrative child support order even if the order terminates before the Superior court order is entered but after the Petition to Modify is filed. CL 3, CP 135-36
5. The court erred in ruling the Superior court has jurisdiction to set post-secondary support in this case. CL 5, CP 136
6. The court erred in ruling, if it did, that the child's prior emancipation was not relevant to the issues of the case. CP 160, CP 136

### **Issues Pertaining to Assignments of Error**

1. Whether the Superior court has authority to modify an administrative child support order?
2. Whether a child support order that has terminated by its terms can be subsequently be modified?
3. Whether the Superior court has authority to set post secondary support after the child is emancipated where there is no written agreement and there is no decree in which it is expressly provided?
4. Whether a superior court cannot modify an administrative order because it would be a violation of the separation of powers?
5. Whether there is statutory authority fo a superior court to modify an administrative order of child support?
6. Whether the administrative child support order was valid after the child's 18<sup>th</sup> birthday when there was no court-ordered child support?
7. Whether the appellant is entitled to attorney fees?

## **B. STATEMENT OF THE CASE**

### **Original Parenting Plan Action**

On December 14, 2006, the attorney for Petitioner Anna Dean, nka Morales, filed a Petition for Parenting Plan signed by both Ms. Dean and her attorney, CP 2-6, along with the joinder of pro se Respondent Martin Dominguez, CP 1. An Agreed Temporary Parenting Plan, also signed by Mr. Dominguez, was signed and presented by Ms. Dean's attorney. It was signed by the judge and filed the same day. *Id.*

Par. 1.6 of the Petition, CP 4, entitled CHILD SUPPORT, stated:

Support and health insurance coverage for the minor children has been determined administratively by the Division of Child Support and the Petitioner does not want the court to address child support.

The court thus never addressed support or insurance.<sup>1</sup>

Two months earlier, on October 11, 2006, the Division of Child Support had sent Mr. Dominguez a Notice and Finding of Financial

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<sup>1</sup> The person drafting the Petition for Parenting Plan included in the Relief Requested portion the following language, which must have been a mistaken failure to remove boilerplate form language in light of the specific language of Paragraph 1.6 set forth above, CP 5:

The court is requested to enter an order that

Determines support for the dependent children pursuant to the Washington State Support Schedule and either or both parents be ordered to maintain or provide health insurance coverage for the children and pay extraordinary uninsured costs proportionate to their income.

Responsibility (the Notice), CP 24–30, which set current and past-due child support. The Notice also stated that it would become a “final child support order” if a hearing was not requested. CP 24. Petitioner claims, and Respondent does not dispute, that the Notice in fact became the final administrative child support order.<sup>2</sup> Under the heading of “Order Duration,” CP 28, the order states in relevant part as follows:

If this notice becomes a final child support order, the current child support and health insurance requirements listed continue each month until one of the following occurs. . . .

3. A child reaches 18 years of age. This rule does not apply to a child who is under 19 years of age and is a full-time student in a secondary school program . . .

A settlement conference was ultimately held on February 9, 2009, resulting in a handwritten CR 2A Agreement filed the same day, signed by a settlement conference judge. CP 7–8. The CR 2A Agreement adopted the Agreed Temporary Parenting Plan, with several agreed changes unrelated to child support, CP 8, as the Final Parenting Plan. There was nothing in the CR 2A agreement, or in any other writing since the filing of the Petition for Parenting Plan, 2–6, about child support.

The child turned 18 on April 23, 2017. CP 77. No later than 2:00 on June 14, 2017, the time her final high school class ended on the final class

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<sup>2</sup> On June 14, 2017, Petitioner submitted the Notice, designated DCS Child Support Order, CP 23, along with her purported Petition to Modify Child Support Order. CP 35–39.

day for graduating seniors at River Ridge High School, the child had obtained signatures from all her teachers that she had successfully completed all her classes (or at least all her classes necessary for graduation) and had met all requirements to finish her educational program. *Id.*, CP 83, 85.

### **Petition to Modify Child Support Order**

After 2:00 p.m. on June 14, 2017 the mother filed her Petition to Modify Child Support Order. CP 80, n. 3; 83.<sup>3</sup> The mother submitted with the Petition the Declaration of Anna Moralez, CP 9–12, but it contained no allegation the parties had made any written agreement to extend child support beyond the emancipation of the child. Nor does any such agreement exist in the file. Also filed with the petition was a cover sheet entitled DCS Child Support Order to which was attached “A copy of the original child support order from the Division of Child Support entered October 11, 2006.” CP 23.

The Petition to Modify was sent by first class mail, return receipt requested, addressed to Mr. Dominguez at his place of business, Oskar’s

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<sup>3</sup> See also Appendix A, Email from Clerk’s office. Counsel’s declaration statement that the Petition was filed after 2:00 p.m. on June 14, 2017, CP 83, was accurate, though the email from the clerk’s office so stating was not attached. Counsel made the assumption that the time would be accessible to the judicial officer in the computerized court record. CP 80, n. 3. As it turned out, the undersigned learned at the hearing that the judicial officer was not able to access the time of filing, and the undersigned has since learned that it is apparently no longer available to the clerk as well. Appendix A shows that the Petition was filed at 2:09:38 p.m. and the first document filed with it was filed at 2:05:34 p.m.

German Deli, at 720 Sleater-Kinney Rd SE, Lacey, WA 98503. CP 84, 53.

Mr. Dominguez resides in Olympia at an address known to Ms. Morales. CP

86. The mail was not signed for by Mr. Dominguez, nor did he authorize the person who signed it to do so. CP 84, 86.

Mr. Dominguez' attorney filed a Notice of Appearance on July 7, 2017, stating in part, CP 77:

without waiving objections as to lack of jurisdiction over his person, . . . insufficiency of process or insufficiency of service of process.

A Response to Petition was filed September 18, 2017, alleging in relevant part, CP 57:

The administrative finding/order of child support was not issued by a Washington state court. . . . The Superior Court has no authority to modify an administrative finding/order. The administrative finding/order had no jurisdiction or authority to order post-secondary support and it did not do so. There was no written agreement to continue support beyond the emancipation of the child. There was no "decree" entered, nor was post-emancipation support expressly provided in the administrative finding/order, even if such were considered to be a decree. And the CR 2A agreement did not address support in any way whatsoever. Both parents are bound to the terms of the CR 2A agreement. The obligation to provide support thus ended as set forth in the administrative finding/order. See RCW 26.09.170(3).

The court commissioner denied the motion, CP 137–40, entering Findings of Fact and Conclusions of Law, CP 134–36, and a final Child Support Order. CP 141–150, 151–155.

The court commissioner found the Petition to Modify, CP 35–39, was not the first action filed in the state within the meaning of RCW 26.44.175 and concluded service was proper. CP 135, FF 9. The commissioner also held the Superior court had jurisdiction to modify an administrative child support order, and even if the order terminates before the Superior court order is entered but after the Petition to Modify is filed. CP 135–36, CL3. The commissioner found the child, who turned 18 on April 23, 2017, was still dependent until she graduated from high school. CP 135, FF 5, concluding the child was not emancipated within the meaning of RCW 26.09.170(3) at the time the Petition to Modify was filed June 14, 2017. CP 136, CL 4.

The appellant herein timely filed for revision, CP 156–59, but the motion was denied by the judge, except that Conclusion of Law 4 (that the 18-year-old child was not emancipated for the purpose of RCW 26.09.170(3)) was stricken as not relevant. CP 160. This appeal timely followed. CP 161.

### **C. SUMMARY OF ARGUMENT**

Absent statutory authority, of which there is none in this case, a superior court may not modify an administrative order. While both superior court and former DSHS (DCS) had the subject matter jurisdiction to enter orders of child support, the interrelation between the two is clearly defined by statute and separation of powers.

Respondent mother chose at the outset to pursue child support administratively, waiving the option to have superior court order support.

Appellant father was in agreement and signed a joinder of the initial “Petition for Parenting Plan” from which the mother explicitly excluded child support for their three children. CP 24. There was also no written agreement and the father relied on the October 11, 2006 administrative order which set the child’s meeting the requirements for completion of the high school program as the point at which his support obligation would end.

There were apparently no issues regarding the oldest two children, who both turned 18 within three years of the mother’s filing the Petition. CP 24, 2. And as of April 23, 2017, when the youngest child turned 18 and was emancipated, the mother had still sought no court order of support to supersede the 2006 administrative order. The third child completed the requirement of her high school program as of 2:00 p.m on June 14, 2017. Within minutes, the mother filed a petition in superior court purporting to seek modification of the administrative order. She walked in graduation on June 16, 2017. CP 86.

It is clear why the mother sought to modify the administrative order—it may still have been in effect (if graduation was its endpoint). Unfortunately, RCW 26.09.170(3) states that absent written agreement or a decree of support (in superior court), provisions for support terminate upon the child’s emancipation. The mother could thus no longer seek to establish post secondary support in court after the child emancipated. Her only option was to claim that she could modify the administrative order in superior court. However, assuming the order was still in effect when she filed after 2:00 p.m.

on June 14, it had clearly terminated by the graduation ceremony on June 16. As of that point there was no longer anything to modify, even if a court could modify an administrative support order.

Engaging in what seems to be a jurisdictional illusion, the court granted the mother's petition and entered an order of post secondary support.

#### **D. ARGUMENT**

I. IN WAIVING THE AUTHORITY OF COURT-ORDERED CHILD SUPPORT, AND FAILING TO AVAIL HERSELF OF THE COURT PRIOR TO THE CHILD'S EMANCIPATION, THE MOTHER DID NOT GIVE THE FATHER NOTICE OF HER INTENT TO SEEK POST SECONDARY SUPPORT.

The mother was clear and explicit in her "Petition for Parenting Plan." She did "not want the court to address child support." CP 4. The Petition was signed by the mother's attorney on October 20, 2006, and the father signed a joinder on the same day. CP 1. The father thus agreed with the mother that child support had already "been determined administratively by the Division of Child Support," CP 4, which indicates he did not challenge the Notice and Finding of Financial Responsibility dated nine days earlier on October 11. CP 24-30. Mr. Dominguez was entitled to rely on the mother's choice, that support would end when the children finished high school. CP 28.

In determining whether the child support order authorizes an award of postsecondary educational support, we look to whether "the support-paying parent has notice that the support obligation will extend past the age of majority." *Rains v. Dep't of Soc. & Health Servs.*, 98 Wn. App. 127, 137, 989 P.2d 558 (1999) (citing *Balch [v. Balch]*, 75 Wn. App. [776,] 780, 880 P.2d 78 [(1994)]). The

rationale for requiring postmajority support to be expressly provided in a decree is that the support-paying parent must be “given advance notice of the termination date or event, rather than being forced to wait for some elusive or fortuitous date of the dependency cessation.” [*In re Marriage of*] *Gimlett*, 95 Wn.2d [699,] 703, 629 P.2d 450 [(1981)].

*In re Marriage of Cota*, 177 Wn. App. 527, 534, 312 P.3d 695 (2013). While *Cota* dealt with a court order, the mother’s reliance on the administrative order nevertheless gave the father advance notice of the termination of support when the youngest child completed high school.

The mother’s attempted end run around the statutes contravenes the purpose of notice. She could have still sought a superseding court order before April 23, 2017 when the child became emancipated. Her failure to do so let the father know that there would only be a few more months of support, leaving him more financially able to concentrate on his business, CP 106–14, and his other four minor dependents. CP 104.

## II. THE STANDARD OF REVIEW FOR ISSUES OF LAW IS DE NOVO.

The trial court’s primary error was holding that the superior court could modify and administrative order of child support.

We review a trial court’s decision setting child support for abuse of discretion. A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; . . . it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

*In re Marriage of Fiorito*, 112 Wn. App. 657, 663–64, 50 P.3d 298 (2002).

[A] court necessarily abuses its discretion where it bases its ruling “on an erroneous view of the law.” *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). We review questions of law de novo. *Anthis v. Copland*, 173 Wn.2d 752, 755, 270 P.3d 574 (2012).

*Marriage of Herridge*, 169 Wn. App. 290, 296–97, 279 P.3d 956 (2012).

III. THE SUPERIOR COURT IS NOT LEGALLY AUTHORIZED TO MODIFY AN ADMINISTRATIVE ORDER OF CHILD SUPPORT.

A. The relationship between the superior court and the administrative agency in matters of child support occurs in two ways—administrative appeal through the APA, chapter 34.05 RCW, and entry of a superseding order of support.

**1. Administrative appeal.**

It was obvious from the mother’s Petition that, in waiving her opportunity to have the court enter an order (with no doubt the advice of her attorney), she was satisfied with the administrative order of child support. She thus had no interest in challenging the administrative order by seeking review in superior court pursuant to the Administrative Procedure Act, chapter 34.05 RCW. But even had she sought such review no later than October 31, 2007, the court could not have modified the order.

A court reviewing agency action under the APA has authority only to affirm, reverse, or remand administrative proceedings to the agency. [Fn: RCW 34.05.574(1)(b).] A reviewing court has no authority to modify an agency’s decision. [Citation omitted.]

*In re MacGibbon*, 139 Wn. App. 496, 503–04, 161 P.3d 441 (2007)

(footnotes omitted). RCW 34.05.574(1)(b) states in relevant part:

In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency.

A party “is entitled to seek a *new* superior court child support order that would have superseded DSHS’s administrative order on a prospective basis. See RCW 74.20A.055(7).” *In re Marriage of Aldrich*, 72 Wn. App. 132, 139, 864 P.2d 388 (1993) (emphasis added). RCW 74.20A.055(7) states:

The final administrative order establishing liability and/or future periodic support payments shall be superseded upon entry of a superior court order for support to the extent the superior court order is inconsistent with the administrative order.

**2. An administrative order of child support may only be modified by hearings before former DCS.**

The procedure for modification of administrative orders of support is set forth in RCW 74.20A.059(8): “The responsible parent or the physical custodian *shall follow* the procedures in this chapter for filing an application for an adjudicative proceeding to petition for modification.” (Emphasis added.) RCW 74.20A.059(1)(a) states:

(1) The department, the physical custodian, or the responsible parent may petition for a prospective modification of a final administrative order if: (a) The administrative order has not been superseded by a superior court order;

*See also* WAC 388-14A-3925(2) **Who can ask to modify an administrative support order?** “The petitioning party must file the request for modification

with DCS.” Thus, a party wishing to modify an administrative order may only bring the petition in the administrative agency.

**3. The superior court may supersede an administrative order of child support.**

The authority of the superior court relative to an administrative order of support does not exist to modify the order. That can only be done administratively. What the superior court can do is to exercise its independent authority to enter a new order, which automatically supersedes the administrative order. Unlike modification, which operates on the same order, superseding deals with two separate things. According to BLACK’S LAW DICTIONARY 1479 (7th ed.1999), supersede is defined: “To annul, make void or repeal by taking the place of.” Something that supersedes is different from that which it supersedes. The superior court has authority independent of the administrative agency to establish a child support order.

**4. What does not exist cannot be modified or superseded.**

An analogous situation would be a life estate. A person can convey a life estate for only so long as he or she lives. Thereafter the estate reverts to the remaindermen. Similarly, since the administrative order lasted only so long as the child was in high school, even if the superior court could modify that order, there would be nothing to modify after the child graduated. Nor would there be anything to supersede. Another analogy would be failure of

consideration. In the present case, the superior court order was not entered until well after the child completed her course of high school study. CP 141.

B. The superior court lacked jurisdiction to enter a post secondary support order after the child turned 18 and was emancipated.

Once it is recognized that the superior court has no authority to modify an administrative support order but must exercise its own authority if it is to supersede an administrative order, it is necessary to determine whether the superior court had the authority in the present case to enter a post secondary support order. Since the superior court could not modify the administrative order, did it have the authority to supersede it even after the order had terminated?

Since the authority of the superior court is independent of the agency, RCW 26.09.170(3) then becomes relevant.

Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child . . .

There is no agreement, written or otherwise, between the parties. The CR 2A agreement which established the parenting plan did not address support. CP 7-8. Nor is there a decree of child support because the mother explicitly chose to exclude the issue of child support from the superior court order. Because there was no decree, there was no order that authorized or reserved the issue of child support beyond the child's majority.

The language of RCW 26.09.170 does not quite apply in this case because there never was a court order of child support. It would, however, be an absurd result to say that the absence of a child support order authorized the court to order post secondary support when the petition is not filed until after emancipation.

IV. MR. DOMINGUEZ WAS NOT PROPERLY SERVED UNDER RCW 26.09.175.

RCW 26.09.175(2) states in relevant part:

If the modification proceeding is the first action filed in this state, service shall be made by personal service. If the decree to be modified was entered in this state, service shall be by personal service or by any form of mail requiring a return receipt. Proof of service shall be filed with the court.

It has been shown that the administrative order could not be modified by the superior court. More importantly for this action, there was no child support decree entered in this state because the mother chose not to have the court enter a child support order. The term “decree” implies an order of the court, and there are 106 instances of the word in chapter 26.09 RCW. On the other hand, chapter 388-14A WAC uses the term “order” 63 times but never the word “decree”. Thus, service by mail was inappropriate because there was no decree of child support entered in this state.

In addition, the mother’s petition is the first action in the state regarding child support. An administrative proceeding is not an action. The case of

*Thorgaard Plumbing & Heating Co. v. King Cty.*, 71 Wn.2d 126, 130–32, 426 P.2d 828 (1967)(footnotes omitted) discussed the meaning of “action” as follows, clarifying that an arbitration is not an action.:

An *action* is a prosecution *in a court* for the enforcement or protection of private rights and the redress of private wrongs. [Citations omitted.] It is clear that by using the word ‘action’ in the foregoing section the legislature had a *lawsuit* in mind. This is consistent with RCW 4.04.020, which provides:

There shall be \* \* \* but one form of *action* for the enforcement or protection of private rights and the redress of private wrongs, which shall be called a civil *action*. (Italics ours.)

Thus the legislature has prescribed the conditions under which a county may be sued. *Cook v. Clallam Cy.*, 27 Wn.2d 793, 180 P.2d 573 (1947). If one intends to bring an action (e.g., a lawsuit) against a county, he must do so in the manner provided by RCW 36.45.010. However, this has nothing to do with a statutory arbitration proceeding.

The court went on to point out that arbitration is a substitute for litigation. In the same way, RCW 74.20A.010 states that litigation is “slow and inadequate” for child support and that the administrative process would augment the courts. Therefore the administrative proceeding was not an “action” and the summons and petition should have been personally served on Mr. Dominguez rather than mailed.

#### V. APPELLANT IS ENTITLED TO ATTORNEYS FEES ON APPEAL.

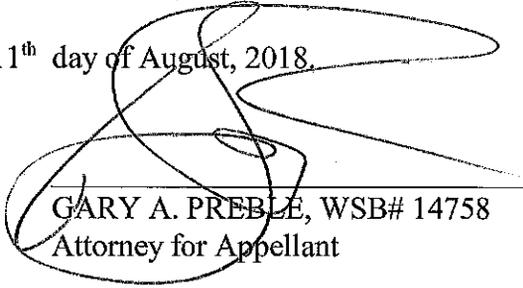
RCW 26.09.140 says the appellate court may in its discretion order a party to pay the attorneys fees of the other. This matter comes before the court because of the choices of the mother, resulting in her attempt have the

superior court modify an administrative order without any authority and even when the administrative order had terminated. The statute also authorizes payment of fees below.

#### **E. CONCLUSION**

Based on the foregoing, Mr. Dominguez requests the appellate court to reverse all orders entered below, order the mother to pay his attorneys fees, and remand the matter to superior court for an order of attorney fees and for reimbursement of all fees paid on the child support order.

Respectfully submitted this 11<sup>th</sup> day of August, 2018.



GARY A. PREBLE, WSB# 14758  
Attorney for Appellant

**Subject:** RE: In re Anna Dean & Martin Dominguez; 06-3-01345-1  
**From:** Alisa Everson <eversoa@co.thurston.wa.us>  
**Date:** 9/20/2017 5:03 PM  
**To:** "Gary A. Preble" <gary@preblelaw.com>

The first document filed in the e-filing system on that day was the Confidential Information Form, which was filed at 2:05:34 p.m

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**From:** Gary A. Preble [mailto:gary@preblelaw.com]  
**Sent:** Wednesday, September 20, 2017 4:38 PM  
**To:** Alisa Everson <eversoa@co.thurston.wa.us>  
**Subject:** Re: In re Anna Dean & Martin Dominguez; 06-3-01345-1

Alisa:

I saw that several other documents were filed with the Petition on June 14.

Can you also let me know the time the first document was filed in the case that day?

Thanks.

Gary

On 9/20/2017 11:25 AM, Alisa Everson wrote:

Good morning, Gary!

The time of filing of the Petition to Modify Child Support Order on June 14, was 2:09:38 p.m.

If you need anything else, feel free to contact me.



**Alisa J. Everson**, Services Manager  
Thurston County Clerk's Office  
(360) 360/786-5435  
[eversoa@co.thurston.wa.us](mailto:eversoa@co.thurston.wa.us)  
[www.co.thurston.wa.us/clerk](http://www.co.thurston.wa.us/clerk)

**APPENDIX A - 1 of 1**

**PREBLE LAW FIRM, P.S.**

**August 11, 2018 - 8:57 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51490-7  
**Appellate Court Case Title:** In re the Parentage of A.D.  
**Superior Court Case Number:** 06-3-01345-1

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