

85112-3

FILED

APR 12 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 284697

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

In re the Marriage of:

CAROL MARIE SCHNEIDER, Respondent/Petitioner,

v.

JEFFREY JOSEPH ALMGREN, Appellant/Respondent.

BRIEF OF RESPONDENT

Scott C. Broyles
Broyles & Laws, PLLC
901 Sixth Street
Clarkston WA 99403
(509) 758-1636

Attorney for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
ISSUES.....	1
A. STATEMENT OF CASE.....	2
B. ARGUMENT.....	3
C. CONCLUSION.....	17

TABLE OF AUTHORITIES

CASES

<i>Childers v. Childers</i> 89 Wash.2d 592, 575 P.2d 201 (1978).....	9
<i>In re the Marriage of Daubert</i> 124 Wn.App. 483, 99 P.3d 401 (Ct.App. Div 1 2004).....	15
<i>In re the Marriage of Gimlet</i> 95 Wash.2d 699, 629 P.2d 450 (1981).....	10
<i>In re the Marriage of Griffin</i> 114 Wash.2d 772, 791 P.2d 519 (1990).....	3
<i>In re the Marriage of Kelly</i> 85 Wn.App. 785, 934 P.2nd 1218 (Ct.App. Div 1 1997) review denied, 133 Wash.2d 1014 (1997).....	10
<i>In re the Marriage of Littlefield</i> 133 Wash.2d 39, 940 P.2d 1362 (1997).....	3
<i>In re the Marriage of Nicholson</i> 17 Wn.App. 110, 561 P.2d 1116 (Ct.App. Div 1 1977).....	4
<i>In re the Marriage of Stern</i> 57 Wn.App. 707, 789 P.2d 807 (Ct.App. Div 1990) review denied, 115 Wash.2d 1013 (1990).....	4
<i>In re the Marriage of Wayt</i> 63 Wn.App. 510, 820 P.2d 519 (Ct.App. Div 3 1991).....	14
<i>In re the Parentage of Goude</i> 27753-4-III (Ct.App. Div 3 2009).....	10

<i>M.A. Mortenson Co. V. Timberline Software Corp.</i> 93 Wn.App. 819, 970 P.2d 803 (Ct.App. Div 1 1999) <i>affirmed</i> 140 Wash.2d 568, 998 P.2d 305 (2000).....	3
<i>McCausland v. McCausland</i> 159 Wash.2d 607, 152 P.3d 1013 (2007),.....	15
<i>Rusch v. Rusch</i> 124 Wn.App. 226, 98 P.3d 1216 (Ct.App. Div 1 2004).....	15
<i>State ex rel. Carroll v. Junker</i> 79 Wash.2d 12, 482 P.2d 775 (1971).....	3
<i>State ex rel. Stout v. Stout</i> 89 Wn.App. 118, 948 P.2d 851 (Ct.App. Div 1 1997).....	15
<i>State v. Tatum</i> 74 Wn.App. 81, 871 P.2d 1123 (Ct.App. Div 1 1994).....	4

STATUTES AND RULES

RCW 26.09.140.....	19
RCW 26.09.170(5).....	17
RCW 26.19.020.....	15
RCW 26.19.090.....	10
RCW 26.19.090(2).....	10
RCW 26.21.A.090(2).....	11
RCW 26.21A.120.....	5

RCW 26.21A.130.....	5
RCW 26.21A.130(5).....	5

ISSUES

1. Did the Court err in ordering post-secondary education support for the parties' young adult child?
2. Did the Court err in refusing to order a reduction in child support for the parties' minor child?

A. STATEMENT OF CASE

The parties were previously married and during the marriage resided in Nebraska. The parties had two children, Amanda Almgren, born December 24, 1990, and J.D.A., born October 31, 1993, as issue of that marriage. The parties' marriage was terminated by divorce. The divorce decree was dated June 16, 1997. CP, pp.1-19. Respondent, Jeffrey Almgren, was ordered to pay child support, CP, p.3. The Nebraska decree and child support orders were domesticated in Washington by the filing of UCCJEA paperwork on December 5, 2005. CP, pp.1-19. As part of the domestication of the Nebraska orders a motion for modification was filed. A Final Order of Child Support and a Parenting Plan Final Order were entered on January 16, 2007. CP, pp.20-38. On January 21, 2009, Ms. Schneider petitioned for modification of the child support alleging that the parties' oldest child was in need of post-educational support. CP, pp.3-38, 39-41. Mr. Almgren filed his own Motion and Declaration for Modification of Support on June 17, 2009. CP, pp.244-245. The matters were heard on July 14, 2009, see RP, Vol. B. On September 1, 2009, the court entered an Order on Modification of Child Support. CP, p.321, Order of Child Support, CP, pp. 322-337, Findings/Conclusions on Petition for Modification of Child Support, CP, pp.316-320.

B. ARGUMENT

1. **The Trial Court did not abuse its discretion in ordering post-secondary education support for the parties' young adult child.**

Standard of Review

Child support orders are reviewed under an abuse of discretion standard.

In re the Marriage of Griffin, 114 Wash.2d 772, 776, 791 P.2d 519 (1990).

An appellant must show that the lower court's decision was manifestly unreasonable or based on untenable grounds or reasons in order to succeed. *State ex. rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971), *M.A. Mortenson Co. v. Timberline Software Corp.*, 93 Wn.App. 819, 837, 970 P.2d 803 (CtApp. Div 1 1999) *affirmed*, 140 Wash.2d 568, 998 P.2d 305 (2000). The Supreme Court of Washington has further explained these terms, stating:

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

In re the Marriage of Littlefield, 133 Wash.2d 39, 47, 940 P.2d 1362 (1997).

Additionally, Washington courts have been reluctant to substitute their judgment for that of the trial court when it is shown that all relevant factors were considered and the award is not unreasonable. In *re the Marriage of Stern*, 57 Wn.App. 707, 717, 789 P.2d 807 (Ct.App. Div 1 1990) *review denied*, 115 Wash.2d 1013 (1990) (citing *In re the Marriage of Nicholson*, 17 Wn. App. 110, 119, 561 P.2d 1116 (Ct.App. Div 1 1977)).

A de novo standard of review is applicable in this case only as to the issue of subject matter jurisdiction. The de novo standard is applied to rulings of law, including the application of a statute to undisputed facts. *State v. Tatum*, 74 Wn.App. 81, 86, 871 P.2d 1123 (Ct.App. Div 1 1994).

"When the trial court bases an otherwise discretionary decision solely on application of a court rule or statute to particular facts, the issue is one of law, which is reviewed de novo on appeal." *Id.* The trial courts' decision to retain jurisdiction is inextricably tied to the application of the Uniform Interstate Family Support Act (UIFSA) to undisputed facts in this case. However, the court's decision to award child support is a factual determination to be reviewed for abuse of discretion.

Jurisdiction

Mr. Almgren's counsel initially asserts that the trial court erred in retaining jurisdiction in this case. It is counsel's argument that because the

parties' divorce and initial support order originated in Nebraska, jurisdiction was retained by that state under the provisions of UIFSA.

UIFSA is codified in Washington at Chapter RCW 26.21A Revised Code of Washington (RCW). As noted by counsel for Mr. Almgren, UIFSA governs the procedures for adopting, enforcing or modifying child support orders in which more than one state is involved. Brief of Appellant at 19.

In situations where there are multiple child support orders issued by multiple states, RCW 26.21 A. 130 determines which support order is controlling. The tribunal which issued the controlling support order is deemed to have continuing subject matter jurisdiction under the statute as long as the requirements of RCW 26.21A.120 are met. RCW 26.21A.130(5) In the present case, the parties' divorce and initial child support order were established in Nebraska, where they resided at the time. Ms. Schneider and the parties' two children moved to Washington shortly thereafter; Mr. Almgren moved to Minnesota. In 2007, a second order of child support modifying the Nebraska order was entered in Asotin County, Washington.

RCW 26.21 A. 130(2) provides in relevant part:

(2) If a proceeding is brought under this chapter, and two or more child support orders have been issued by tribunals of this state or another state with regard to the same obligor and same child, a tribunal of this state having personal jurisdiction over both the obligor and individual obligee shall apply the following rules and by order shall determine which order controls:

(a) If only one of the tribunals would have continuing, exclusive jurisdiction under this chapter, the order of that tribunal controls and must be so recognized.

(b) If more than one of the tribunals would have continuing, exclusive jurisdiction under this chapter, an order issued by a tribunal in the current home state of the child controls. However, if an order has not been issued in the current home state of the child, the order most recently issued controls.

Further, RCW 26.21A.550 in relevant part provides as follows:

(2) Modification of a registered child support order is subject to the same requirements, procedures, and defenses that apply to the modification of an order issued by a tribunal of this state and the order may be enforced and satisfied in the same manner.

(3) Except as otherwise provided in RCW 26.21A.570, a tribunal of this state may not modify any aspect of a child support order that may not be modified under the law of the issuing state. If two or more tribunals have issued child support orders for the same obligor and same child, the order that controls and must be so recognized under RCW 26.21A.130 establishes the aspects of the support order that are nonmodifiable.

(4) In a proceeding to modify a child support order, the law of the state that is determined to have issued the initial controlling order governs the duration of the obligation of support. The obligor's fulfillment of the duty of support established by that order precludes imposition of a further obligation of support by a tribunal of this state.

(5) On issuance of an order by a tribunal of this state modifying a child support order issued in another state, the tribunal of this state becomes the tribunal having continuing, exclusive jurisdiction.

On January 16, 2007, the Asotin County Superior Court entered the Final Order of Child Support and the Parenting Plan Final Order (CP 20-38), and pursuant to RCW 26.21A.550(5) became "the tribunal having continuing, exclusive jurisdiction."

At the time the request for modification of the Washington support order was filed in January of 2009, Ms. Schneider (individual obligee) as well as A.J.A. and J.D.A. (children benefitting from issuance of the support order) resided in Washington. Because Asotin County Superior Court, a Washington tribunal, issued the controlling support order in this case, and because at the time modification of said order was requested both the obligee and the children benefitting from the order resided in Washington, the Asotin County Superior Court has exclusive and continuing subject matter jurisdiction over the order under UIFSA.

Award of post-secondary support

Counsel for Mr. Almgren gives numerous arguments as to why the award of post-secondary support was an abuse of discretion by the trial court. At least one of these is based upon counsel's attempt to apply RCW 26.21A.550(4) inappropriately to these facts, saying said section is jurisdictional and the Asotin County Superior Court lacks jurisdiction to modify Nebraska's Order which stated that support was only ordered until the age of majority. Counsel's argument is that order couldn't be modified past the age of nineteen, which was the age of majority in Nebraska at the time. This argument is defeated by the provisions of 26.21A.550(5) and by the fact that Washington had been the home state of the children for many years. Consequently, the January 2009 modification action was a modification of a support order of the state of Washington and was not "modification of a registered child support order."

Counsel for Mr. Almgren argues his jurisdictional argument under (4) without clearly taking into account 26.21A.550(2) and (5). Modification of the Nebraska order occurred in January of 2007, and the Nebraska order was then superceded by the Washington order, which was then modified in the 2009 order, and the modification of the 2009 order being the Washington order, was not pursuant to RCW 26.21A.550.

It takes a large stretch of the imagination to reach the conclusion that a child whose second (and new or successive) home state is Washington is not entitled to the same support opportunities as any Washington child who has never had another home state. Further, we need to remember that all the parties contacts with Nebraska terminated shortly after the divorce. Mrs. Schneider and the children relocated to Washington, which became the new home state, and Mr. Almgren relocated to Minnesota. When that happened, and Washington became the children's home state, Nebraska lost the ability for original jurisdiction and the ability to modify.

Counsel's other arguments center around assertions that certain factors relating to post-secondary support either weren't considered at all by the trial court or were considered but were interpreted in what counsel believes to be an unreasonable manner.

Courts do have the ability and jurisdiction to order postsecondary educational support for adult children. *Childers v. Childers*, 89 Wash.2d 592, 605, 575 P.2d 201 (1978). "Even where child support is originally set to terminate upon the child's emancipation, courts have the power to modify the decree and order postmajority educational support in

compelling circumstances." *In re the Marriage of Gimlett*, 95 Wash.2d 699, 704, 629 P.2d 450 (1981).

RCW 26.19.090 presents standards for post-secondary educational support awards. As long as the court considers all the relevant factors set forth in RCW 26.19.090 for determining post-secondary support, it does not abuse its discretion. *In re the Marriage of Kelly*, 85 Wn.App. 785, 792-93, 934 P.2d 1218 (Ct.App. Div 1 1997) *review denied*, 133 Wash.2d 1014 (1997). The first factor listed in the statute that must be considered in a determination of whether to award post-secondary support is whether the child is dependent on the parents and relies on them for the "reasonable necessities of life." RCW 26.19.090(2) Counsel for Mr. Almgren asserts that A.J.A. is not dependent and does not rely on her parents for the reasonable necessities of life because she has not maintained a relationship with Mr. Almgren. Brief of Appellant at 27. It is important to note that this Court has very recently heard a case with very similar facts to those in this case.

In *In Re the Parentage of Goude*, which also involved an award of post-secondary support of an adult child, the parties had no contact with each other since the time of the child's birth. The child resided with the mother. The father argued that there had been no evidence presented to

show that the child was dependent. In rejecting his argument, the court noted that the evidence presented to the trial court that the child lived with the mother and worked only part-time was sufficient to determine that the child was dependent. *In re the Parentage of Goude*, 27753-4-III (Ct.App. Div 3 2009).

Similarly in this case, A.J.A resides with her mother and works only part-time. The fact that she has not maintained a relationship with Mr. Almgren is irrelevant to a determination of whether she is financially dependent on him. She is dependent on her mother and, as counsel for Mr. Almgren noted, relies upon her for the reasonable necessities of life. What counsel failed to consider is that Mr. Almgren has been under a support obligation to Ms. Schneider for the benefit of A.J.A. since the dissolution of their marriage. This begs the question of whether A.J.A. relies on Mr. Almgren, at least in part, for the necessities of life.

Additional factors the court is to consider when determining whether to award post-secondary support are listed in RCW 26.21A.090(2) as well:

Age of the child; the child's needs; the expectations of the parties for their children when the parents were together; the child's prospects, desires, aptitudes, abilities or disabilities; the nature of the postsecondary education sought; and the parents' level of education, standard of

living, and current and future resources. Also to be considered are the amount and type of support that the child would have been afforded if the parents had stayed together.

Despite arguments made by Counsel for Mr. Almgren, a quick review of the findings of fact issued by the court following the modification hearing make it clear that the trial court was presented with evidence not only of the factors listed above but also additional factors such as the state of the economy. "We must presume that the court considered all evidence before it in fashioning the order." *Kelly*, 85 Wn.App. at 793.

Counsel for Mr. Almgren asserts that the trial court failed to consider the expectation of the parties for their children when the parents were together. Brief of Appellant at 28. However, as counsel noted, the parties were divorced when A.J.A. was six and therefore it is not unexpected that this evidence wasn't made part of the record as the parties likely hadn't considered whether they would expect A.J.A. to attend college before their divorce. This was the case in *Kelly*, where the court stated "In finding that Miranda's aptitude for college could not have been known when the parents divorced, the lower court sufficiently considered her parents' expectations while they were together." *Kelly*, 85 Wn.App. at

793. The Court further noted that "where child support is originally established for young children, the child's subsequent showing of ability to attend college may be considered a substantial change of circumstances justifying a modification to provide postsecondary support." *Id.*

Counsel for Mr. Almgren contends that the trial court "doesn't take into account the current economic environment." Brief of Appellant at 28. In fact the opposite is true. In its' findings the court states that despite the fact that the economy is up and down and both of the parties are currently recently unemployed, the parties' children are still growing and have need for support, including a college education. Findings/Conclusions No. 05-03-00141-0. A.J.A. shouldn't be penalized by being prevented from attending college simply because her father didn't obtain a college degree. Nor should her mother be financially penalized for the same, as opposing counsel seems to assert she should. If there is anything that can be said about the current economy, it is that it is uncertain. Individuals with college degrees may be no more successful at obtaining a job than a "blue collar worker." Many individuals are taking jobs outside of their fields that they may be overqualified for. What counsel for Mr. Almgren fails to recognize is that *both* parties are unemployed. Neither party is certain that they will become employed in the near future. Despite counsel's

assertions, Mr. Almgren is arguably in a preferable position to Ms. Schneider as he has been granted unemployment and will at least be guaranteed that income until he can find another job. Ms. Schneider isn't even certain of that.

The bottom line in this situation is that it isn't ideal for anyone involved. The trial court did its best to balance the predicament of the parent with the best interests of the child. Further, because the trial court considered all of the relevant factors listed in the statute and because the award was not unreasonable, the trial court did not err in awarding post-secondary support for A.J.A.

2. The Trial Court did not abuse its' discretion by refusing to order a reduction in child support for the parties' minor child.

Deviations from the standard calculation of child support are matters within the discretion of the trial court. *In re the Marriage of Wayt*, 63 Wn.App. 510, 512-13, 820 P.2d 519 (Ct.App. Div 3 1991). In this case, the trial court refused to grant a reduction of a previous award of child support requested on the basis that Mr. Almgren is temporarily unemployed. Opposing counsel argues that refusing to reduce the award constitutes a deviation from the child support schedule, and that court should have reduced the support amount for J.D.A. to reflect Mr.

Almgren's new calculated income based on his unemployment compensation. Brief of Appellant at 31.

In exercising its' discretion to deviate from the child support schedule set out in RCW 26.19.020, the court is required to enter written findings and conclusions stating its reasoning. *State ex rel. Stout v. Stout*, 89 Wn.App. 118, 123, 948 P.2d 851 (Ct.App. Div 1 1997). Further, the Supreme Court has noted that "although cursory findings of fact and the trial record might appear to justify awarding a child support amount that exceeds the economic table, only the entry of written findings of fact demonstrate that the trial court properly exercised its discretion in making the award." *McCausland v. McCausland*, 159 Wash.2d 607 152 P.3d 1013, 1019 (2007). The Court also noted that 1) the parent's standard of living and 2) the children's special medical, educational or financial needs should be considered in the written findings. *Id.* (citing *In re the Marriage of Daubert*, 124 Wn.App. 483, 495-496, 99 P.3d 401 (Ct.App. Div 1 2004); *Rusch v. Rusch*, 124 Wn.App. 226, 233, 98 P.3d 1216 (Ct.App. Div 1 2004)).

It is clear that in the case at hand, the trial court made specific written findings justifying its' discretion in declining to reduce the award of support for J.D.A. as well as in awarding post-secondary support to A.

J. A. In reviewing the findings of fact and conclusions of law issued by the court pursuant to the modification hearing, one will notice that rather than simply marking the boxes indicating common findings of fact, the trial court issued four paragraphs of specific written findings of fact. These paragraphs included an explanation of the needs of the education and financial needs of the children as well as a discussion of the financial situation of the parties in relation to the current economic environment.

Opposing counsel also objects to the trial courts' finding on the basis that it was improper for the court to impute income to Mr. Almgren because there is no evidence that he is unemployed by his own volition. Income will be imputed to a parent who is voluntarily unemployed or underemployed. RCW 26.19.071 (6).

The trial court specifically notes in its' findings that while it is unfortunate that both parties are unemployed, the children are still growing and have need of support. Because of this, the trial court noted that, based on their education and training, both parties are highly employable and would no doubt be employed in the near future. Failing to order post-secondary support or reducing the amount of support for J.D.A. would put the parties children at a significant disadvantage, especially when considering it would be a year at minimum until the order could be

modified. RCW 26.09.170(5).

Opposing counsel also notes an objection based on the requirement that a support amount may not exceed 45% of a parties' net income. What counsel fails to note is that there are factors a court is required to consider before applying the limitation. Relevant factors to this case include whether applying the limitation would leave insufficient funds in the custodial parents' household to meet the basic needs of the child and comparative hardship to the affected households. RCW 26.19.065(1)(b) There is also an exception to the 45% limitation if it is applied for "good cause." RCW 26.19.065 Good cause includes educational need. RCW 26.19.065(1)(c).

The trial court was not required to apply the 45% limitation in this case due to special circumstances. Further, in issuing substantial written findings that outlined the special circumstances present in this case, the trial court was well within its' discretion in maintaining a support award that deviates from the standard support schedule.

C. CONCLUSION

The Asotin County Superior Court has exclusive and continuing subject matter jurisdiction over the child support order in this case because

it is the tribunal that issued the controlling order as determined by the provisions of UIFSA and particularly RCW 26.21A.550(5). Therefore, the Asotin County Superior Court does have the authority to order post-secondary support for A.J.A. past the age of 19. In doing so the trial court considered all of the relevant factors listed in the related statute. Additionally, the award was not unreasonable when considering the evidence presented. Therefore, the trial court did not err in awarding post-secondary support for A.J.A.

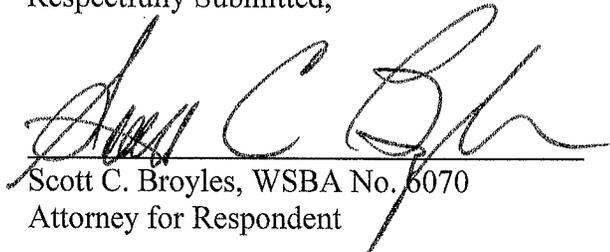
In determining that the support for J.D.A. should not be reduced, the trial court issued specific findings of fact which identified why that decision was in the best interest of the children and was necessary under the circumstances. The court, in light of the circumstances, was not required to apply the 45% limitation outlined in the identified statute. Therefore, the court acted within its discretion and did not err in refusing to reduce the support award for J.D.A.

Respondent respectfully requests that this Court affirm the rulings of the Asotin County Superior Court with respect to post-secondary support for A.J.A. and continuing support for J.D.A.

In closing, this Court is aware that Ms. Schneider has been unemployed and supporting two children. It has been financially difficult for her to defend against this action, and as such Respondent requests costs and attorney's fees pursuant to RCW 26.09.140 and RAP 18.1.

DATED this 9 day of April, 2010.

Respectfully Submitted,



Scott C. Broyles, WSBA No. 6070
Attorney for Respondent