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No. 51490-7-II

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

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**IN RE THE PARENTAGE OF A.D.**

MARTIN DOMINGUE  
Appellant

and

ANNA MARIE DEAN  
Respondent.

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**REPLY BRIEF OF RESPDENT/APPELLEE**

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**I. RESPONSE TO STATEMENT OF THE ISSUES**

Did the Superior Court have jurisdiction/authority to set postsecondary educational support?

Was mother's request of postsecondary educational support in Superior Court timely?

Was the father properly served?

**II. STATEMENT OF THE CASE**

**1) *Administrative Child Support Order.***

On or about October 11, 2006, the Division of Child Support sent Respondent Martin Dominguez a Notice and Finding of Financial Responsibility (the Notice), CP 24-30, which appears to have later become the final administrative child support order pursuant to its own terms. CP 24, 27, 134. Under the heading "Order Duration," CP 28, Mr. Dominguez was placed on notice that child support would continue until one of the following occurred:

2. A state...court order supercedes the order....
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

**2) 2006 Petition for Parenting Plan and Child Support**

Desiring to address matters through Superior Court, on December 14, 2006, Petitioner Anna Dean (nka Moralez) commenced the underlying action in Thurston County Superior Court by filing a pleadings entitled "Petition for Parenting Plan," CP 2-6 (the then-pattern form WPF PS 15.0100, as shown in its footer). Substantively, the body of the Petition requested that the court address both a parenting plan *and* child support, although the Petition contains some conflicting language on the issue of support. On the one hand, Par. 1.6 of the Petition, CP 4, entitled "Child Support" contains the following boilerplate language from the pattern form:

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.

Even so, the "Relief Requested" section of the Petition, CP 5, specifically pled as follows:

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.

**3) *Father Files Joinder***

Before Ms. Morales filed her Petition, Respondent Martin Dominguez reviewed the same and signed a Joinder that was filed the same day as the Petition. The Joinder, CP 1, states in relevant part:

The Respondent, Martin Dominguez, has read the petition and joins in it. The Respondent understands that by joining in the petition, a decree may be entered in accordance with the relief requested in the petition, unless prior to the entry of the decree a response is filed and served.

An Agreed Temporary Parenting Plan, signed also by Mr. Dominguez, was submitted the same day as as mother's Petition and father's Joinder, and was signed by the court.

**4) *2009 CR 2A Agreement***

The case sat dormant for more than two years until, following a settlement conference held on February 9, 2009, the parties signed and filed a handwritten CR 2A Agreement to the court. CP 7-8. In that Agreement, the parties contracted with each other to adopt the 2006 Temporary Parenting Plan as their final agreed residential schedule (subject to a few agreed changes). The parties either chose not to address, or could not agreed upon, child support-related issues at the settlement conference, as evidenced by the silence of the CR 2A Agreement on the topic of child support. No

final parenting plan was entered, nor were any order entered rendering the CR 2A Agreement the order of the court.

***5) Procedural Posture of Case in 2017***

Other than the Agreed Temporary Parenting Plan filed with mother's Petition on December 14, 2006, it appears undisputed that no orders (agreed or litigated) were entered in this case at all until the the recent 2017 orders establishing support for postsecondary education. CP 137-155. That includes the absence of any order dismissing the case due lack of the parties prosecuting the matter diligently. Thus, the case apparently sat dormant and open until the recent activity in connection with postsecondary educational support.

***6) Mother Finally Addresses Postsecondary Educational Support in Superior Court in 2017***

The child turned 18 on April 23, 2017, but did not graduate from high school until June 16, 2017, as set forth in the court's Findings of Fact and Conclusions of Law drafted by father's attorney, CP 135, FF 5, 6. See also father's acknowledgement of that date at CP 86.

On June 14, 2017, in between the time of her daughter's 18<sup>th</sup> birthday and her graduation, Ms. Morales filed a pleading entitled "Petition to Modify Child Support Order" (pattern form WPF PS 15.0100, as shown

in its footer). As with her 2006 Petition, there was some contradiction and ambiguity in the body of the form.

For instance, Par. 3, CP 36, states, “The court has authority to modify the current Child Support Order because it was issued by a Washington state court,” but Par. 5 indicates that “The Child Support Order I want to modify was signed by the DCS officer on 10/11/2006 in Thurston, WA....” What is abundantly clear, however, is that the focus of Ms. Moralez’ request was that the court order postsecondary educational support, as is shown in the detailed request in Par. 8. CP 37.

Mr. Dominguez filed a Response to Petition on September 18, 2017, CP 56-58, in which he raised essentially the same arguments currently before the court on appeal. In Par. 3 of his Response, CP 58, Mr. Dominguez stated that mother did not specifically “request post-emancipation support in the original action” (referring, it seems, to the 2006 Petition); however, he did not go so far as to state that the issue of child support in general was not invoked by Ms. Moralez (and therefore remained before the court) in her original Petition. He later filed a CR 12(b)(6) motion to dismiss on the grounds he raises on appeal.

***7) Final Child Support Order In Superior Court***

On December 5, 2017, the court heard arguments on father’s CR 12(b)(6) motion, and arguments on the merits of of postsecondary support.

That same day it entered Findings of Fact and Conclusions of Law, CP 134-136, drafted by father's attorney, together with a Final Order and Findings on Petition to Modify Child Support Order, CP 137-140, and Final Child Support Order, CP 141-155, all in mother's favor with respect to postsecondary educational support. Father sought Revision, CP 156-159, which was otherwise denied except for the striking of Conclusion of Law #4 (the court finding it to be irrelevant). CP 160. Father then appealed.

### III. ARGUMENT

The trial court properly awarded postsecondary educational support because the mother requested that the Superior Court address child support in her 2006 Petition, or in any event before the administrative order terminated, and service on father was proper.

**A. MOTHER'S REQUEST FOR POSTSECONDARY EDUCATIONAL SUPPORT IN SUPERIOR COURT WAS IN THE PROPER FORUM AND TIMELY BECAUSE SHE INVOKED THE COURT'S JURISDICTION IN HER 2006 PETITION AND BECAUSE SHE REQUESTED IT BEFORE FATHER'S OBLIGATION TERMINATED UNDER THE ADMINISTRATIVE ORDER.**

**1) *Superior Court Alone May Establish Postsecondary Educational Support.***

It is undisputed that Superior Court has the authority to establish child support. In addition, *only* the Superior Court has jurisdiction to order postsecondary educational support, as governed and guided by the

standards set forth in RCW 26.19.090. See also *In re Kelly*, 85 Wash.App. 785, 790, 934 P.2d 1218 (1997) (citing *Childers v. Childers*, 89 Wash.2d 592, 605, 575 P.2d 201 (1978)). Moreover, there is no statute, administrative code, or other Washington law authorizing the Washington State Department of Social and Health Services/Division of Child Support to award postsecondary educational support. Therefore, Ms. Morales approached the only forum wherein her requested relief *could* be granted.

It would have been an exercise in futurity for Ms. Morales to pursue the administrative appeal/modification process outlined by Mr. Dominguez in his brief. Had she done so she would have been turned away due to the Division of Child Support lacking jurisdiction and authority to award postsecondary educational support. Instead, after obtainin an administrative order initially, Ms. Morales then filed her 2006 action in superior court asking the court to address a parenting plan *and* child support. The request at the time was general. In 2017, Ms. Morales, filing into an open and unresolved case, followed up with a specific and clarifying request for the court to award postsecondary educational support.

**2) *Mother Asked Superior Court to Address Child Support in Her 2006 Petition.***

It is important to analyze mother's original 2006 Petition and the procedural posture of the case by the time of her 2017 pleadings. As set both

parties acknowledge, there is a clear provision requesting child support in the 2006 Petition (e.g. the court is requested to determine support for the dependent children). CP 5. Father footnotes his acknowledgment of this request on page 2 of his brief, but dismissively opiones that the request for child support “must have been a mistaken failure to remove boilerplate form language.”

On the other hand, the language in Par. 1.6 of the Petition that father relies heavily on (e.g. that support had been determined administratively and mother is not requesting the court to address child support) is also boilerplate pattern form language. It can just as easily have been the mother’s oversight in not removing that provision, or it could be construed as language the mother perceived as a mere recitation of facts (e.g. there was, in fact, an existing administrative support order).

When father signed and returned his Joinder for filing, CP 1, he did so knowing the affirmative request for child support was present. He was, therefore, on notice at least that the Superior Court *could and might* at some future date address child support through a court order, including for postsecondary educational support. To construe this differently would be to completely set aside the father’s Joinder, in which he stated he had “*read* the petition, “*joins* in it,” and “*understands* that by joining in the petition a *decree may be entered in accordance with the relief requested* in the

petition, *unless* prior to the entry of a decree a response is filed and served.” He never filed a response, and averred that he understood the consequences. (Arguably, Ms. Moralez, on the basis of his Joinder, might have appropriately sought a final order of child support without additional notice to Mr. Dominguez, which she nevertheless provided by mail with her 2017 pleadings).

Because Ms. Moralez invoked the court’s jurisdiction and authority to address child support in her 2006 Petition, and because the case remained an open case, without final orders or an order dismissing the action for lack of prosecution, the issue was preserved and her renewed request for a child support order (including for postsecondary educational support) should not be time barred because the child had already turned 18. The request was made long before then, and father was put on notice of the possibility.

### ***3) Use of Incorrect Form in 2017 Was Harmless Error***

Mr. Dominguez goes to great lengths to persuade the court on appeal that, because mother filed a “Petition to Modify Child Support Order” in 2017 using the current pattern form, the trial court erred in awarding postsecondary educational support because it lacks authority to modify an administrative order. However, this is an argument of form over substance, and Washington courts have held that the form of a request for postsecondary support should does not annul the court’s jurisdiction.

In case of *In re Marriage of Morris*, 176 Wn.App. 893, 309 P.3d 767 (2013), the day before child support was to terminate as to the oldest of the parties' two children, a mother filed a motion for adjustment to establish previously reserved postsecondary support. The commissioner denied mother's request upon finding that her filing of a motion for adjustment rather than a petition for modification rendered the court without jurisdiction. The trial judge revised the commissioner's decision and father appealed. On appeal the court began by reciting the trial court's "broad equitable powers in family law matters." 176 Wn.App. at 903-904. The court held that the mother's use of an incorrect pattern form (a "motion" rather than a "petition") was "harmless error." *Id.* at 902-904. In rejecting the father's insistence that the mother mischaracterized the nature of the request through her use of an incorrect form, the court went on to explain as follows:

The practical consequence of Morris's argument would be to foreclose [the mother] from seeking postsecondary educational support for their oldest daughter because she is older than 18, and has graduated from high school, and support has terminated. The trial court characterized Morris's argument as a "gotcha" defense. He did not dispute that his daughter was an excellent student or that she should attend the University of Washington.... The equities strongly favor affirming the trial court's disregard of the erroneous choice of forms....

*Id.* at 904.

In this case, to the extent that father's theories serve to preclude her from obtaining the substantive relief she seeks (postsecondary support), the court should look past Ms. Morales' use of a Petition to Modify Child Support and focus on the substance of her request. She requested that postsecondary educational support be reviewed and established by Superior Court.

Ms. Morales' timely requested that the court address child support via her 2006 petition, and the substance of her 2017 request clarified and extended it to provision of postsecondary support for her daughter. While Ms. Morales may not have presented proof of any preservation *language* providing for postsecondary educational support (such as through evidence of an agreement of the parties or an earlier temporary or final court order) she certainly preserved the *issue* for the court to address in her 2006 Petition. To hold otherwise would similarly validate this father's "gotcha" defense as well.

***4) The Court Had Jurisdiction Order Postsecondary Support in 2017 Because Mother Requested Such Before the Child Graduated From High School.***

Even if the court does not agree that Ms. Morales preserved her right to address postsecondary support through her 2006 Petition, her 2017 request was nevertheless timely and the court had jurisdiction because she

filed the same before the child graduated and the father's support obligation terminated.

Mr. Dominguez acknowledges on page 12-13 of his brief that "the superior court can...exercise its independent authority to enter a new order, which automatically supersedes the administrative order." He goes on to argue, however, that the superior court lacked authority to enter a postsecondary order in 2017 "after the child graduated" and therefore "after the [administrative] order had terminated."

To support this argument, Mr. Dominguez cites RCW 26.09.170(3), which he says "becomes relevant" in this case:

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.

On page 13 of his brief, however, father goes on to acknowledge that the language of this statute "does not quite apply in this case because there never was a court order of child support." He is correct that the statute does not apply in this case.

Here, the administrative order of child support itself defined when the child emancipated for purposes of the termination of Mr. Dominguez support obligation. As discussed previously, under the heading "Order Duration," CP 28, Mr. Dominguez was placed on notice that child support would continue until one of the following occurred:

1. A state...court order supercedes the order....
  
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

Since no court order for postsecondary support was issued before the child turned 18 and graduated, the first provision does not apply. We therefore look to provision #3 of the administrative order, which would have terminated father's support obligation when the child turned 18 – *unless* she was still in high school at the time, in which case the obligation continued until graduation or she turned 19, whichever came first. Of course this issue is a major point of dispute in this case, since, as father argues, his daughter *finished all classes* necessary for graduation *before* her actual graduation/diploma date on June 16, 2014. Consequently, he argues, his obligation under the administrative order should have ended on June 14, 2017 at 2:00 p.m., the time father argues his daughter completed all her her necessary classes.

To support this argument, father's attorney submitted a declaration to the trial court containing *acknowledged hearsay* concerning his contact with a school official about the daughter's classes. From that discussion, father's attorney states as follows:

Since the child walked in graduation on Friday, June 16, 2017, *it is my presumption* that she obtained signature from all her teachers that she received passing grades....*I*

*further presume* that she would have received those signatures prior to 2:00 p.m. on June 14, 2017 [the supposed time the last class let out].

(Emphasis and brackets added).

Unfortunately, given the complete lack of any admissible evidence about the timing of the daughter's course completion, the father's argument fails in regard to his obligation not extending beyond age 18 or until his daughter graduates. Consequently, the trial court correctly determined the following in Par. 24 of its in the December 5, 2017 Final Child Support Order, CP 149:

The child graduated High School and completed all necessary educational requirements *as of the date of graduation when she was handed her diploma.*

(Emphasis added).

Again, it is conceivable that the child may *not* have successfully completed every class at the purported time the last class of the school year let out. That was for the school to determine and memorialize in a diploma, which was received at the time of the daughter's graduation. Importantly, it was also after Ms. Moralez filed her Petition.

In conclusion on this point, even if the court does not agree that Ms. Moralez adequately preserved the issue of child support (or more specifically postsecondary support) through her 2006 Petition, her 2017 filing was brought *before the father's support obligation terminated* under

the only support order in effect. Ms. Morales agrees with the *Morris* court that “[t]he practical consequence of [the father’s] argument would be to foreclose [her] from seeking postsecondary educational support for their...daughter because she is [now] older than 18, and has graduated from high school, and support [under the administrative order] has terminated.” Such a result would construe the law, at least as applied to this case, unjustly.

**5) *Father Had Sufficient Notice of When His Support Obligation Would Terminate***

Based on the above arguments, the father was *not* “entitled to rely on the mother’s choice, that support would end when the children finished high school, ” as he argues he was on page 8 of his appellate brief. Instead, he had notice that the issue of child support was preserved through mother’s 2006 Petition, and/or through the administrative order’s own terms, which extended support through the age of 19 or was still in high school. Father further recites the court’s language in the *Cota*, part of which is reproduced here:

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.”... 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 Cota*, 177 Wn.Aopp 527, 534, 312 P.3d 695 (2013) (internal citations omitted). As with his acknowledgement that RCW 26.09.170(3) does not apply in the absence of a court order, the father similarly acknowledges that *Cota* dealt with a court order, and specifically indicates on page 9 of his brief that “mother’s reliance on the administrative order nevertheless gave the father advance notice of the termination of support when the...child completed high school.” Not so. The administrative order which he acknowledges he looked to for notice specifically extended the obligation beyond age 18 as long as the child was still in school (which she was until her later graduation/diploma date). The father had adequate notice of his obligation termination time frame under the spirit of *Cota*.

#### **B. FATHER WAS PROPERLY SERVED**

Mr. Dominguez argues that he was not properly served under RCW 26.09.175(2), which 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 is important to note that this statute pertains only to *modification* actions, and the first sentence contemplates modification brought for the first time in Washington to modify a *foreign* child support order. That is made clear also by the second sentence which begins, “If the decree to be modified *was entered in this state...*”, in contrast with the modification of a decree that was *not* entered in this state. Clearly this case does not involve the modification of a foreign child support order, so the requirement for personal service does not apply.

Moreover, the only way this statute should apply is if the court deems the 2006 administrative child support order to be a “decree” within the meaning of the statute, which Ms. Morales sought to *modify* through her 2017 Petition. If so, then then service on Mr. Dominguez was proper “by any form of mail requiring a return receipt.” The statute does *not* specify that the mailing must be to a home address. Proof of service was filed with the court. CP 51-53. Here, Mr. Dominguez acknowledges receipt of Ms. Morales mailing at the business he owns, CP 86, and his attorney attaches the return receipt signed for by Mr. Morales’s agent/employee, CP 84 (although Mr. Morales argues that he did not authorize that individual to

accept service on his behalf. CP 86). Regardless, the business was owned by Mr. Moralez, who controls who may signs for mail at the business.

On the other hand, as was discussed above, the court can look past the form of the pleading and recharacterize Ms. Moralez' "Petition" as something other than a modificadtion. It is also not a petition for new relief; rather, it was a request for postsecondary educational support to issue *at that point* in time as the next relevant step in her ongoing superior court action for a parenting plan and child support order. If that is true, Superior Court Civil Rule 5 governs the proper method of notice. CR 5 states in relevant part as follows:

(a) Service--When Required. Except as otherwise provided in these rules...every pleading ***subsequent to the original complaint...***and every written notice...demand...and similar paper shall be served upon each of the parties....

(b) Service--How Made.

(1) On Attorney or Party.... Service upon...a party shall be made by delivering a copy to the party...***or by mailing*** it to the party's...last known address.

(2) Service by Mail.

(A) How made. If service is made by mail, the papers shall be deposited in the post office ***addressed to the person on whom they are being served,*** with the postage prepaid. The service shall be ***deemed complete*** upon the third day following the day upon which they are placed in the mail....

(B) Proof of service by mail. Proof of service of all papers permitted to be mailed may be by written

acknowledgment of service, *by affidavit of the person who mailed the papers*, or by certificate of an attorney.

The certificate of an attorney may be in form substantially as follows:

CERTIFICATE

I certify that I mailed a copy of the foregoing \_\_\_\_\_ to (here name the person, first name then last name), (plaintiff's) attorney, at (*office address or residence*), and to (here name the person, first name then last name), an additional (defendant's) attorney (or attorneys) at (office address or residence), postage prepaid, on (date).

Once again, personal service was not required under CR5(a) because this was an ongoing court action in which Mr. Dominguez had joined. CP 1. Service *by mail* was therefore authorized, and *did not even require a return receipt*. The Proof of Service by Mail filed on June 15, 2017, CP 51-53, indicates by the person who mailed the documents that two copies were sent through the post office – “one copy by regular, prepaid first class mail” and “the other copy by certified mail with return receipt requested” to Mr. Dominguez acknowledged business address (and attaching the return receipt). *Id.*

In addition, CR 5 does not require that the mailing be to the residence of the other party. As the sample certificate in CR 5(b)(2)(B) further elucidates, the mailing was appropriate at Mr. Dominguez’ “office address or residence.”

In conclusion, Mr. Dominguez was properly served, whether Ms. Morales' 2017 pleadings are interpreted as a modification action or simply as the continuation of her pre-existing case.

**C. COURT SHOULD NOT AWARD ATTORNEY'S FEES TO FATHER ON APPEAL**

Court should deny Mr. Dominguez' request for attorney's fees. RCW 26.09.140 provides that awarding attorney's fees is discretionary with the court "after considering the financial resources of both parties." After reviewing the mother's proper financial submissions, CP , and father's unfiled 2016 tax return, CP 103-114, and explanation about why he did not provide his 2015 tax return as required by court rule, CP 115, the Superior Court awarded mother modest attorney's fees in the amount of \$360. CP 137. The court did not award attorney's fees to father. Ms. Morales's financial circumstances do not support an award of attorney's fees against her, and if fees are awarded on appeal, the court should order them to Ms. Morales for having to defend the matter.

**D. CONCLUSION**

The court should affirm the trial court's orders and its award of postsecondary educational support. It should also award Ms. Morales attorneys fees for having to respond to this appeal, and the court should deny father's request for attorney's fees.

Respectfully submitted this 31<sup>st</sup> day of December, 2018.

DICKSON FROHLICH, PS

A handwritten signature in black ink, appearing to read 'm. j.', is written over a horizontal line.

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Attorney for Petitioner/Appellee

**DICKSON FROHLICH**

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**Transmittal Information**

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