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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By CR

Cause No. 366707

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

The Estate of SHENNEN GOODYEAR-BLACKBURN

v.

SHAWN BLACKBURN

RESPONSE BRIEF OF RESPONDENT

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III. INTRODUCTION

On October 23, 2009, the Blackburns had agreed to all aspects of their legal separation within their petition for legal separation. The court ordered the husband to be 100% responsible for day care expenses, beyond the parties' agreement.

Over the years, the mother applied to DCS to include additional monthly amounts in the DCS collection for child care. The child had never been enrolled with a licensed "child care" provider and the mother was never employed. In June, 2012, the mother increased the amount requested for on-going child care to \$650/month.

The amount of the judgment at issue is the amount of child care expenses paid since DCS increased the monthly day care cost to \$650/month in June 2012. The \$650 was based on the mother's claim.

When the mother did not provide sufficient proof to DCS, that the \$650 in child care expenses had actually been used for child care expenses, DCS made a finding that \$46,800 in child care expense reimbursements were owed to the father, from June 2012 through June 2018, per statute. The father acknowledged that the mother had paid \$3,500 in reimbursements to him directly, reducing that arrearage.

When the collection matter was brought into superior court by Motion and Order to Show Cause in September 2018, the mother did not

defend with any persuasive proof that any of the \$43,300 in child care expenses at issue, since June 2012, had been used for child care. The mother had been given almost nine months from June 2018 via DCS's finding, through entry of the superior court order of March 6, 2019, to present legitimate evidence that any of the \$43,300 had been utilized for child care. She never did.

The father is now the child's sole custodial parent.

The best interests of the child are served with a \$43,300 judgment and attorney fees to the father.

IV ASSIGNMENTS OF ERROR RESTATED

1. Where the trial court entered a judgment for six years of child care expense reimbursement arrearages, was it correct to apply the longer than six years statute of limitations?

Short Answer: Yes, all statute of limitations statutes that apply to all aspects of child support collection actions are longer than six years.

2. Did the trial court rely on substantial evidence and appropriate discretion to not apply laches to reduce or bar the reimbursement of child care expenses?

Short Answer: Yes, the court made findings to support its conclusions, the findings were supported by the evidence, the weight to

afford the evidence and credibility is properly left to the fact finder, and the fact finding court did not abuse its discretion.

3. Did the trial court rely on substantial evidence and appropriate discretion to not apply equitable estoppel to reduce or bar the reimbursement judgment?

Short Answer: Yes, the court made findings to support its conclusions, the findings were supported by the evidence, the weight of the evidence and credibility is properly left to the fact finder, and the fact finding court did not abuse its discretion.

4. Did the court err in not interpreting the \$3,500 of partial repayments as not evidence of a contradictory agreement which could not support a finding in support of equitable relief?

Short Answer: Yes, substantial evidence supports acknowledging that the repayments were flowing in the direction of repayment and were not contradictory evidence that might support equitable relief.

5. Did the court abuse its discretion by requesting and requiring documentary proof of six years of child care expenses at issue?

Short Answer: No, the documentary proof could have been received from a bank, the request was consistent with the law requiring child care expense proof, and the court properly used its discretion.

6. Did the court have the right to rely on the DCS calculation of child care expenses paid when no one had disputed the amount paid?

Short Answer: Yes. There had been no dispute as to the meaning and origins of the DCS's numbers and calculations, nor misunderstanding about its non-final determination: the issue had not been raised.

7. Did the trial court have the right to call reimbursement of child care expenses, "child support"?

Short Answer: Yes, child care expenses and their reimbursement rights are included in the order of child support and in the statutory chapter of the child support schedule: child care expenses are a form of child support.

V. STATEMENT OF THE CASE

On October 23, 2009, the parties joined in a petition for legal separation with a complete division of all assets and debts, a parenting plan and a worksheet. *See* CP 1 – 36. In that decree, the wife received two pieces of real property, and a 50% tenancy in common interest in a 3rd home, with Mr. Blackburn receiving the other 50% interest. CP 33 and 36. The wife was also to receive \$1,500 in spousal support for 84 months. CP 34. The husband agreed to pay more in monthly child support transfer payments than the child support worksheets required. *See* CP 18. He

agreed to pay \$1,000/month in child support. CP 11. The husband's basic support obligation was only \$557.24. *See* CP at 18.

The respondent did not sign all the final legal separation documents, including the child support order. *See* CP 8, 30 and 36. At the ex parte presentment, the trial court inserted a requirement that the father would be 100% responsible for child care expenses. CP 13. The court has acknowledged that this was inappropriate and error, but, the court did not void the provision. CP 371 at para. 2.5.

The legal separation was turned into a divorce by order of August 20, 2010, with clarifying language regarding the parties' tenants in common home. CP 95-97.

The State of Washington had administratively been collecting alleged child care expenses on behalf of Shennen Goodyear, beginning February 2010. *See e.g.* CP 294. The first administrative order found the father's responsibility at \$150/month from Nov. 2009 through January 2010. CP 285. It then found the responsibility to be \$300/month beginning February 2010. CR 285-287. Beginning June 1, 2012 DCS accepted a \$650/month monthly child care request from Shennen, and ordered it administratively on June 26, 2012. *See* CP 104; CP 280-84.

Due to Shennen's lack of verification to DCS of spending the money on child care, DCS made a preliminary determination that all of the

\$46,800 from June 1, 2012 through May 31, 2018 had been overpaid. CP 103-104.

The father brought the matter to Superior Court for collection by way of a Show Cause Order, seeking a reduced judgment of \$43,300 in past child support repayment owed. CP 98-100. He had acknowledged the \$3,500 Shennen for what she had already paid him in 2016 and 2017 to satisfy the arrears. CP 98 – 100.

Since September 17, 2018, Shennen had failed to provide the superior court with sufficiently competent proof of child care expenses actually paid that might reduce the \$43,300 further. *See e.g.* RP 273, 275 ln 1-5. *See also* CP at 371 para 2.4; 372 para 3.1 and 3.2.

Shennen acknowledged an overpayment of child care expenses, reimbursing \$3,500 of the funds in 2016-2017. *See* Shennen's submission of cancelled checks CP 106-110.

Of the rest of the mother's defenses, Shawn Blackburn had objected to the alleged offered "proof." *See e.g.* CP 272 – 275. Shennen had provided some sheets of paper claiming child care payments made to her boyfriend and a friend, but she failed to provide any financial proof that these funds had actually been paid, nor original signatures. *See e.g.* 275 lns 1-5 and CP 117 -119. She had also claimed that Shawn had engaged in negotiations with her, even claiming agreements, but they never

materialized as valid documents. *See* judge's findings CP 372 para 2.6. Shawn had asserted that his signature was a forgery and, as well, the alleged agreements themselves did not make sense and the alleged terms had never occurred in real life. *See e.g.* 273 ln 23 – 274 ln 12; CP 372 at para 2.6.

Shennen asserted equitable estoppel but could not show any competent agreement at any time that Shawn had agreed to the child care amounts ordered and garnished. *See* Court's Ruling, CP 371 para 2.3 “(finding, “respondent had not agreed to the \$650/mo., in daycare costs and gave no action or indication that he agreed with the administrative judge's determination that the petitioner had regularly incurred \$650/mo. in actual daycare costs.”) Even her lawyer referred to the issue as mere negotiations. *See* RP 41 lns 1-3. There was no competent evidence presented of any agreements at odds with a judgment for back owed day care expenses. CP 372 para 2.6.

Shennen asserted laches. *See* RP 68 lns 6-9, argued by her attorney. But she also could not show that seeking six years of payment proof was unreasonable, or that she had been harmed by the delay. RP at 43 lns 2 - 44 ln 2 (Shennen acknowledges at hearing that her producing proof of the records requested is doable.); The judge found that seeking and producing financial records from six years back was reasonable. RP

84 lns 6-17 and CP 340 order of Dec. 7, 2018 incorporating the record. The trial judge wanted more than a statement from the care provider, and would not accept claimed credits in exchange for rent; he wanted something more like checks and corresponding withdraws or bank transfers. *See* VP at 92 lns 11-16, 93 ln 2 – 94 ln 4, incorporated into order of 12/7/18 CP 340. The court gave Shennen additional time from the December 7, 2018 hearing to the March 6, 2019 Order and Judgment to produce additional financial proof of child care expenses paid. She did not produce any additional financial documents. She filed other things. CP 372 para 2.7.

The court found no harm in the delay in seeking reimbursement. *See e.g. Court's Finding*, CP 373 para 3.4: “There was never any indication that petitioner should be paid any more, and most likely would have been paid less, had she filed for a modification of such child support.”; *See also* RP 59 ln 14 (Atty for Blackburn arguing that she had the over payment funds to utilize for the past six years and was already receiving more in child support than was required.) The court acknowledged and observed that Petitioner had been able to produce and file a lot of information for the court, but most of it was not relevant. CP 372, para 3.2.

Since the legal separation of Oct 2009 until November 2018, Shawn had paid \$287,054 in combined child and spousal support. CP 299. His spousal support payment at \$1,500/month had ended 10/1/16. CP at 296. With the generous support and child care payments too, the mother, who had not been employed since the divorce, had expanded her real estate holdings by two and now had interests in five real properties, including the ½ interest in the father's one. *See* CP 175. The judge found that Shawn had substantially complied with his support orders. RP 373. Shawn sought \$43,300 in over payments be returned to him, as a judgment, in order to reduce the amount he owes the estate to purchase the home in which he lives. *See* CP 99 -101 and CP 96-97.

Shawn is now the custodial parent, and his child's inheritance is of no financial benefit to him at any time, and not to the child's benefit, either. *See* CP 167 (The Living Trust allows no distributions before the age of 21) and CP 173 (allowing Shawn "no vote, say or financial interest in said trust").

VI. ARGUMENT: POINTS AND AUTHORITIES

Standard of Review:

An appellate court is to review the trial court's decisions in actions regarding parenting plans and child support for abuse of discretion. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997); *In re Marriage of Griffin*, 114 Wn.2d 772, 776, 791 P.2d 519 (1990). The court abuses its discretion only if the decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46–47, 940 P.2d 1362 (1997).

Findings of fact are reviewed for substantial evidence. *In re Marriage of Katare*, 175 Wn.2d 23, 35, 283 P.3d 546 (2012). Substantial evidence is the amount of evidence that would persuade a rational, fair-minded person, that the premise is true. *Id.* The appellate court defers to the trial court's determination on issues of credibility and persuasiveness of the evidence. *In re Marriage of Akon*, 160 Wn.App. 48, 57, 248 P.3d 94 (2011); *In re Marriage of Meredith*, 148 Wn.App. 887, 891 n. 1, 201 P.3d 1056 (2009). A reviewing court does not weigh conflicting evidence or substitute their judgment for that of the trial court. *In re Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234 (1996). The appellate court lacks the ability to find persuasive evidence that the fact finding court failed to find persuasive. *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009).

A. THE 10 YEAR STATUTE OF LIMITATIONS APPLIES TO ALL ASPECTS OF CHILD SUPPORT ORDERS.

A 10 year statute of limitations plainly applies to the child support expenses under both RCW 4.16.020 (2) and (3). The right to reimbursement in this action arises out of both a court order and administrative action.

“Action to be commenced within ten years - - Exception
The period prescribed for the commencement of actions shall be as follows:

Within ten years: . . .

(2) For action upon a judgment or decree of any court of the United States, or of any state or territory within the United States, or of any territory or possession of the United States outside the boundaries thereof, or of any extraterritorial court of the United States, unless the period is extended under RCW 6.17.020 or a similar provision in another jurisdiction.

(3) Of the eighteenth birthday of the youngest child named in the order for whom support is ordered for an action to collect past due child support that has accrued under an order entered after July 23, 1989, by any of the above-named courts or that has accrued under an administrative order as defined in RCW 74.20A.020(6), which is issued after July 23, 1989.

RCW 4.16.020

For purposes of applying the statute of limitations, Appellant attempts to isolate one aspect of child support from other aspects of child support. *See* Opening Brief at 13-16. But all aspects of child support are legislated within RCW 26.19, the “Child Support Schedule” chapter, and

all aspects of child support were addressed within a standard form “Child Support Order.”

The legislature has devoted an entire chapter to child support, “The Child Support Schedule” chapter 26.19, and defines the title as the “standards, economic table, worksheets, and instructions, as defined in this chapter.” RCW 26.19.011. According to the RCW 26.19 chapter, the concept of Child Support obligations is broad and applies to both parents and is to be allocated between the parents based on their share of the combined monthly net income. RCW 26.19.080 (1).

Appellant asks the appellate court to act as the WA legislature and declare a new statute of limitations for reimbursement of child support expenses. This court cannot do that.

The 10 year statute of limitations applies to all actions upon a *decree* of any court of the United States, unless extended. RCW 4.16.020 (2). The original child support order here is a 10 year statute of limitations qualifying decree from the Spokane County Superior Court, for an action arising from that decree.

The statute of limitations to *collect* past due child support is even longer. For an action to collect past due child support that has accrued under either a superior court or administrative order, that statute of limitations, is within 10 years of the 18th birthday of the youngest child.

Here, the child at issue is not yet 18 years old, for this statute of limitations to even begin to run.

It would be clear error of law to conclude that a two year statute of limitations should apply to one kind of duty within child support orders, the day care expenses, when the 10 year statute of limitations applies to the content of all court orders, generally, per RCW 4.16.020 (2).

Although there cannot be any doubt what statute of limitations could apply here, “where doubt exists as to the nature of the action, courts lean toward the application of the longer period of limitations.” *Hughes v. Reed*, 46 F.2d 435, 440 (1931). Our Washington. Supreme Court has declared it so: “[i]f it were questionable which of the two statutes applied, the rule is that the statute applying the longest period is generally used.” *Shew v. Coon Bay Loafers, Inc.*, 76 Wn.2d 40, 51-52, 455 P.2d 359 (1969).

The “basic child support obligation,” derived from the economic table, is a certain kind of child support per RCW 26.19.080, but this cannot be interpreted to mean that day care and special child rearing expenses are not child support obligations arising from a decree. Child expenses are included within the child support decree as well as the statutory requirement of percentage allocation between the parents, just as the basic child support obligation is. *See* RCW 26.19.080. The biggest

difference between the two kinds of child support is that overpayments of child care expenses are allowed to be reimbursed to the payor if the overpayment is 20 percent or more of the entire annual child care expenses paid. *Compare* RCW 26.19.080 (1) and (3). Another difference is that child care expenses can be based on a formula or percentage of the actual monthly child care expense, rather than a specific ongoing monthly amount. When paid as a percentage of the actual monthly expense incurred, and not a fixed amount, the child care expense is not considered part of the “support transfer payment.” RCW 26.19.011 (9).

Regardless, child care expenses and their right of reimbursement are included in the child support order. *See* CP 11 (“The obligor may be able to seek reimbursement for day care or special child rearing expenses not actually incurred. RCW 26.19.080.”) *and* CP 13 (ordering that day care expenses to be paid 100% by the father.)

Here, the child support day care expenses were originally inserted and ordered at 100% by Judge Strohmaier. CP 13. Then later, based on the mother’s claims, they became fixed amounts by DCS and became part of the support transfer payment. *See e.g.* CP 280 – 288 and CP 294-297. Whether the specific amounts are included or not included as part of the support transfer payment, the proportionate sharing of child care expenses is still child support. RCW 26.19.080 (4). Whether a basic child support

obligation or child support transfer payment, what Shawn paid in day care expenses was of the child support order, and subject to the 10 year statute of limitations. See CP 9-16 and RCW 4.16.020 (2) and (3).

1) Shennen's "Policy Discussion" of burdensome record keeping is not policy. Rather, detailed record keeping and receipts is the law and was the law at the time these parties contracted. The general rule of actual importance is that "parties to a marriage settlement are presumed to contract with reference to existing statutes, and statutes which directly bear upon the subject matter of the settlement are incorporated into and become part of the decree." *In re Marriage of Briscoe*, 134 Wn.2d 344, 348, 949 P.2d 1388 (1998).

The statute of limitations is 10 years for any decree, and even longer for collection on child support support orders, so persons subject to the child support orders are on notice that they had better keep records on their payments and expenses until 10 years after their youngest child turns 18 years old. Additionally, in this case, the notice was even more obvious with the reimbursement of expenses statute, RCW 26.19.080, specifically named and incorporated into the order, with a warning that day care expenses paid and not actually incurred could be sought to be reimbursed. CP 11.

The claimed, imagined detriment opined by Appellant at opening brief 13-14, does not reflect the facts in this case. By the time of the enforcement process, the father was becoming the custodial parent of the 14-year-old, and with the mother's death, was going to have no second parent to help pay for the child at all. *See e.g.* Living Trust of CP 164-176, with no consideration to paying the child any support, and with no access to the trust at all before the son is age 21.

Furthermore, in this case, Respondent's obligation to pay child care expenses AT ALL was unjust on multiple levels. First, the requirement to pay additional day care at all should not have happened as a matter of law, and is acknowledge by the trial judge as, originally, his error. CP 371 para 2.5. Secondly, fraud was at issue with Appellant because the child was not in day care and did not have ongoing child care expenses at all. *See e.g.* CP 273 lns 8-9. But, the mother claimed to pay child care to her live-in boyfriend and claimed it "will be on going." *See* CP 283. Third, the mother already received almost all the property of the marriage and the father had voluntarily increased, by more than double, his child support obligation beyond the economic table. *See* CP 18-19, 23-24, 25. Fourth, there was no consideration in the child support calculations of spousal support as income to the mother and reduction of income to the father. *See* CP at 17 and CP Court's decision at 4 para 3.4.

2) Unpaid Child Support Obligations

The discussion regarding unpaid child support obligations becoming judgments when not paid is not relevant to this appeal. If the amount of child support is based on a formula and all the facts of the formula have to be found before the amount is known, that kind of unpaid child support is more akin to unliquidated damages. The father has not asked for pre-judgment interest.

The status of whether the unpaid child support is a judgment or not, is not relevant to this appeal.

3-4) Whether as a decree or judgment, actions on orders have a 10 year statute of limitations. RCW 4.16.020 (2) applies to any orders, including child support orders. The separate statute of RCW 4.16.020 (3) is specific to collection actions on arrears and applies here as well. Because the child care expenses and their reimbursement authority arise from a child support order and the child support schedule RCW chapter, it is child support and subject to RCW 4.16.020 (3)'s statute of limitations. Because childcare expenses reimbursement also arise from an order, "a decree" the statute of limitations of RCW 4.16.020 (2) can also apply and can apply here, since the time at issue is not more than 10 years and the only (and youngest) child is not 18 years old. Although child care expenses are treated

slightly differently than the basic child support obligation in a few ways, it is still child support within the RCW 26.19 chapter entitled the “Child Support Schedule,” and addressed within the “child support” order. It is not “legally erroneous” to apply the court’s chosen statute of limitations. Both RCW 4.16.020 (2) and (3) apply here.

This court has no authority and no discretion to avoid clear statutory authority that requires child support orders and other orders to be given a 10-year statute of limitations.

B. THE COURT DID NOT ABUSE ITS DISCRETION TO NOT APPLY LACHES TO REDUCE THE CLAIM.

Appellant complains that the superior court did not utilize the equitable remedy of laches to bar the reimbursement of day care expenses not incurred. He opines that requiring 10 years of receipts is unjust.

In this case, the requests for reimbursement spanned only six years, June 2012 through May 2018, not 10 years. Those six years consisted of \$650/month in day care payments, collected under a DCS determination. Throughout the \$650/month payments, Appellant did not provide DCS, the court or anyone else, any credible proof of payments of child care actually utilized for child care. CP 372 at para 3.1 – 3.3.

The court was considering applying laches if the request for reimbursement went back 10 years, due to concerns about available proof. VP at 75 lns 7-12. But requiring proof for six years did not seem difficult, because the records should be available, even from banks. VP at 84 lns 11-17.

The person asserting laches defense must prove: 1) the petitioner had knowledge or reasonable opportunity to know of the facts for a cause of action; 2) the start of the action was unreasonably delayed; 3) the asserting party was damaged by the delay. *In re Marriage of Capetillo*, 85 Wn.App. 311, 317, 932 P.2d 691 (1997). Whether laches should be applied depends on the facts, circumstances and nature of the case. *See Global Neighborhood v. Respect Washington*, 7 Wn.App. 2d 354, 382-383, 434 P.3d 1024 (Div. 3, January 29, 2019); *Lopp v. Peninsula School District No. 401*, 90 Wn.2d 754, 759, 585 P.2d 801 (1978), *Schrock v. Gillingham*, 36 Wn.2d 419, 428, 219 P.2d 92 (1950).

To fulfill the element of “unreasonable delay,” laches is not to be applied within a statute of limitations “absent unusual circumstances.” *Capetillo*, 85 Wn.App. at 317. Laches is an extraordinary defense. *Global Neighborhood*, 7 Wn.App. 2d at 383.

Reluctance to pursue past-due support for any number of reasons, including lack of funds to hire a lawyer and not wanting enforcement to

trigger an attempt to enforce visits, are not unusual circumstances that justify laches. *See Capetillo*, 85 Wn.App. 317-18. Even believing that your children are adopted by another, substantial financial changes, hardship, and supporting others during the interim, was not considered an unusual enough circumstance that a request for 10 years of unpaid child support was not too great a delay. *Id.* at 315-316. Not finding facts to meet all the elements, the *Capetillo* court reversed a trial court for applying laches to 10 years of back child support, on untenable grounds. *Id.*

A seven year delay where the father was unable to pay support and the mother knew it was ill advised to seek legal action, was not an unusual circumstances that proved an unreasonable delay. *In re Marriage of Hunter*, 52 Wn.App. 265, 270-71, 758 P.2d 1019 (1988), *review denied*, 112 Wn.2d 1006 (1989).

The legislature has found that “there is an urgent need for vigorous enforcement of child support.” RCW 26.18.010; *Capetillo*, 85 Wn.App. at 319. It found that “equitable relief from past-due support obligations should be limited to those cases where enforcement would create a severe hardship on the obligor-parent and where the facts support traditional equitable remedies.” *Capetillo*, 85 Wn.App. at 319. The severe hardship

of the obligor is not met by their own doing of “failure to pay, to inquire, or to seek modification.” *Id.*

“Obligor” means the person owing a duty of support or duty of maintenance. RCW 26.18.020 (5). In this instance, the Estate of Shennen owes a duty of support and therefore is the obligor for the child support reimbursements. And Shawn is the obligee, since he is owed a duty of support. *See* RCW 26.18.020 (4).

Appellant’s attorney opines that parents do not keep child care receipts and it is unfair to ambush them with such a requirement years later. Appellants argument fails. As in *Fairchild*, Ms. Goodyear “was notified in the support order that she may be required to submit an accounting.” *Fairchild v. Davis*, 148 Wn.App. 828, 830, 207 P.3d 449 (April 28, 2009); *See* CP 11 para 3.3; *and see* RCW 26.19.080.

Division 3 in *Fairchild v. Davis*, reversed a trial court for accepting a self-serving declaration on child care expenses rather than more competent proof. *Id.* at 832-833. The mother had not provided competent evidence of child care expenses from 1992 – 2001 for a reimbursement action filed in 2007. *Id.* The youngest child had turned 12 in 2001. *Id.* at 831.

The *Fairchild* Court further noted that since the reimbursement of child care expenses statute did not exist before 1996, prior to 1996, only

equitable common-law principles could have been applied for any reimbursement for child care not spent. *Id.* (citing *In re Marriage of Barber*, 106 Wn.App., 390, 398, 23 P.3d 1106 (2001)).

Without citing to law or the record, Appellant complains that allowing reimbursement for unused child care funds for up to 10 years is contrary to the intent of the legislature. Not so. Child support enforcement remedies are to be “liberally construed to assure that all dependent children are adequately supported.” RCW 26.18.030 (3). In this case, the ordered reimbursement of 6 years of overpaid childcare expenses, \$43,300, is allowing this child’s surviving parent to receive financial assistance in raising the son, full time, from age 14 -18 and beyond. It is the equivalent of the father receiving \$1,000/month from his own child support savings, until the child is 18 years old.

There should be no fear of the 10 years statute of limitations as a “policy shock to the entire statutory regime meant to protect the financial welfare of children,” Appellant’s opening brief at 18. Laches can be applied in extraordinary circumstances involving shock and harm. Such was not the case here.

Furthermore, reducing litigation opportunities, the legislature allows a 20% margin for child care expenses collected and not paid out in child care, before reimbursement is required. *See* RCW 26.19.080.

Rather than the reimbursements being shocking to the child support scheme, here, if anything, the delay in enforcing the right to reimbursement was for the child's and mother's benefit, where the order of reimbursement would only take effect after the mother died and the reimbursement funds were needed for the teenager's benefit. *See e.g.* CP 100-101. As previously noted, the court made a finding of lack of harm to the mother for the delay in the reimbursement. CP 373 para 3.4 (*stating* "There was never any indication that petitioner should be paid any more, and most likely would have be paid less, had she filed for a modification of such child support.")

The law on this subject also states, "A defendant cannot prove damage simply by showing he is having to do now what he has been legally obligated to do for years." *Capetillo*, 85 WnApp. at 318. "It matters little whether one presses a right promptly or slowly," when the parties are in the same condition. *In re Marriage of Sanborn*, 55 Wn.App. 124, 128, 777 P.2d 4 (1989).

The court made findings of fact that are supported by substantial evidence and therefore they should not be overturned on appeal.

RCW 26.19.080 (3) provides three options by which the child care reimbursement credit can be applied: 1) against arrearages, 2) as a direct reimbursement or 3) as a credit against future support payments. Shawn

did not seek a credit against his future support payments, as he saw that as potentially harmful, given Shennen's health and reliance on the monthly funds. *See e.g.* CP 100-101. He did not have child support arrearages. CP 299. Shawn sought a direct reimbursement by Shennen. He intended to effect the reimbursement as an offset against the 50% portion of the home equity owed her, per the terms of their divorce order. CP 99. No conceivable change of circumstances makes that reimbursement unjust to the Estate of Shennen, or to Shennen while she was alive. The delay was within the statute of limitations and reasonable.

C. EQUITABLE ESTOPPEL CAN NOT BE APPLIED HERE

Appellants suggests that the court found all elements of equitable estoppel other than prejudice. That is not so. The court did not find even one element of equitable estoppel.

Equitable estoppel would require clear, cogent and convincing evidence of each of three elements: " 1) an admission, statement, or act by the plaintiff that is inconsistent with the claim afterward asserted; 2) action by the defendant on the faith of such admission, statement, or act; and 3) injury resulting from allowing the plaintiff to contradict or repudiate such admission, statement, or act." *Sanborn*, 55 Wn.App. at 129. This equitable remedy is disfavored. *Id.*

The court properly found lack of evidence to support the elements of equitable estoppel within its findings and ruling. The court made a finding that the first element was not met, a statement inconsistent with one later asserted. CP 372. There is no clear evidence in the record that an admission, statement, or act by Shawn Blackburn was inconsistent with a claim afterward asserted. In fact, there was evidence that Shawn and Shennen had agreed that she would reimburse him for the overpayment, and began to reimburse him and then stopped reimbursing him, after \$3,500. CP 106-110. The act of receiving partial payment in reimbursements is an act or statement consistent with the right to reimbursement, not inconsistent. Co-operative repayment, without court intervention, would have saved attorney fees.

The court reviewed the evidence for any inconsistent contractual agreements against reimbursement. Counsel for Appellant argued only that negotiations had taken place, not that an agreement had occurred. VP at 41 lns 1-8. The court found that there was not sufficient or even competent evidence of an agreement surrounding child care expenses that would supersede the right to reimbursement. *See* CP 372 para 2.6.

The court noted that Mr. Blackburn had never agreed to the \$650 in child care expenses through the administrative process or the court process, and related this finding to the lack of admission. *See* CP 371 para

2.3. Mr. Blackburn's income was garnished to pay the \$650 in child care costs, as in, the payments were forced by DCS order and not by agreement, contrary to Petitioner's suggestion. *See e.g.* CP 294 – 297.

The court had also found that no evidence showed that Shennen was financially prejudiced by delaying modification based on receiving the child care funds, because she had always been receiving more than required by law. *See* CP at 4 para 3.4 court's ruling.

Child support enforcement remedies are to be "liberally construed to assure that all dependent children are adequately supported." RCW 26.18.030 (3).

Like in *Sanborn*, 55 Wn.App. at 129, despite lack of clear communication and wishful thinking, having to do later what a person was legally obligated to do years earlier, is not an injury. A parent receiving money for child care expenses has a duty to collect, retain, and prove all actual costs spent, as expected since 1996 when the reimbursement statute came into effect. This Child Support Order at issue incorporates that statute. The lack of good proof is not a good excuse, especially when the time at issue was within the period that financial institutions keep records. And, the lack of use of the funds for child care is also not a good excuse, when there is a statutory and court ordered right to reimbursement.

The court provided months of more time to produce actual statements to back up the self-serving claims, to effect any offset for the child care reimbursements. None were ever produced. CP oral ruling at 2 para 2.2, 2.4 and 2.7. Providing additional time for adequate proof is within the court's discretion, but when nothing more is provided, the lack solidifies the finding of no evidence. *See in re Anderson*, 134 Wn.App. 111, 117, 138 P.3d 1118 (2006).

As previously noted, the court had found that no evidence showed that Shennen was financially prejudiced by delaying modification based on receiving the child care funds, because she had always been receiving more than required by law. *See* CP at 4 para 3.4 court's ruling.

Appellant claims the lack of seeking a modification to spousal support was her detrimental reliance on the child care expenses. First off, the citation to the record is wrong. Secondly, a potential spousal support modification was not clearly raised at the trial court. Under RAP 2.5 (a) the court of appeals need not consider an issue not raised at trial. Third, there is no evidence to show that such a modification request would have been successful. The court was well within its discretion to find no financial prejudice from any delay.

D. The specific terms of RCW 26.19.090, reimbursement methods for childcare expenses, do not imply a 1-year statute of limitations. The

statute specifies how the child care expenses can be reimbursed. The first remedy requires an offset, if child support is owed, without specifying any number of years of accrued arrearages. The second remedy can be done as a direct reimbursement, with no reference to equivalent years of support. Only the final remedy limits repayment to 12 months, for *future* child support payments. Only if the sum for repayment was quite small would it make sense to reduce future child support for 12 months for an overpayment in the past. The 12-month period is a practical prohibition against reducing the child support transfer payments for a long period of time, not a substantive statute of limitations to reimbursements.

The remedy Mr. Blackburn seeks is most like applying the overpayment to arrearages owed to the mother. Mr. Blackburn owes the Estate of Shennen 50% of the equity in the home in which he, his two sons and his wife currently reside. CP 100. He simply seeks to apply the judgment as an offset to his arrearage to the estate. *Id.* This right is already implied with the child support lien against all property of the obligor. *See* RCW 26.18.055. This method also has the same impact as a direct payment.

Other than the 12-month period, RCW 26.19.080 (3) does not limit the amount of arrearages that can be offset, which may have accumulated for 10 years. It also does not limit the amount of direct reimbursement

that can occur. It only limits a reduction in prospective child support.

Read in context, it is obvious that the legislature is concerned about limiting deductions from *future* child support, not for limiting reimbursements, generally.

E. The *Fairchild v. Davis* case applied the correct statutory statute of limitations of 10 years post the youngest child's 18th birthday and required adequate proof from the parent required to show proof.

1) Appellant incorrectly discounts *Fairchild*. Like the order of child support at issue in *Fairchild v. Davis*, the Blackburn order of child support warned the mother that the father can seek reimbursement for day care expenses not actually incurred and cites RCW 26.19.080, incorporating the child care reimbursement statute directly into the order of child support. See 148 Wn.App. at 833; see also CP at 11, para 3.3. Ms. Goodyear was thus notified in the superior court support order that she may be required to submit an accounting.

As described in *Fairchild*, the burden of proof always falls on the person with the financial duty to prove. See *Fairchild* 148 Wn.App. at 833. And it also falls on the parent claiming equitable defenses. See *Capetillo*, 85 Wn.App. at 320.

The *Fairchild* court did not switch the burden of proof, the burden of proof always falls on the person required to prove anything financial in

any kind of suit. See *Fairchild*, 148 Wn.App. at 832. In the *Blackburn* support order at 3.3, it is obvious that the mother will have to keep and provide an accounting of child care expenses in case the father seeks reimbursement for child care expenses “not actually incurred.” CP at 11.

Appellant seeks to unreasonably limit recoupment of child care expenses from more than 10 years per direct statute, to 1 year or less by creative implications. See Opening Brief at 23. A clear statute directly on point is not open to diminishment by creative implication. Appellant attempts to reduce the time span so much, a court would not be allowed the ability to determine cases on their merits. The general principle of law is to favor decisions of cases on their merits, and to apply the longer statute of limitations when there is a conflict. *Tomlin v. Boeing Co.*, 650 F.2d 1065, 1072 (1981)(citing *Shew v. Coon Bay* 76 Wn.2d 40, 455 P.2d 359, 366 (1969)).

3) The *Fairchild* case did not include a discussion about the statute of limitations, probably, because the matter is too obviously controlled by a statute directly on point. The *Fairchild* court did acknowledge equitable principles could be considered. *Fairchild*, 148 Wn.App. at 932-934.

F. The dissent in *Fairchild v. Davis* equates laches with requiring a lesser burden of proof than required in child support matters, for expenses from 15 years prior. Potentially, laches could be invoked, depending on

the circumstances, to excuse a party from proof, by excusing a party from liability. But no found binding precedent leans the other way, ignoring the quality of evidence, under laches, to justify a result.

The greater issue on dissent in *Fairchild* was the failure of the father to meet the statutory threshold requirement of actual payments first, in order to qualify as “over payments” of child care expenses. Such a complaint does not apply in the case at bar.

The dissent does not cite *In re Marriage of Stern*. Appellant cites it. The issue in *In re Marriage of Stern*, 68 Wn.App. 922, 846 P.2d 1387 (1993), pre-dates the 1996 statutory reimbursement of expenses amendments. The issue is restitution and its application for reimbursement of overpaid child support due to an appeal that reduced child support. The question utilized principles of restitution, discretion and consideration of the amount due and “whether the sum is readily available without causing undue hardship upon the receiving parent or the child.” *Id.* at 931 -32.

Even under the *Stern* principles of restitution, the reimbursement should be fully realized because of the availability of proper recoupment (set off of equity) without depriving the child. Here, the recoupment would be flowing into the household where the child now resides. With

only one living parent, the child and his father are in need of financial support, now.

Appellant cites *Johnson –Skay v. Johnson*, 81 Wn.App. 202, 913 P.2d 834 (Div. 3, 1996) for the proposition that estimates, not receipts, were required to determine the income loss from caring for her own child. This is not actually true. The court was instructed to not rely on average gross receipts, but to arrive at actual income by deducting actual costs for the care of a child – which is exactly the formula for arriving at business net income for child support purposes. *Id.* at 835.

Child support proceedings routinely require verification by corroborating evidence of actual financial records for most numerical findings, and generally, the person asserting a fact has the burden to prove it. *In re Marriage of Gainey*, 89 Wn.App. 269, 274-75, 948 P.2d 865 (1997).

In general, one asserting a fact has the burden of proving it. Thus, one asserting that his or her income has decreased must produce properly verified evidence sufficient to support the desired finding. Similarly, one claiming that he or she has incurred business expenses and unpaid taxes must produce evidence sufficient to support the desired finding.

Id.

Where a party fails to present such evidence, the trial court is not required to act in that parties' favor. *Id.*

Fairchild v. Davis, 148 Wn.App. 828, 207 P.3d 449 (Feb 12, 2009, as amended April 28, 2009) requires the same standard of proof for justifying child support expenses paid. The order of child support in this case, entered October 23, 2009, by agreement, incorporated the existing law, which included the standards set forth in the case of *Fairchild*, published prior to their agreement.

Appellant's "cottage industry" conjecture and flood gates mayhem have not happened in the 10 years after *Fairchild v. Davis*, 148 Wn.App. 828, 207 P.3d 449 (2009) became the law and standard by which child care expenses were to be proven. No modification to *Fairchild* should occur, especially not on the facts of this case. The court was mindful that competent evidence could be presented from child care receipts, only spanning the past six years. RP 84 *Ins* 11-17. The court found no agreements between the parties removed the father's court ordered and statutory right to reimbursement. CP 372 para 2.6. The court did not find equitable reasons to not order the reimbursement. Knowledge of the overpayment is simply not sufficient to invoke equitable relief, per all such the cases cited previously.

When ordering day care expenses as a monthly transfer payment, the court is allowed to set a reasonable amount for day care, without great exactitude. ""The court may exercise its discretion to determine the

necessity for and the reasonableness of” the amount of day care expenses entered in the child support worksheets. RCW 26.19.080(4). “[W]e interpret the terms ‘necessary and reasonable expenses’ and ‘day care’ in a manner that serves the best interests of children.” *In re Marriage of Mattson*, 95 Wn.App. 592, 600, 976 P.2d 157 (1999).

The funds are allowed to freely flow into the parent’s home that needs funds for child care, in the best interest of the child, merely under a “reasonableness” and “best interest” standard, if the estimated need is incorporated into the child support worksheets or is determined administratively, as here. The payor’s protection from abuse of this low standard of proof, is the high standard of proof in the accounting, to show that the funds were actually so spent.

Child support expenses could be ordered to be paid, on a variable basis, as monthly actual amounts. *See e.g.* RCW 26.19.011(9). This method also uses exacting receipts and proofs of payment. Justice is served when both methods of reimbursement are protected from fraudulent abuse, with exacting standards of proof that payments were actually used for day care.

D. ATTORNEY FEES ARE REQUESTED UNDER RAP 18.1:

Pursuant to RAP 18.1, Respondent devotes this brief section to requesting attorney fees on appeal. RCW 26.18.160 requires a court to order attorney fees to enforce a support order at both the trial and appellate level.

In any action to enforce a support or maintenance order under this chapter, the prevailing party is entitled to a recovery of costs, including an award for reasonable attorney fees. An obligor may not be considered a prevailing party under this section unless the obligee has acted in bad faith in connection with the proceeding in question.

RCW 26.18.160.

The obligor is a “person owing a duty of support. . . .” RCW 26.18.020.

(5). “Duty of Support” . . . includes . . . “any obligation to make monetary payments, to pay expenses. . . . in cases in which there is a dependent child, or to reimburse another person or an agency for the cost of necessary support furnished a dependent child. The duty may be imposed by court order, by operation of law, or otherwise.”

RCW 26.18.020 (3).

The “Obligee” means the person “to whom a duty of support is owed. RCW 26.18.020 (4).

The Child Support Enforcement chapter, RCW 26.18 is to be “liberally construed to assure that all dependent children are adequately supported.” RCW 26.18.030 (3).

Where an appeal was taken to address which statute of limitations applied on a foreign child support judgment under the UIFSA, the obligee prevailing party received attorney fees under RCW 26.18.160. *In re Matter of the Paternity of M.H.*, 187 Wn.2d 1, 383 P.3d 1031 (2016).

Where an appeal was taken to force an offset credit for SS payments against interest on child support judgment, and issues of res judicata and equitable defenses were also addressed, the prevailing obligee was entitled to an award of attorney fees and costs under RCW 26.18.060. *In re Marriage of Dicus*, 110 Wn.App. 347, 40 P.3d 1185 (2002).

Where a mother sought to recover ten years of past-due child support (\$15,700) and interest (\$10,938), when the trial court barred the claim under equitable theories, but the appellate court reversed, finding the trial court’s application of laches did not rest upon tenable grounds, costs and attorney fees were then awarded the obligee parent at both the trial and appellate court under RCW 26.18.160. *Capetillo*, 85 Wn.App. at 320-21.

Here, Respondent is the obligee for purposes of reimbursement of overpaid child care expenses, resisting the application of equitable

remedies and the erroneous statute of limitations argument, and should be allowed all attorney fees and costs under RCW 26.18.020, once he prevails on this appeal.

Additionally, now Respondent is also the custodial parent, receiving no child support from the Estate of Shennen. The enforcement process by court ordered reimbursement of expenses and attorney fees has thus grown in importance to “assure that all dependent children are adequately supported.” RCW 26.18.030 (3). Adequate support of children is the focus, not the inheritance received as an adult.

When Mr. Blackburn prevails in this enforcement proceeding, awarding attorney fees is not discretionary.

Additionally, attorney fees should also be awarded for a frivolous appeal.

VII. CONCLUSION:

No appellate interpretation of the statute of limitations of RCW 26.19.080 (3) or (4) is needed because the statute and application is clear. There is no basis to imply that one kind of child support applies a different statute of limitations to another kind of child support when all such child support is included in a child support order and included in the child support schedule RCW chapter. The differences in kinds of child support

are not statute of limitations differences. Even if there was a difference, the longer statute of limitations would apply.

Appellant's request for this court to legislate a new statute of limitations for child care expense reimbursements, or requesting the appellate court to find different facts in order to apply equitable remedies, is completely void of merit.

The person accepting child care funds as a transfer payment is on notice to keep competent proof of all expenses paid and that a right of reimbursement action is possible. They have the duty of proof of their own expenditures and have a duty to keep or supply the records.

In sum, there was no abuse of discretion, no findings based on untenable grounds, and no error of law to warrant a remand or reversal. This court is not the legislature and Appellant's lobbying the court of appeals for a different statute is frivolous. Respondent asks that the appeal be dismissed and attorney fees be awarded to him.

Respectfully submitted this 23rd day of August, 2019.



AMY RIMOY, WSBA No. 30613
Attorney for Shawn Blackburn

FILED

AUG 23 2019

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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STATE OF WASHINGTON,
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GOODYEAR-BLACKBURN,)
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APPELLANT,)
and,)
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SHAWN BLACKBURN,)
)
RESPONDENT.)

No.: 366707-III

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 23rd day of August, 2019, a copy of the Response Brief, in the above-captioned matter, as well as this certificate of service, was caused to be served on the following person in the manner indicated:

Via HAND DELIVERY to: CRAIG MASON, Atty for Estate
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