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COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

NO. 64807-1

In Re Marriage of: Mitchel Krogseth and Kristin Flanigan

KRISTIN FLANIGEN,

Appellant

v.

MITCHEL KROGSETH,

Respondents.

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
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REPLY BRIEF OF APPELLANT

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I. RESPONDENT MAKES FACTUAL ASSERTIONS
WITHOUT CITATIONS TO THE RECORD.

RAP 10.3 (a)(5) states that “reference to the record must be included for each factual statement.” The Brief of Respondent asserts numerous factual statements for which no citation to the record has been included. As set forth in her motion filed with this brief, Appellant, Kristin Flanigen (Hereafter Kristin) objects to all such factual statements asserted by Respondent, Mitchel Krogseth (Hereafter Mitchel) in his brief that are not supported by reference to the record as required by RAP 10.3(a)(5), including specifically the following:

Page 5, paragraph 2, sentence 3;

Page 5, paragraph 2, sentence 4;

Page 12, paragraph 2, sentence 1 (fact alleged is not supported by the citation to CP 64);

Page 13, paragraph 1, sentence 1;

Page 13, paragraph 1, sentence 2;

Page 14, paragraph 2, sentence 3;

Page 14, paragraph 2, sentence 8;

Page 14, paragraph 2, sentence 9 – page 15, paragraph 1, sentence 1;

Page 15, paragraph 2, sentence 2;

Page 15, paragraph 2, sentence 8;

Page 15, paragraph 3, sentence 2;

Page 16, paragraph 1, sentence 3;

Except as otherwise noted, the factual assertions made by Mitchel were not supported by reference to the record and cannot be reasonably inferred from any facts supported by the record. Therefore, these factual assertions should be disregarded by the Court.

II. INTRODUCTION

Mitchel presents this appeal as though it were a review of multiple orders entered by trial court family law Commissioner Ponomarchuk. It is not. This appeal does not review the Order of Child Support entered by Commissioner Ponomarchuk on October 23, 2009, or any findings or conclusions therein. CP 15 – 41. That order was not appealed by either party and is unchallenged. This appeal also does not review the Order on Post Secondary Support also entered by Commissioner Ponomarchuk on October 23, 2009, or the Order Denying Motion to Set Aside Post Secondary Support, or any findings or conclusions therein. CP 42–57; CP 211-212. Those orders were not appealed by either party and are unchallenged. There is no basis for Mitchel to attack those orders in this appeal. This appeal is limited to a review of Commissioner Ponomarchuk’s Judgment and Order for Overpayment of Daycare Expenses, dated December 18, 2009, and Order Denying Motion for

Reconsideration, dated January 20, 2010. CP 91-93; CP 139. Therefore, evidence not before Commissioner Ponomarchuk or reviewed by him in support of or in opposition to entry of those orders should not be presented to this Court on appeal.

III. REPLY ARGUMENT

A. THE STANDARD OF REVIEW ON THIS APPEAL IS DE NOVO.

Respondent, Mitchel attempts to defeat Kristin's appeal on procedural grounds, arguing that the standard of review should be "abuse of discretion," not "de novo." This appeal is not a review of either a child support modification action or a parenting plan modification action. It is a review only of a decision by a family law court commissioner upon a motion for reimbursement of day care expenses under RCW 26.19.080(3). The commissioner's decision was based entirely on documentary evidence. Therefore, review is de novo. In re Parentage of Hilborn, 114 Wn.App. 275,276, 58 P.3d 905 (2002); In re Marriage of Balcom, 101 Wash.App. 56, 59, 1 P.3d 1174 (2000).

Mitchel relies on two cases for the proposition that the correct standard of review in this case is "abuse of discretion," Marriage of Abercrombie, 105 Wn.App. 239, 19 P.3d 1056 (2001), and In Re Parentage of Jannot, 149 Wn.2d 123, 65 P.3d 664 (2003), both of which

significantly differ from our case, and both of which very narrowly apply the “abuse of discretion” standard. The Abercrombie Court, in reviewing an appeal of a child support modification action, narrowly applied the “abuse of discretion” standard to review only of “an award of child support.” Abercrombie, at p. 242. Since our case is not a review of an award of child support the “abuse of discretion” standard in Abercrombie does not apply.

The Court in Jannot, reviewed the appropriate standard of review only with respect to the denial of a motion for adequate cause in parenting plan modification actions under RCW 26.09.270. In that case the trial court denied a petitioning parent’s motion for adequate cause to present a petition to modify a parenting plan. It reasoned that because adequate cause determinations are so fact intensive and individualized based upon a wide variety of factors, that the trial court judge was in a better position to evaluate the facts than an appellate judge. Jannot, at p. 127. The Jannot Court also noted that appellate review of a parenting plan modification action must be weighed against the detriment to children caused by extended litigation. Jannot, at p. 127. The Jannot Court’s application of the “abuse of discretion” standard was so narrowly construed that it has been limited only to trial court *denials* of adequate cause and was not even applied in a subsequent case that reviewed the *grant* of motion for

adequate cause. Marriage of Lemke, 120 Wn.App. 536, 85 P.3d 966 (2004).

The factors that were persuasive to the Jannot Court are not present here. This case does not involve extensive facts to consider or multiple factors to evaluate. This is not a parenting plan action where there is concern of a continuing unsettled residential placement of a child. This is a case of interpretation and application of a statute, which under Washington law is reviewed de novo even in domestic relations cases. *See, In re Parentage of L.B.*, 121 Wn.App. 460, 470, 83 P.2d 271 (2004); Marriage of Waters and Anderson, 116 Wn.App. 211, 215, 63 P.3d 137 (2002). The applicable standard of review in this case is de novo.

B. KRISTIN RAISED HER EQUITABLE DEFENSES IN THE TRIAL COURT.

Mitchel attempts to defeat Kristin's appeal on a second procedural ground, arguing that she failed to raise the defenses of equitable estoppel and laches in the trial court and, therefore, the Court of Appeals cannot consider those defenses on appeal. This argument ignores the record. In her Amended Motion for Order re: Reconsideration of Judgment for Overpayment of Daycare, specifically raised the issues of laches and equitable estoppels and, in fact, attached for the trial court's review the

leading Washington case on this issue, Marriage of Barber, 106 Wn.App. 390, 23 P.3d 1106 (2001). CP 102 – 114.

Prior to this, and while she was unrepresented, Kristin additionally raised the issues in substance, if not form. She raised the issues in her Declaration filed December 10, 2009, when she stated:

At no time over the past 11 years since the original Order of Child Support went into effect did Mr. Krogseth seek adjustment to the amount of child support owed, as was allowed pursuant to Section 3.13 of the original Order of Child Support. It was only after the Order of Child Support was modified and a judgment on back child support issued on the 23rd of October, 2009, that Mr. Krogseth hired an attorney and, in turn, sought a judgment against me, retroactive to 2002, in a continued attempt to avoid paying the judgment against him or contribute his proportional share of child support.

CP 80; CP 181. She raised the issues again in her Declaration filed December 28, 2009, when she stated:

In that I did not anticipate the judgment against me, as any modification of the original Order of Child Support would have more than compensated for daycare not incurred had I realized action on my part was required.

CP 98. When Kristin attempted to prove that she had in fact incurred daycare expenses during the relevant period, she raised the issues a third and fourth time in her Declaration of January 19, 2010, when she stated:

I spent thousands of dollars each summer toward all-day daycare for my minor children in the form of summer camps, however all but one of the organizations I contacted (list attached) do not keep records as far back as I requested, i.e. 2002. Nor do banks or the IRS keep records for more than seven years. The length of time required to retrieve banking records, credit cards in particular,

exceeded the 30 days I was given. Thus the attached receipts cover only a small percentage of the expense incurred entirely by me toward summer daycare for Kaitlin and Reese Krogseth, up until September 2004.

Had I ever imagined that Mr. Krogseth could or would ever seek a judgment against me for daycare not incurred, with the knowledge that I took on the far greater financial responsibility in raising the children and that his proportional share of child support would increase were I to have sought modification of the original order, then I would have had the foresight to keep more intricate records for purposes of reimbursement now. I implore the court to take into consideration the extreme financial hardship incurred by the judgment against me for daycare not incurred, which was not sought by Mr. Krogseth until seven years after he claims overpayment began, and show leniency in this matter.

CP 127. Kristin was unrepresented at the time she made these declarations. She would not be expected to know latin-root, legal terms such as “estoppel” or “laches.” However, she knows the underpinning fairness issues that those legal doctrines address. The essence of Kristin’s declarations to the court is that it is fundamentally unfair to her for Mitchel to neglect this issue for many years and then, only after he is unhappy with a ruling on post-secondary educational support, and only after it is too late for Kristin to seek adjustment of child support for the daycare reimbursement years, he hires an attorney, learns about a reimbursement statute and then seeks reimbursement. Kristin went on to demonstrate that had support been adjusted for the period September 2002 through June 2009, then support would have increased by approximately

the amount that Mitchel was deemed to be paying daycare. CP 80; CP 181. Only after she lost her opportunity for those adjustments did Mitchel seek the reimbursement. Therefore, Kristin articulated, as only a layperson could, that Mitchel's long delay of over seven years to make any claim for overpayment of daycare, changed her position in two respects that caused her injury: (1) she lost her right under the law to pursue simultaneous child support adjustments to set the true amount of child support as determined by Washington law; and (2) she lost her ability to account for the daycare that she in fact incurred.

It is not necessary to specifically or correctly cite to legal provisions or theories to preserve an issue for appeal. Greenfield v. Western Heritage Insurance Company, 154 Wn.App. 795,801, 226 P.3d 199 (2010) (failure to specifically refer to statute in trial court did not prevent raising a claim under the statute on appeal). Further, Marriage of Barber, 106 Wn.App. 390, 23 P.3d 1106 (2001) is the leading Washington case on the issue of reimbursement of day care expenses under RCW 26.19.080(3), and there is no indication in that case that the party claiming equitable estoppel and laches defenses specifically raised her claims in the trial court. Nevertheless, the Court of Appeals considered the issues on appeal and remanded for determination of whether equitable principals barred the claim for reimbursement. Barber, at p. 398.

Here, Kristin showed that she refrained from seeking an adjustment of child support to her detriment based on Mitchel's continuous payment of the daycare obligation, which included an obligation for monthly daycare. In this manner, Kristin also showed that Mitchel's seven and one-half year delay in asserting his right to reimbursement caused her to forego her right to statutory child support adjustments, which resulted in damage. In this manner, Kristin raised the issues of estoppel and laches. Therefore, the issues are before the court on appeal.

C. KRISTIN DOES NOT HAVE A BURDEN OF SHOWING THAT DAYCARE EXPENSES WERE INCURRED FROM 2002 – 2009.

Mitchel repeatedly complains in his Brief of Respondent, that Kristin “made no effort” to prove the amount of daycare expenses she incurred since entry of the original order. Brief of Respondent, pp. 1, 5, 6, 8, 9. Mitchell expects her to have maintained all such records since 2002, and describes her as having “defiantly refused to even attempt” to provide daycare expense documentation. Brief of Respondent, p. 9. First, Mitchel's complaints mischaracterize the evidence. Kristin provided 11 pages of documents showing her efforts to supply the court with evidence of daycare she actually incurred during the relevant period. CP 128 – 138. She provided a declaration describing how she had spent thousands of

dollars each summer during the relevant years putting her children in all-day daycare summer camps, but that the documentation could not be obtained due to the lapse in time between incurring the expenses and the time at which proof was requested. CP 126 – 127.

Second, and more importantly, attempts to impose upon Kristin a requirement that she document daycare expenses going back over seven years *before* she can seek the equitable relief of equitable estoppel and laches. Mitchel misses the issue in this case for it is precisely Mitchel's unreasonable delay in pursuing reimbursement that has put Kristin in the position that she cannot supply daycare expense documents going back to 2002. Kristin shows a list of organizations that provided daycare for the children, which Kristin procured and purchased over the years. CP 128. Many of these providers were closed or no longer had records going back seven years, and, as a result, Kristin was unable to retrieve the documents supporting her expenses. CP 128 -129. Therefore, Kristin's inability to obtain documentation for the daycare that she actually incurred does not preclude her from raising the defense of laches, but rather is further support for her claim.

As Mitchel notes in his Brief of Respondent, the original Order of Child Support contained a provision that "the parent receiving support *may* be required to submit an accounting of how the support is *being* spent

to benefit the child.” CP 4 (*emphasis added*). Thus, Mitchel had a right to ask Kristin for an accounting of expenditures being made concurrently with the request. He had that right throughout the life of that Order of Child Support. This provision does not mean that Mitchel can demand an accounting many years later. Mitchel acknowledges that he failed to assert his right for an accounting at any time during the period that the order was in effect. Once the 2009 Order of Child Support was entered on October 23, 2009, the 1998 Order was terminated and replaced, and it was no longer possible to seek an accounting of expenses under that order. Again, Mitchel delayed for too long, and his claim for an accounting of Kristin’s daycare expenses under the terminated order should be barred by laches.

D. THE FINANCIAL RESOURCES OF THE PARTIES ARE NOT RELEVANT¹

Mitchel attempts to inject into this appeal the relative financial resources of the parties. Facts of the parties’ respective incomes or other financial circumstances are not pertinent to the issues on this appeal. The

¹ Kristin respectfully submits that facts of the parties’ financial resources are not relevant to the issues in this appeal and has moved to strike portions of Respondent’s Brief related to evidence of financial and economic circumstances that were not before the commissioner in the trial court at the hearing on the Motion for Judgment for Day Care Expenses Not Incurred. A final ruling on that motion is pending at the time of drafting of this brief. Therefore, this section, III.D. of Appellant’s Reply Brief is submitted only for review in the event the Court accepts and considers Mitchel’s evidence of financial resources and is not a waiver by Kristin of her objection to such evidence.

court in Marriage of Barber, *supra*, did not evaluate the parties' respective financial circumstances in the analysis of whether the mother had equitable estoppel or laches defenses to the father's claim under RCW 26.19.080(3). The court did not consider them because they were not relevant to the issue. Under the doctrine of laches, the party asserting the defense must only show damage caused by an unreasonable delay by the other party in commencing an action. In Barber, the trial court awarded the father a judgment for reimbursement of \$5,242.88. The court of appeals then held that the mother, without any showing of her financial circumstances, could pursue her defense of laches. Barber, *supra*, at p. 393. The Barber court recognized damage to the mother without considering her financial resources. Imposition of a reimbursement judgment in the amount of \$32,684.10 (approximately six times that of the judgment in Barber) must therefore, be regarded as damage to the judgment debtor per se. The financial circumstances of the parties are irrelevant, and Kristin's citations to the record herein regarding financial circumstances are only offered in rebuttal to assertions made by Mitchel, which were objected to earlier in this Appeal. See, Objection and Motion to Strike Portions of Respondent's Brief, dated June 23, 2010.

Nevertheless, the trial court in this case has already determined that Mitchel earns monthly net income of \$3,283.28 and Kristin's monthly

net income is \$4,838.12. These are unappealed and unchallenged findings, which are accepted as verities on appeal. Kelly v. Powell, 55 Wn.App. 143,146, 776 P.2d 996 (1989). This court should not be persuaded by Mitchel's efforts to show that Kristin is economically advantaged and will not be negatively impacted by a judgment of \$32,684.10. He provides no citations to the record to support the majority of his factual assertions on this matter. *See*, Objection to Factual Assertions Made Without Citations to the Record, Section A, above.

Kristin's financial circumstances are not nearly as promising as Mitchel would have the Court believe. Kristin is a co-provider for a family of six, two adults and four children. Financial Declaration of Petitioner, dated June 28, 2009, Sub #52, page 4; CP _____. Her monthly household expenses are \$13,129.53, which includes monthly first and second mortgage payments totaling \$5,232.03. Financial Declaration of Petitioner, dated June 28, 2009, Sub #52, page 3; CP _____. Kristin's husband earns gross monthly income of \$6,701.92, which, when added to Kristin's monthly net income leaves the family with a monthly cash flow deficit of over \$1,589.00 per month. CP 40. Kristin's household owes \$29,682 in combined credit card debt and \$783,694 in combined mortgage payments. Financial Declaration of Petitioner, dated June 28, 2009, Sub #52, page 5; CP _____. CP 40; CP 83. Kristin's home encumbered by the

two mortgages is worth only \$632,000, leaving her family with negative equity of \$153,694. CP 40; CP 83. Kristin did not have the available funds to retain an attorney throughout the trial court proceedings. CP 78; CP 165. Kristin does not possess any stock or retirement investments. CP 143. Therefore, the record shows that despite Mitchel's unsupported assertions, Kristin does not have the ability to pay a judgment of \$32,684.10.

On the other hand, Mitchel's economic circumstances may not be nearly as dire as he would have the Court believe. He is employed by his sister, Vicki Sellers in her profitable businesses, Sellers Masonry and JOV, LLC. CP 144. His only debts appear to be a an IRS debt of \$7,500 and a loan from his sister's company in the amount of \$45,000. CP 221. His Sealed Financial Source Documents do not provide any documentary evidence of this loan or any re-payment requirements. CP 228-242. Kristin has alleged that Mitchel has a history of working for his sister's businesses "under the table" to conceal additional income. Declaration of Petitioner, dated July 8, 2009, Sub #50, pages 1-2; CP ____.

Therefore, if this Court considers the financial circumstances of the parties in its review of the merits of this appeal, it should conclude that the judgment against Kristin for reimbursement of daycare expenses will cause her significant financial hardship.

E. THE TWENTY (20) PERCENT THRESHOLD UNDER RCW 26.19.080(3).

Mitchel misconstrues the language of RCW 26.19.080(3).

Initially, the relevant portion of subsection (3), reads in applicable part:

(3) If an obligor pays court . . . ordered day care . . . expenses that are not actually incurred, the obligee must reimburse the obligor for the overpayment if the overpayment amounts to at least twenty percent of the obligor's annual day care . . . expenses. The obligor may institute an action in the superior court . . . for reimbursement of day care . . . expense overpayments *that amount to twenty percent or more* of the obligor's annual day care . . . expenses.

RCW 26.19.080 (*Emphasis Added*). In construing a statute, courts should read it in its entirety, instead of reading only a single sentence or a single phrase. Each provision must be viewed in relation to the other provisions and harmonized, if at all possible. Statutes must be construed so that all the language is given effect and no portion is rendered meaningless or superfluous. The court must also avoid constructions that yield unlikely, absurd or strained consequences. Kilian v. Atkinson, 147 Wn.2d 16,21, 50 P.3d 638 (2002). Mitchel's interpretation of RCW 26.19.080(3) ignores the plain language of the phrase, "*that amount to twenty percent or more,*" which clearly limits the reimbursable portion of any overpayment to amounts that exceed twenty percent of the annual obligation. It is not permissible to construe the statute without giving effect to this phrase.

Additionally, Mitchel interprets the statute to mean that a claimant is entitled to reimbursement of 100% of all overpayments over many years, less only twenty percent of the obligation for one year. However, this construction of the statute is inconsistent with the court's obligation to construe a statute based on a fair reading of the statute as a whole to avoid strained, absurd, or unlikely results. *See, Public Utility Dist. No. 1 of Pend Oreille County v. State, Dept. of Ecology*, 146 Wn.2d 778,816, 51 P.3d 744 (2002); *King County v. Seawest Inv. Associates, LLC*, 141 Wn.App. 304,313, 170 P.3d 53 (Wash.App. Div. 1 2007). A fair reading of the statute shows that reimbursement claims are to be calculated and assessed on an annual basis during the life of the order of child support. Directly following the statute's language limiting reimbursement to the amount that exceeds twenty percent, RCW 26.19.080(3) then goes on to read:

Any ordered overpayment reimbursement shall be applied first as an offset to child support arrearages of the obligor. If the obligor does not have child support arrearages, the reimbursement may be in the form of a direct reimbursement by the obligee or a credit against the obligor's future support payments. If the reimbursement is in the form of a credit against the obligor's future child support payments, the credit shall be spread equally over a twelve-month period.

RCW 26.19.080(3). The fair reading of this portion of the statute when viewed in its entirety with the statute as a whole shows that the legislature intended reimbursements to be claimed and made during the life of the

F. STATUTORY INTEREST IS NOT MANDATED BY RCW 26.19.080.

Statutory interest applies to properly entered judgments. RCW 26.19.080(3) does not state or suggest that judgments may be entered against obligee parents for reimbursement of overpaid day care. The statutory methods of reimbursement are (1) offset against child support arrearages; (2) direct reimbursement by the obligee; or (3) a credit against future support payments. There is no mention in the statute of a judgment or of interest thereon, and interest does not work well under the reimbursement scheme, as credits against future monthly support payments do not become due and payable until the due date for each individual monthly support payment.

Even less does statutory interest make sense in this case under the reimbursement method imposed by Commissioner Ponomarchuk. The practical effect of requiring Kristin to pay Mitchel's 40% obligation of his annual post secondary support obligation up front and then crediting back to him the unpaid day care reimbursement judgment at a rate of \$610.20 per month causes her to pay interest on her obligation to Mitchel, while allowing Mitchel to avoid interest on his obligation to her. Nothing in the Brief of Respondent addresses the inconsistency in assessing interest against Kristin on her liquidated debt, but not against Mitchel on his

liquidated debt. Therefore, Kristin should not be required to pay interest on any judgment for overpaid day care.

G. AN AWARD OF ATTORNEY'S FEES AND COSTS IS NOT APPROPRIATE IN THIS CASE.

Kristin does not have the ability to pay attorney fees and costs. Mitchel grossly over represents Kristin's household income inconsistent with the findings of the trial court. The trial court reviewed all of the economic circumstances of the parties prior to the hearing on Kristin's Petition for Modification of Child Support and entered findings of fact on the parties' incomes and relative economic positions, and did not award attorney fees at any stage in the proceedings. The parties' respective monthly incomes are not significantly disparate. Mitchel earns 40% of the parties' combined income and approximately 70% of Kristin's income. CP 32. Kristin not only houses the two children of the marriage, but also supports with her new husband two additional children. CP 40-41. The trial court found that the mortgages encumbering Kristin's home far exceed its value to the extent that her home has negative value of \$151,000, and is therefore a liability, not an asset. CP 40. The court also found that Kristin and her husband have commercial credit card debt of \$30,000. CP 40. Her financial declaration shows that her household expenses exceed her

entire household income by over \$1,589.00 per month. Financial Declaration of Petitioner, dated June 28, 2009, Sub #52, page 3; CP _____.

Therefore, Kristin has no resources available for attorney fees and an award of fees and costs is not appropriate under RCW 26.09.140.

V. CONCLUSION

For the foregoing reasons, Kristin's appeal should not be precluded or defeated on procedural grounds. The applicable standard of review is "de novo," which was the standard applied by the court in Marriage of Barber, supra. Kristin raised the issues of equitable estoppels and laches to the trial court, both specifically and as defenses based on facts that meet the elements of the legal doctrines. No law requires Kristin to prove years-old daycare expenses before she can assert equitable defenses to a reimbursement claim under RCW 26.19.080(3). A primary purpose of the doctrine of laches is to address the inability of obtaining such proof due to the lapse of time caused by a claimant who does not timely pursue a known claim.

Further, the plain language of RCW 26.19.080(3) limits any reimbursement recovery to the portion that exceeds twenty percent on an annual basis, and a fair reading of that statute shows that such claims must be asserted within twelve months of daycare overpayments. The statute

does not mandate interest on reimbursement awards and such interest is not appropriate in this case. Therefore, the Court should reverse and vacate Commissioner Ponomarchuk's Judgment and Order for Overpayment of Day Care Expenses and remand the matter to the King County Superior Court. The Court should further deny Mitchel's request for attorney fees and costs.

Respectfully Submitted this 18th Day of July, 2010.

THE HUNT LAW OFFICES

A handwritten signature in black ink, appearing to read 'J. Hunt', written over a horizontal line.

JOSEPH T. HUNT, WSBA #22120
Attorneys for Appellant