

FILED

APR 26 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 313352-III

**COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON**

State of Washington Ex Rel

Paulina Coronado,

Respondent,

v.

Eric Keith Lampkin

Appellant

BRIEF OF APPELLANT

MINNICK • HAYNER, P.S.

BRANDON L. JOHNSON
WSBA #30837
P.O. Box 1757/249 West Alder
Walla Walla, WA 99362

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I. PRELIMINARY STATEMENT

This matter concerns post-secondary child support. The trial court entered an order requiring the Appellant, Eric Lampkin, to pay one-third of the cost of the child's college education. While trial courts have discretion in such matters, the applicable statute, RCW 26.19.090, contains specific factors that must be considered. Additionally, the trial court's findings on these factors must be supported by substantial evidence.

Here, the trial court committed errors of law by failing to consider all of the required factors, failing to complete a child support work sheet, failing to apportion the post secondary support pro-rata between the parties, and by ordering the payments go directly to the other parent. Additionally, the trial court made numerous "findings" that are not supported by substantial evidence. The trial court also considered evidence that should have been stricken. For these reasons, the trial court's order should be reversed and the matter remanded for proper consideration of the statutory factors and additional factual findings that are necessary to consider said factors.

II. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion by failing to consider all of the required factors set forth in RCW 26.19.090.
2. The trial court erred by not completing and considering a child support work sheet *prior* to entry of the order establishing post-secondary support.
3. The trial court erred by failing to order a pro rata apportionment of post secondary support between the parties.
4. The trial court erred by making numerous factual findings that are not supported by substantial evidence.
5. The trial court erred by ordering Mr. Lampkin to make payments directly to Ms. Coronado in violation of RCW 26.19.090(6) when the child does not reside with her.
6. The trial court erred by holding that Mr. Lampkin was not prejudiced by Ms. Coronado's delay between the January 2011 child support order and her petition to modify child support filed on February 24, 2012.
7. The trial court abused its discretion by denying Mr. Lampkin's motion to strike Ms. Coronado's improper declaration filed in response to his motion for reconsideration.

III. STATEMENT OF THE ISSUES

1. Whether the trial court erred and abused its discretion by ordering post secondary support without obtaining all necessary information needed to properly apply the mandated factors set forth in RCW 26.19.090?
2. Whether the trial court erred by (a) not completing and considering a child support work sheet *prior* to entry of the order establishing post-secondary support, (b) failing to order a pro rata apportionment between the parties, and (c) ordering Mr. Lampkin to make payments directly to Ms. Coronado in violation of RCW 26.19.090(6)?
3. Whether a delay of thirteen (13) months between the order of child support and filing of the petition for modification causes prejudice when the child graduates high school, selects and begins college, and the custodial parent obligates herself to numerous loans, all without the knowledge of the other parent?
4. Whether the trial court abuses its discretion by refusing to strike a declaration that contains new evidence in response to a motion for reconsideration and is filled with hearsay and conjecture?

IV. FACTUAL AND PROCEDURAL HISTORY

The underlying facts and procedure in this matter are neither complex nor disputed. The Appellant herein, Eric Lampkin, is the father of a minor child with the Respondent, Paulina Coronado. (CP at 90-91) In January 2011 a new child support order was entered. (CP at 3-19) That order provided both parents would be responsible to contribute toward the cost of Xavier's college education. (CP at 8)

Paragraph 3.14 states:

The parents shall pay for the post secondary educational support of the child. Post secondary support provisions will be decided by agreement or by the court.”

Order of Child Support p. 6 (CP at 8)

The order went on to state at paragraph 3.16:

The child is currently age 17 and will turn age 18 on March 3, 2011. High school graduation is anticipated in June, 2011. It is also anticipated that the child will attend college. Once the presumptive amount of support terminates in June 2011, **college support shall be determined once the college cost information is available.**

Order of Child Support p. 6 (CP at 8) (emphasis added).

Ms. Coronado filed the petition to modify the child support that is the subject of this appeal at the end of February 2012, some thirteen (13) months after entry of the amended child support order. (CP at 20-24) This was the first time Eric had received any contact whatsoever concerning

Xavier attending college. See, Declaration of Eric Lampkin at p. 2, §§ 4-5.
(CP at 91)

Ms. Coronado filed a declaration in support of the petition. (CP at 25-78) No information was provided from the child and no academic records were been provided. The only documentation provided at the time the petition was filed purported to show that Ms. Coronado had taken out approximately \$37,000 in loans to cover the current academic year. (CP at 25-78)

The trial court heard oral argument on May 7, 2012. (VRP at 1) At that time, the trial court orally held that the delay between the child starting college and the petition to establish post-secondary support was not an issue. (VRP at 14-16) The Court ordered that each parent pay one-third of the actual cost of the full amount of the child's schooling, and that the choice of college was not unreasonable. (VRP at 14-16) The Court also orally stated that the payments could go directly to the school or to the Petitioner. (VRP at 14-16)

For unknown reasons, an order on the Court's decision was not submitted to opposing counsel until August 2, 2012 – nearly three months after oral argument. (CP at 95-96) On August 21, 2012, the Court signed and the proposed order was filed. (CP at 97-107) The subject order did not include a child support worksheet. (CP at 97-107) No worksheet was

prepared or submitted prior to entry of the order on August 21, 2012.

Mr. Lampkin did not file a proposed order. Mr. Lampkin's counsel had difficulty contacting him and, therefore, an alternate proposed order was not prepared prior to the Court's entry of the August 21, 2012 order. This fact was communicated to both the trial court and to opposing counsel. (CP at 108-109, 121)

On August 31, 2012, Mr. Lampkin moved for reconsideration and amendment of the findings of fact contained in the August 21, 2012 order. (CP at 122-23) The trial court called for a response from Ms. Coronado. (CP at 134) Ms. Coronado filed a responsive memorandum that, for the first time, included a purported child support worksheet. (CP at 136-50) Ms. Coronado also filed a second declaration which included, among other things, a letter from the child to the trial court. (CP at 151-71) Mr. Lampkin filed a motion to strike Ms. Coronado's declaration. (CP at 172-73)

The trial court issued a letter ruling denying Mr. Lampkin's motions on October 15, 2012. (CP at 182) On November 8, 2012, the trial court entered an order denying Mr. Lampkin's motion for reconsideration, motion to amend findings, and motion to strike in their entirety. (CP at 188-89)

On November 16, 2012, the trial court entered a second order

related to the motion for reconsideration, motion to amend findings, and motion to strike. (CP at 191-98) This second order purported to grant Mr. Lampkin's motion in part, and also includes a child support worksheet. (CP at 191-98) The only explanation as to entry of this order is a handwritten note from the trial judge dated November 15, 2012 (written on the bottom of an earlier letter from Ms. Coronado's counsel to the trial court). (CP at 190)

Mr. Lampkin then timely filed this appeal. (CP at 199-214)

V. ARGUMENT

A. Standard of Review.

The standard of review on modification of a child support order is abuse of discretion. This Court has stated:

We review a trial court's modification of an order for child support for an abuse of discretion. "Discretion is abused where it is exercised on untenable grounds or for untenable reasons." Further, the trial court's findings of fact must be supported by substantial evidence. Substantial evidence is that which is sufficient to persuade a fair-minded person of the declared premise.

In re Goude, 152 Wn. App. 784, 790, 219 P.3d 717 (2009) (citations omitted).

In order to properly exercise its discretion, the trial court must consider all of the relevant statutory factors. *Id.* at 791. Accordingly, to affirm, this Court must conclude that the trial court properly considered all of the statutory factors in RCW 26.19.090, and that substantial evidence supports the trial court’s findings on each factor.

B. The trial court abused its discretion by failing to consider all of the required factors set forth in RCW 26.19.090.

Post-secondary child support is governed by RCW 26.19.090.

Here, there is no issue of whether the child was “dependent” because that determination had been made in the earlier child support order filed in January 2011. (CP at 8) As a result, the trial court had a duty to consider the factors set forth in RCW 26.19.090 when determining the amount and length of the post-secondary support.

The relevant factors can be broken down into two categories—considerations based on the child, and considerations based on the parents.

With regard to the child, the trial court is required to consider:

- age of the child
- the child’s needs
- the child's prospects, desires, aptitudes, abilities or disabilities

- the nature of the postsecondary education sought

With regard to the parents, the trial court is to consider:

- the expectations of the parties for their children when the parents were together
- the parents' level of education
- the parents' standard of living
- the parents' current and future resources
- the amount and type of support that the child would have been afforded if the parents had stayed together

RCW 26.19.090(2).

Here, the order establishing the post secondary obligation filed on August 21, 2012 is based on a standard form order of child support. (CP at 97-107) The order does not include a child support worksheet. (CP at 97-107) In § 3.23 “Other”, the order sets forth five (5) numbered paragraphs labeled as “ADDITIONAL FINDINGS”. (CP at 106-07)

The additional findings do not purport to consider the individual factors contained in the statute. Rather, there is a blanket statement: “That the court has considered the factors in RCW 26.19.090(2).” (CP at 106) The remaining numbered paragraphs identify only some of the express factors laid out in RCW 26.19.090(2). (CP at 106-07)

The order is inadequate and does not contain sufficient findings on which this Court can pass review. Several Washington cases demonstrate this point. In In re Marriage of Scanlon and Witrak, 109 Wn. App. 167, 34 P.3d 877 (2001), the trial court made substantially more thorough findings than what are contained in the record here. Nonetheless, the Court of Appeals remanded because the findings did not consider the parties' respective standards of living or the needs of the children. Id. at 177-78.

The situation is analogous to fee awards, which are also reviewed for abuse of discretion, but require specific findings:

Where a trial court fails to provide sufficient findings of fact and conclusions of law to develop an adequate record for appellate review of the fee award, we will vacate the judgment and remand for a new hearing to gather adequate information and for entry of findings of fact and conclusions of law regarding the fee award.

Bay v. Jensen, 147 Wn. App. 641, 659-60, 196 P.3d 753 (2008) (citations omitted).

It is likewise comparable to the factors the legislature requires when a trial court enters a parenting plan (which is also reviewed for abuse of discretion). In In re Marriage of Horner, 151 Wn.2d 884, 93 P.3d 124 (2004), the Washington State Supreme Court analyzed the need for

adequate findings concerning the statutory factors applicable in a relocation matter. The Court stated:

When this court considers whether a trial court abused its discretion in failing to document its consideration of the child relocation factors, we will ask two questions. Did the trial court enter specific findings of fact on each factor? If not, was substantial evidence presented on each factor, and do the trial court's findings of fact and oral articulations reflect that it considered each factor? Only with such written documentation or oral articulations can we be certain that the trial court properly considered the interests of the child and the relocating person within the context of the competing interests and circumstances required by the CRA.

The trial court abused its discretion because it failed to satisfy either of these methods of documenting its consideration of the child relocation factors. It failed to satisfy the first method because it did not enter specific findings of fact on each child relocation factor. It failed to satisfy the second method because the record does not reflect that substantial evidence was presented on each child relocation factor, and the trial court's written findings and oral ruling do not reflect that it considered each factor. Without a discussion of each child relocation factor in the trial court's findings or oral opinion, the trial court's conclusory findings that “the detrimental effects of the relocation outweigh the benefit of the change to the child and Petitioner,” and “[a]fter analysis of the factors for consideration outlined in RCW 26.09.520, the court has determined Respondent has rebutted the presumption that the relocation should be permitted” are insufficient because we cannot review the trial court's application of the facts to the child relocation factors. **In other words, we cannot review the trial court decision because its basis is unclear. We reverse the Court of Appeals.**

Marriage of Horner, 151 Wn.2d at 896-897 (citations omitted) (emphasis added).

As in Marriage of Horner, it is impossible for this Court to review the trial court's analysis of the legislatively mandated factors. The blanket

statement: “That the court has considered the factors in RCW 26.19.090(2).” is wholly inadequate, and the trial court’s oral ruling is likewise unenlightening. (CP at 106; VRP at 14-16)

Because the subject order and oral ruling do not show that the necessary factors were considered, this Court should reverse and remand for further proceedings so that the trial court can properly consider the factors set forth in RCW 26.19.090(2).

C. The trial court committed reversible error by not completing and considering a child support work sheet *prior* to entry of the order establishing post-secondary support.

In § 2.2 of the August 21, 2012 order establishing post secondary support, the order states that the child support worksheet is not applicable. (CP 98) This is contrary to Washington law. While the child support worksheet is advisory, and not mandatory, in post-secondary court cases, Washington courts have expressly held that the Court must calculate the parties’ income and enter a child support worksheet so as to aid the Court in the division of the post-secondary support obligations between the parties. This requirement was explained in detail in Newell v. Newell, 117 Wn. App. 711, 72 P.3d 1130 (2003):

In construing a statute our goal is to give effect to legislative intent, and when a statute is unambiguous, we derive its meaning from the plain language of the statute

alone. *State v. Glas*, 147 Wn.2d 410, 415, 54 P.3d 147 (2002). The postsecondary educational award statute is within RCW chapter 26.19 entitled “Child Support Schedule”. The intent of the chapter as expressed by the legislature is to insure that child support orders meet a child's basic need and to provide additional support “commensurate with the parents' income, resources, and standard of living.” RCW 26.19.001. “The legislature also intends that the child support obligation should be equitably apportioned between the parents.” RCW 26.19.001.

RCW 26.19.090(1) expressly states that the child support schedule should be “advisory” in a court's determination of postsecondary educational support. Advisory is defined as “containing or giving advice” or “having or exercising power to advise”. *Webster's Third New International Dictionary* at 32 (1993). Advice is defined as an “opinion” or “recommendation regarding a decision or course of conduct”. *Webster's* at 32. **While the postsecondary educational statute does not require the court to follow the child support schedule in allocating expenses between the parents, we believe the legislature intended that the standards of the child support schedule must be used to accurately determine the parents' income and the presumptive proportionate share of the combined income for each parent before the court determines, based on the other factors listed in RCW 26.19.090(2) what the percentage allocation should be.** If the legislature had intended that the parties and the court could disregard the child support schedule or certain aspects of it, it would have expressly said so.

After the court accurately determines each parent's income and proportional share, the court has discretion to equitably apportion education expenses and may order “either or both parents” to pay for a child's postsecondary education support. RCW 26.19.090(6); RCW 26.19.001(1); *In re Marriage of Kelly*, 85 Wn. App. 785, 794, 934 P.2d 1218 (1997). **Under the statute, it is within the trial court's discretion to decide whether, for how long, and how to apportion postsecondary educational expenses. But to**

do so without accurately calculating income and the proportional share of the income as required by the child support schedule, the court is not properly advised or informed under RCW 26.19.090(1).

We conclude that the pro tem commissioner and the trial court erred in not accurately determining each parties' income and proportional share under the child support schedule before making its decision about the amount each parent should be required to pay for postsecondary education support.

...

We reverse and remand so that the court can accurately determine the parties' income and proportional share, and then equitably apportion postsecondary education expenses for their daughter.

Newell, 117 Wn. App. at 719-721 (emphasis added).¹

In this case, no child support worksheet was calculated and entered prior to entry of the trial court's order establishing post secondary support. (CP 97-107) While it is understood that the trial court has the discretion to not follow the work sheet, the law is clear that it must be accurately completed *before* the trial court makes its ruling.

¹ The Newell decision has twice, at least, been applied by Division III in holdings that reverse and remand for additional consideration and completion of a child support worksheet in the context of post-secondary support. In re Marriage of Lamp, 2004 WL 2307422, 6 (Div. III, 2004); In re Marriage of Harrison, WL 5869096, 7-8 (Div. III, 2012). However, because these decisions are unpublished, they are not cited as authority pursuant to Rules of Appellate Procedure (RAP) 10.4(h) and General Rule (GR) 14.1(a).

Apparently recognizing the error, Ms. Coronado attempted to correct the situation by submitting a worksheet with her order on the motion for reconsideration. (CP 191-98) While it was signed by the trial judge, it was done only *after* the trial court had made its ruling. Moreover, the worksheet was not adjudicated nor put to any level of scrutiny (as discussed more fully below in sub part “E”). The trial court committed an error of law by not requiring completion of a child support worksheet prior to ordering the parties proportional share of post-secondary support. As a result, the trial court abused its discretion because it based its ruling on incomplete information. Remand is required.

D. The trial court erred by failing to order a pro rata apportionment between the parties.

The order establishing the post secondary support obligation requires Mr. Lampkin to pay one-third (1/3) of the overall total cost. (CP 107). That is consistent with the trial court’s oral ruling given at the time of hearing. (VRP 15) As stated above, there was no child support worksheet completed at the time. (CP 97-107)

The trial court erred by imposing a 1/3 obligation as opposed to a pro rata determination. In In re Marriage of Daubert and Johnson, 124 Wn. App. 483, 99 P.3d 401 (2004), abrogated on other grounds by

McCausland v. McCausland, 159 Wn.2d 607, 152 P.3d 1013 (2007), the Court held that, despite the broad discretion given to trial court, the allocation between parents must be pro rata:

The context clearly requires us to conclude that the legislature did not intend the use of the term child support schedule in RCW 26.19.090(1) to be as defined in RCW 26.19.011(2). We conclude it intended to make the economic table advisory, rather than the entire schedule. Under this interpretation postsecondary educational awards would be made under the same rules that awards of support are made for those children when they are younger and for their younger siblings. The trial court, after deciding postsecondary support is appropriate, may consider the basic needs of the student and the costs of attendance. The court is not bound to follow the economic table in setting postsecondary support. The economic table may advise the level of support obligation placed upon the parents or it may be ignored. **However, the other requirements of chapter 26.19 RCW remain applicable. Specifically, we hold that postsecondary support must be apportioned according to the net income of the parents as determined under the chapter.**

Marriage of Daubert and Johnson, 124 Wn. App. at 505 (emphasis added).

As discussed above, Ms. Coronado attempted to correct the lack of a completed child support worksheet by submitting one after the trial court ruled on Mr. Lampkin's motion for reconsideration. While that worksheet should be disregarded, nonetheless even if it were determined to be valid, the order does not comply with the pro rata allocation therein. (CP 194) Additionally, it should be noted that the belatedly filed worksheet (CP 194) is not the same as the pro rata set forth in the August 21, 2012 order.

(CP 106). Thus, the allocation ordered by the trial court is inconsistent with both.

The trial court's failure to make a pro rata allocation between the parents is reversible error.

E. The trial court made numerous factual findings that are not supported by substantial evidence.

The trial court entered an order that contains implied findings throughout the order, and specific "additional findings". (CP 97-107) Those findings must be supported by substantial evidence, which is evidence "sufficient to persuade a fair-minded person of the declared premise." In re Goude, 152 Wn. App. at 790. The order includes a variety of findings that are not supported by substantial evidence, in some cases, not supported by any evidence, are contrary to the evidence that was before the trial court, or are internally inconsistent with other findings.

For example, in § 3.2, the order states that Mr. Lampkin's actual monthly net income is "\$3,000 (approximately)." (CP 99) In fact, Mr. Lampkin's declaration states that his income is \$2,500 per month. (CP 92) No other evidence concerning Mr. Lampkin's income was provided to the Court. Accordingly, the order stating that his actual monthly net income is \$3,000 is not supported by the evidence. Further, it should be noted that

the child support worksheet that was offered after the trial court had made its rulings, lists net income for Mr. Lampkin at \$3,553.45. (CP 194) It is not clear where this number came from.

Likewise, in § 3.3, the order states that Ms. Coronado's actual monthly net income is \$2,200. (CP 99) This is, likewise, not supported by the evidence. It is inconsistent with Ms. Coronado's own declaration (CP 26) and, in any event, no supporting documentation concerning her wages was provided to the Court. It is also different than the number attributed to Ms. Coronado in the untimely child support worksheet, which attributes her monthly net income of \$1,714.49. (CP 194) Ms. Coronado's second declaration, filed in September 2012 in response to Mr. Lampkin's motion for reconsideration, does not include any additional information on her income. (CP 151-71)

There was insufficient information provided to the court to support the factual findings related to the parties' income. RCW 26.19.071 provides standards for computing income, which includes two (2) years of tax returns and current paystubs. RCW 26.19.071(2). Ms. Coronado did not provide the same, nor anything else to substantiate her claimed income.

In re Marriage of Daubert and Johnson, 124 Wn. App. 483, 99

P.3d 401 (2004), demonstrates the information that ought to be before the court:

The trial court had before it the prior child support order, the financial declarations of the parties, tax returns, W-2 forms, wage stubs, credit card statements, financial statements, and check registers. Johnson elaborated in his declaration on his significant tax debt and lack of liquid assets. Information about the value of assets was not provided by Johnson, but was supplied by Daubert. The record appears to contain significant information about the assets, liabilities, income, and expenses of the parties. Nothing indicates that the ability of the parties to provide complete information was in any way limited. The child support worksheets adopted by the court constitute findings of fact to the extent of the information contained in them. The worksheets indicate calculation of net income, allowance for uninsured medical expenses, and lists values for assets of the parties which appear to be net of liabilities. The worksheets become incorporated as findings of fact for purposes of the child support order.

Id. at 492-93.

Here, the trial court had nothing upon which to base its findings on the parties' income and financial resources. The applicable statute requires the trial court to consider the parents' current and future resources. RCW 26.19.090(2). The trial court's findings are not supported by substantial evidence and should be vacated on remand.

§ 3.16, which sets the terms for adjustment, is inconsistent with the language contained in § 3.23(5). (CP 102, 107) The former provides for

the order to be in effect for three (3) years, and the latter calls for payments for five (5) years.

The trial court also made a finding concerning tax exemptions at § 3.17. (CP 102) However, the trial court made no findings and took no evidence concerning income tax exemptions. Moreover, the requirement that Mr. Lampkin's ability to claim the exemption be conditioned upon him being no more than 30 days past due on all support obligations as of December 31st of the relevant tax year was not requested in the underlying petition, was not addressed at argument, and not previously discussed or otherwise adjudicated by the Court in any manner. (CP 23-24; VRP 1-16)

In § 3.18, the order states that the trial court has made a finding that insurance coverage for the child was available and assessable for Mr. Lampkin at zero cost. (CP 102-06) No information was provided to the Court concerning health insurance prior to entry of the order. The information provided *after* entry of the order was conclusory and speculative, and not supported with documentation. (CP at 153) This finding is not supported by any evidence. Additionally, the "other" box is checked for Ms. Coronado in § 3.18(B). (CP 102-03) However, no information was provided. (See CP 25-78, 151-71) Likewise, in § 3.18(C) the Court makes a finding requiring Mr. Lampkin to provide health insurance for the child, and excuses Ms. Coronado from providing

health insurance. (CP 103-04) No documentation was provided as to the basis for Ms. Coronado being excused from providing health insurance. (See CP 25-78, 151-71) Stated plainly, there was inadequate information provided to the trial court to make any determination whatsoever concerning health insurance.

§ 3.19 requires Mr. Lampkin to pay 58 percent of unpaid medical expenses and Ms. Coronado 42 percent of the same. (CP 106) The paragraph also makes reference to the child support worksheet. (CP 106) As stated above, no worksheet was prepared or presented to the trial court. § 3.19 is, therefore, entirely contrary to section 2.2 of the order. (CP 98, 106)

§ 3.23 of the order, which is titled “Other”, purports to be the Court’s “Additional Findings.” (CP 106-07) Those additional findings are numbered one through five and will be addressed in order.

Additional Finding number one (1) is inadequate. A general statement that the Court has considered the factors is not the equivalent of the Court making specific findings on each factor. (CP 106) This argument is set forth in sub part “B” above and will not be repeated here.

Additional Finding number two (2) states that “Full Sail” is a well-known university in the entertainment industry.” (CP 106) There was no

evidence provided to establish the same, and in fact Mr. Lampkin had never heard of the university. (CP 91)

Additional Findings numbered four (4) and five (5) are also confusing and not supported by the evidence. (CP 107) The documentation provided by Ms. Coronado is ambiguous and confusing. (CP 25-78) It is unclear what amounts of financial aid were awarded to the child, what amounts have been borrowed, when payments are due, or even the actual cost of the education. Moreover, the finding that Mr. Lampkin's proportional share is one-third is also not supported because, as is stated above, the Court failed to complete a child support worksheet and ascertain the parties' current actual incomes and financial resources.

The finding that "mother has agreed that father may pay his proportionate share of college costs over 60 months to make it more affordable to him" (CP 107) is not supported by evidence and is also inconsistent with the applicable statute.

First, the child was nineteen (19) years old when the order was entered. (CP 98) With payments beginning September 1, 2012, the child will be at least twenty-four (24) years old at the time Mr. Lampkin is still making payments. RCW 26.19.090(5) states that the trial court shall not order payment of post-secondary educational expenses beyond the child's

23rd birthday unless exceptional circumstances are found. Here, there are no such findings of exceptional circumstances. (CP 97-107; VRP 1-16)

Likewise, the finding that “the college demands payment each school term and that cost for school year 2011-2012 has been paid already by mother and son” is also not supported by the evidence. (CP 107) As stated above, the documentation submitted by Ms. Coronado is ambiguous at best. (See CP 25-78, 151-71)

The record does not support many of the trial court’s findings of fact. Other findings are internally contrary to findings in the same order. All of the trial court’s findings should be vacated and the matter remanded for proper gathering of the necessary information under the statute.

F. The trial court erred by ordering Mr. Lampkin to make payments directly to Ms. Coronado in violation of RCW 26.19.090(6) when the child does not reside with her.

The trial court ordered Mr. Lampkin to make payments directly to Ms. Coronado. (CP 100-01, 107) This is inconsistent with the mandate of RCW 26.19.090(6), which requires the trial court to direct that payments be made directly to the educational institution if feasible.

Here, no findings were made concerning the feasibility of such payments. (CP 97-107) The statement in the order that it is “not practical” for Mr. Lampkin to pay directly to the college is made entirely

without factual or evidentiary support. (CP 107) Rather, this appears to be merely an issue of convenience. Ms. Coronado chose to co-sign and borrow monies (although in an unknown amount and under unknown terms) without first consulting Mr. Lampkin or bringing this matter before the Court. (CP 91-92)

Moreover, even if a feasibility finding had been made, the statute does not allow the payments to be made directly to Ms. Coronado. The statute is clear, payments can only be made to the other parent if the child resides with that parent. RCW 26.19.090(6). Here, it is undisputed that the child moved to the State of Florida and does not reside with his mother. (CP 26) Accordingly, under the statute, if the payments do not go to the university directly, they must go directly to the child.

It was an error of law for the trial court to order the payments be made to Ms. Coronado under these circumstances. Moreover, there was no finding of feasibility concerning direct payments to the university. On remand, the trial court should gather necessary evidence to address this issue, including the feasibility determination required by RCW 26.19.090(6).

G. The trial court erred by holding that Mr. Lampkin was not prejudiced by Ms. Coronado's delay between the January 2011 child support order and her petition to modify child support filed on February 24, 2012.

It is undisputed that there was a substantial delay between entry of the order of child support in January 2011 (CP 3-19) and the filing of the petition for modification in February 2012 (CP 20-24) — a period of over thirteen (13) months. During that time frame the child not only graduated from high school, but evidently applied to and was accepted at Full Sail University, attended online courses over the summer, and relocated to the State of Florida to continue attending courses at the school's campus. (CP 25-26)

It is also undisputed that neither Ms. Coronado nor the child contacted Mr. Lampkin to discuss the post secondary support issue between the January 2011 child support order and the petition for modification filed in February 2012. (CP 91, 152)

Given that Mr. Lampkin was not provided any notice or opportunity for input into the child's selection of a college, he requested that the post secondary support order be made prospective, and commence no sooner than the summer of 2012. (CP 85-86) The trial court summarily rejected this request, stating that it was Mr. Lampkin who had the duty to make inquiry. (VRP 14-16)

The January 2011 child support order, which was drafted by Ms. Coronado's counsel, states specifically that "College support shall be determined once the cost information is available." (CP 8) The college cost information for Full Sail University had to have been available prior to the child's enrollment. Thus, the question becomes upon whom did the burden lay? Ms. Coronado had all of the information (the child was residing with her and she took out loans in her name). (CP 26-27) Mr. Lampkin, on the other hand, was left in the dark. (CP 85-86, CP 152 ("The last time I spoke with Eric Lampkin was November 2010."))

The undisputed facts, and resulting prejudice to Mr. Lampkin which is equally undisputed, call for application of the doctrines of waiver, estoppel, and laches.

Most rights can be waived by contract or conduct. Bowman v. Webster, 44 Wn.2d 667, 669, 269 P.2d 960 (1954).

The doctrine of waiver ordinarily applies to all rights or privileges to which a person is legally entitled. A waiver is the intentional and voluntary relinquishment of a known right, **or such conduct as warrants an inference of the relinquishment of such right.**

Id. (emphasis added).

Waiver is also an equitable principle that defeats someone's legal rights where the facts support an argument that a party relinquished its rights **by delaying in asserting or failing to assert an otherwise available adequate remedy.**

Frizzell v. Murray, 170 Wn. App. 420, 426-27, 283 P.3d 1139 (2012)

(emphasis added).

The facts also support application of the doctrine of laches.

To establish laches, the defendant has the burden of proving that: (1) the plaintiff had knowledge of the facts constituting a cause of action or a reasonable opportunity to discover such facts; (2) there was an unreasonable delay in commencing the action; and (3) there is damage to the defendant resulting from the delay.

Marriage of Watkins, 42 Wn. App. 371, 374, 710 P.2d 819 (1985).

Here, Ms. Coronado delayed in filing her petition for some thirteen (13) months. She chose not to share any information with Mr. Lampkin despite the fact that the 2011 child support order expressly called for calculations “once the cost information is available.” (CP 8) Mr. Lampkin was directly prejudiced by Ms. Coronado’s delay.

It is recognized that these doctrines do not, normally, apply to child support based on public policy. See Hammack v. Hammack, 114 Wn. App. 805, 808, 60 P.3d 663 (2003) (holding that agreements to waive child support are unenforceable based on public policy). However, it has been held that the court may apply “equitable principles to mitigate the harshness of some claims for retrospective support when it did not work an injustice to the custodian or to the child.” Hartman v. Smith, 100 Wn.2d 766, 769, 674 P.2d 176 (1984).

In Hartman, the father consented to his child being adopted by his wife's new husband on the condition he be allowed visitation. The parties understood that this relieved the father of any support obligation. Seven (7) years later, the adoption was vacated as void, and the mother sought back child support for the seven (7) year period of the presumed adoption. The court held that the mother was equitably estopped from seeking child support. Id.

In the present case, equity mandates that Mr. Lampkin should not be forced to pay for college schooling that occurred *prior* to entry of an order establishing his obligation, and without any opportunity to provide input or otherwise be heard. Additionally, the public policy issue is not the same because, unlike standard support for a minor child that cannot be waived, post secondary support is discretionary, and the trial court can deny to order it all together, or establish the parent's obligation outside of the support tables. RCW 26.19.090(1); Newell, 117 Wn. App. at 719-721.

Mr. Lampkin has been prejudiced by Ms. Coronado's unexplained and unjustified delay. The Court should determine that equitable doctrines may be applied, or remand for consideration of the same once the trial court has been presented with sufficient information to make a ruling.

H. The trial court abused its discretion in denying Mr. Lampkin's motion to strike Ms. Coronado's improper declaration filed in response to his motion for reconsideration.

After the trial court called for a response from Ms. Coronado with regard to Mr. Lampkin's motion for reconsideration, she filed a lengthy declaration. (CP 151-71) The trial court denied Mr. Lampkin's motion to strike the same. This was in error.

"The abuse of discretion standard applies to review of a trial court's decision on a motion to strike a declaration or affidavit allegedly containing inadmissible evidence." Oltman v. Holland America Line USA, Inc., 163 Wn.2d 236, 247-248, 178 P.3d 981 (2008). The declaration should have been stricken for several reasons.

First, there is no basis for its submission pursuant Civil Rule (CR) 59. When evaluating a motion for reconsideration, CR 59 makes provision for additional evidence only when it is "newly discovered." CR 59(a)(4) states:

Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial.

Ms. Coronado's declaration was filed in response to Mr. Lampkin's motion for reconsideration, which provided no new evidence nor new material. (CP 122-33) Ms. Coronado's declaration did provide additional information that had not previously been submitted, yet did not even assert

that the newly provided information was somehow newly discovered. (CP 151-71) Accordingly, Ms. Coronado's declaration and its attachments should have been stricken.

Second, Ms. Coronado's declaration should also have been stricken because it is filled with hearsay and speculation. The Declaration, which is really written as a personal letter from Ms. Coronado to Judge Schacht, is filled with speculation concerning what the Respondent knew, didn't know, and what the Respondent was thinking. (CP 152-53) These statements are obviously outside the realm of Ms. Coronado's personal knowledge and should have been stricken pursuant to Evidence Rule (ER) 801 and 802. Moreover, while there are a number of documents attached to the declaration, her only statement regarding the same is: "I have enclosed information regarding the parent and student loans with Fed Loan Servicing." (CP 152) There is nothing to indicate exactly what the documents are, where they were obtained, and whether they are true and accurate copies. Therefore, they are not admissible under ER 901.

Finally, there is also a letter from the child written to Judge Schacht directly. (CP 155-56) While the child was over eighteen (18) years old, his letter is unsigned and there is no declaration coversheet that indicates it is made under the penalty of perjury. As a result, it does not comply with General Rule (GR) 13. The child's letter also improperly

contains hearsay and speculation concerning Mr. Lampkin's knowledge and state of mind, all in violation of ER 801 and 802. (CP 155-56)

For any and all of these reasons, the September 20, 2012, Declaration of Paulina Coronado was entirely inappropriate, inconsistent with the applicable court rules, and should have been stricken in its entirety and not considered by the trial court.

VI. CONCLUSION

The trial court entered an order obligating Mr. Lampkin to pay post secondary support without considering the mandated factors set forth in RCW 26.19.090. The trial court failed to require a completed child support worksheet. The trial court's order and findings are not based on sufficient evidence. The order contains provisions that are directly inconsistent with the requirements of the statute.

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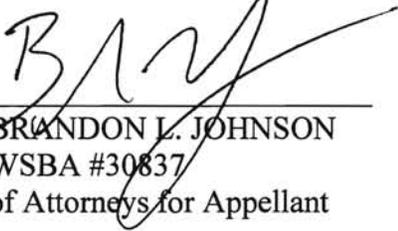
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This Court should reverse and remand this matter back to the trial court so that an appropriate post secondary order can be entered that complies with the statute and is based on the necessary information required to be considered.

DATED this 24th day of April, 2013.

MINNICK • HAYNER, P.S.

By:



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of Attorneys for Appellant

FILED

APR 26 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ERIC LAMPKIN,

Petitioner/Appellant,

vs.

PAULINA CORONADO,

Respondent.

NO. 313352

CERTIFICATE OF SERVICE

SYLVIA ACOSTA declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. That I am a citizen of the United States, over the age of 18 years, and not a party to this action;

2. That on April 24, 2013, a true and correct copy of the Brief of Appellant and Certificate of Service were served on

**Richard Wernette
McAdams, Ponti, Wernette & Van Dorn, P.S.
103 East Poplar Street
Walla Walla, WA 99362**

By: hand delivery faxed



SYLVIA ACOSTA

Signed on the 24 day of April, 2013, at
Walla Walla, Walla Walla County, WA

CERTIFICATE OF SERVICE - 1
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