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COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
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**NO. 74940-4-1**

**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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**In re the Marriage of:**

**Virginia Berry**

**Petitioner/Appellant,**

**and**

**David Berry**

**Respondent/Appellee.**

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**BRIEF OF RESPONDENT DAVID BERRY**

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## A. INTRODUCTION

The trial court did not abuse its discretion when it terminated college support for Rachel Berry. The order was based on the fact that Rachel Berry did not attend college full time the spring, 2015 term. Rachel had previously withdrawn from all of her classes the fall, 2014 term. Rather than seeking modification of the full time requirement when she decided to withdraw from class and become a part time student during the spring 2015 term, a falsified grade report was sent to David Berry misrepresenting her status to be that of a full time student. David Berry requests that the court's order be affirmed.

## B. RESTATEMENT OF THE CASE

Virginia Berry has included in the record on review copies of Clerk's Papers from previous proceedings under the Superior Court cause number which were not presented to or considered by the trial court at the hearings on motion to terminate post-secondary support. Since the Court of Appeals must determine whether or not the trial court abused its discretion based on the facts considered by the court, only evidence that was presented to the trial court at the hearing should be considered on appeal. None of the Clerk's Papers referenced in pages 3 – 8 and footnote 5 on page 10 of

Virginia Berry's Brief were included in the evidence presented to the trial court on the motion to terminate post-secondary support. The only clerk's papers considered at the hearing were documents in the range of CP 11 through 147 and 539 through 601. Therefore, the Court of Appeals should consider only the facts set forth below and at pages 9 – 12 of Virginia Berry's Brief in determining whether or not the trial court abused its discretion.

The facts that were before the trial court at hearing of the motion to terminate or suspend post-secondary support are as follows: On July 8, 2015, pursuant to the requirements of the order of child support, a transcript report was sent to David Berry showing Rachel Berry's grades for the spring term at Cascadia College along with a request for payment of the fall, 2015 term tuition. CP 63, 93, 100. The transcript report purported to show that she had completed 15 credit hours, consisting of English 105, Sociology 150 and Math 120. CP 101.

Based upon the documentation received showing that Rachel Berry was attending college full time, David Berry paid his share of the tuition for the fall, 2015 term. CP 93, 105. Petitioner requested proof of payment and David Berry provided bank account records to her. CP 103 – 105.

Subsequently, after repeated demands for an official transcript, David Berry was finally provided a copy of Rachel Berry's Cascadia College Transcript/Grade Record dated September 30, 2015. CP 93, 107. The transcript shows that Rachel Berry did not take any of the classes listed on the transcript report previously sent to Mr. Berry. Rather, she took Math 085, Sociology 101 and Philosophy 102. CP 107. The official transcript shows that she withdrew from the Philosophy course and did not earn three credit hours with a grade of 2.9 as represented on the transcript previously provided to David Berry. CP 107, 101. Further, the Math class she actually took, Math 085, is not a college level class (CP 80, 81). Rachel Berry completed only one five credit college class and one five credit pre-college level course during the spring, 2015 term. A "full time student" must take at least 12 credits of coursework each quarter. CP 110. Rachel Berry was not a full time student at Cascadia College during the spring, 2015 term.

The transcript provided on July 8, 2015 was clearly a falsified document. Virginia Berry claimed in her response to the motion that the false Cascadia College Spring Quarter, 2015 transcript that Rachel and Virginia sent to David Berry was an error

on the part of the college. She claimed that she was given that explanation by the registrar. CP 63. David Berry objected to that hearsay assertion and moved that it be stricken and not considered by the court. CP 51. Further, while Virginia Berry submitted with her response two unsworn letters from Cascadia College (CP 83, 84), she did not submit any statement from the College verifying her assertion that the false information on the transcript sent to Mr. Berry on July 8, 2015 was caused by errors in new software at the college. CP 51.

Rachel Berry in fact was not a full-time student as required for continued post-secondary support under the child support order. CP 118. Tuition for the next term was claimed with a falsified Cascadia College grade report. CP 100. Virginia Berry asserts that when David Berry's attorney pointed out errors on the transcript, that Rachel provided immediate permission for him to have online access to her grade reports. CP 63. That is false. On July 29, 2015, David Berry's attorney requested an official transcript from Cascadia College. CP 59. A response to that request was sent by Rachel Berry on August 26, 2015 indicating that she would request the official transcript. CP 57. The official transcript was not sent to David Berry's attorney until September 14, 2015, after he

paid the tuition for fall quarter 2015 on August 30, 2015. CP 55.

In addition to not attending full-time the spring 2015 term, Rachel Berry withdrew from college and earned no credits the fall 2014 term. CP 92-93.

Along with termination of post-secondary support, the motion included a request for judgment against Virginia Berry for counseling reimbursements which she claimed under the Child Support Order based upon falsified counseling invoices she sent to David Berry. CP 92, 94-96. In her response to the motion, Virginia Berry did not deny that the counseling invoices that she sent to Mr. Berry were falsified. CP 63.

### C. ARGUMENT

#### 1) Standard of Review

The standard of review is manifest abuse of the trial court's discretion. In *Marriage of Booth and Griffin*, 114 Wash.2d 772, 791 P. 2d 519 (1990), the Court held:

In considering appeals regarding the setting of child support we have relied on the rule that trial court decisions in dissolution proceedings will seldom be changed on appeal. The spouse who challenges such decisions must show the trial court manifestly abused its discretion.

In *Marriage of Wicklund*, 84 Wash.App. 763, 932 P.2d 652

(1996), the court set forth the rule as follows:

In order to determine if a trial court has abused its discretion we look to see if its decision is based on untenable grounds or reasons, or is manifestly unreasonable. The court acts on untenable grounds if its factual findings are unsupported by the record; the court acts for untenable reasons if it has used an incorrect standard, or the facts do not meet the requirements of the correct standard; and the court acts unreasonably if its decision is outside the range of acceptable choices given the facts and the legal standard. (citations omitted.)

2) Record on Review.

RAP 9.1 provides in part as follows:

Rule 9.1. COMPOSITION OF RECORD ON REVIEW

(a) Generally. The “record on review” may consist of (1) a “report of proceedings,” (2) “clerks papers,” (3) exhibits, and (4) a certified record of administrative adjudicative proceedings.

...  
(b) Clerk’s Papers. The clerk’s papers include the pleadings, orders, and other papers filed with the clerk of the trial court.

This rule does not permit the designation of papers on file with the clerk of the trial court in connection with earlier proceedings between the same parties (or from unrelated cases for that matter), if the papers were not submitted for consideration by the trial court at the hearing from which the appeal arises.

The trial court’s exercise of discretion must be considered in light of the facts admitted into evidence at the hearing. Therefore,

the extraneous facts referenced in pages 3 – 8 and footnote 5 on page 10 of Virginia Berry's Brief that were not presented to the trial court should not be considered in the determination of whether or not the trial court abused its discretion.

Next, Virginia attempts to rely on inadmissible evidence she submitted with her response to the motion to terminate including hearsay assertions and unsworn statements.

#### ER 802. HEARSAY RULE

Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.

#### ER 801. DEFINITIONS

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

The statements offered by Virginia Berry consisting of her assertion of what she was told by the Cascadia College Registrar were hearsay and should not be considered on appeal.

Further, the note from the doctor was not signed under

penalty of perjury and should also not be considered as evidence on appeal. Statements that are not given under penalty of perjury may not be considered.

#### CR 41(e) TAKING OF TESTIMONY

##### (3) Evidence on Motions.

(1) Generally. When a motion is based on facts appearing of record, the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly on or partly on oral testimony or depositions.

RCW 9A.72.085 does permit sworn statements under penalty of perjury to be submitted in lieu of affidavits but the doctor's statement offered by Virginia Berry was not under penalty of perjury in either affidavit or declaration form and should not be considered as evidence on appeal.

##### 3) The trial court did not abuse its discretion when it terminated post-secondary support

Virginia Berry asserts that the trial court based its order on an erroneous interpretation of the child support order. She points to the cryptic minute entry of the hearing and asserts that the trial judge held that termination of college support is the only option for her failure to attend school full time. That is not what the minute entry states. Rather, the operative language reads as follows:

Petitioner's motion for revision of Commissioner Lester H. Stewart's order on Motion to Terminate or Suspend Post-Secondary support obligation entered on January 12, 2016. Denied. The court finds the support order was clear and that there was no provision in that order for any medical or other reason for reducing work load to that of less than a full-time student. The court confirms the commissioner's ruling terminating post-secondary support. This court modifies the judgment against the petitioner to \$7,086.00. CP 42.

First, the court was not saying that there were too many absences. Rather, the court noted that she was not enrolled full time. Second, the trial court did not read the order as providing that termination was the only option. The motion itself was to terminate or to suspend post-secondary support. CP 92, 42. The judge considered the facts before him and determined that support should be terminated rather than suspended. The court did not manifestly abuse its discretion.

It should also be noted that there is no report of proceedings showing the entire decision and rationale given by Judge Bowden for his decision. The minute entry did not include the Judge's other comments and reasons for his decision and undue weight is being placed on just one statement of the trial court.

Virginia Berry then argues that the child support order is ambiguous so the court should read a medical exception into the

order. However, the order of child support is not ambiguous. It provides at Section 3.15 (CP 117 – 118):

The parents' obligation to pay for postsecondary education support are strictly conditioned on the requirements of RCW 26.09.090 including that Rachel shall enroll in and attend school full-time, and must be in good academic standing, as defined by the institution. Rachel shall timely, not less than every six months, make available all academic records and grades to both parents as a condition of receiving postsecondary educational support as set forth herein. Failure to comply with any of these conditions shall result in automatic suspension of the parents' obligations.

The parents' obligations for payment of any and all post-secondary expenses, including living expenses of Rachel Berry, their adult child shall automatically terminate without further court order upon written verification that Rachel Berry is not enrolled in or not attending full-time or not maintaining good academic standing in an accredited institution of higher learning.

In the first paragraph quoted above, the order paraphrased the provisions of RCW 26.19.190 including the statutory language that failure to comply with all of the statutory requirements would result in automatic suspension of the parents' obligations. In the second paragraph quoted above, the order set forth a more limited number of circumstances, including not attending full time, that would result in automatic termination of the obligation upon receipt of written verification.

The child support order was not ambiguous and there is nothing for the court to interpret. *In re Marriage of Bocanegra*, 58 Wn. App. 271, 792 P.2d 1263 (1990).

Moreover, the intent of the court entering the order is clear. The court first specifically referred to the language of RCW 26.09.090 as providing for suspension of post-secondary support in the event not enrolled full time but the court then went on to include language in the order providing for the termination of support on those grounds. CP 117-118.

There was nothing ambiguous about the order's language which clearly stated that one possible result of failure to attend full-time was termination of the parents' obligation. CP 118.

Even if the child support order arguably provided for either suspension or for termination in the event that Rachel Berry was not attending full-time, the trial did not abuse its discretion by terminating rather than suspending college support.

The court had before it facts supporting termination. Rachel Berry was not attending college full time the spring 2015 term. CP 107, 83. Further, she had already received one free pass as support was not terminated or even suspended when she dropped out of Western Washington University the fall 2014 term and earned no

credits. CP 92-93.

In addition to violating the provision in the child support order that she attend college full time, Rachel Berry violated the provision set forth in the order (CP 117 – 118) and RCW 26.19.090(4) by failing to make available all academic records and grades to both parents. Rather than sending an authentic grade report as required by the order and the statute, a falsified grade report was sent for the spring 2015 term to induce David Berry to continue paying support. The claim of a mistake on the part of the college does not excuse Rachel's involvement in sending a false transcript report to David Berry. If she downloaded the transcript report as claimed, she would have clearly seen that it showed classes that she did not take. CP 63, 100.

Further, the trial court had evidence before it that Virginia Berry claimed counseling reimbursements from Mr. Berry in the amount of \$4,712. CP 96. While Virginia Berry has not appealed that judgment, the circumstances are nonetheless relevant here. Evidence of those fabricated documents, along with Rachel Berry's participation in sending the falsified college transcript, was before the court on the motion to terminate post-secondary support and put into question all assertions in the response.

Considering those facts, the trial court did not manifestly abuse its discretion by terminating post-secondary support.

Next, Virginia Berry argues that consideration of the best interest of the child requires that a "medical" exception must be read into the college support order. She cites *Kruger v. Kruger*, 37 Wn. App. 329, 697 P.2d 961 (1984), as support for that argument. First, the order at issue in *Kruger* included entirely different provisions for college support than those set forth in the order in our case. In *Kruger*, the order provided that support was owed "so long as the child is engaged in a full time program of higher education." The court of appeals affirmed the trial court's holding that the language meant that support was owed for times the child was enrolled in a full time program of higher education. In our case, the child support order provides that the obligation shall terminate when the child is not enrolled full time. Second, the best interest of the child is not furthered by condoning the obtainment of funds through falsified documents.

Virginia Berry next argues that college support would be terminated in more severe circumstances where attendance is not possible because of an accident. Contrary to that assertion, a legal remedy was available if any medical issue prevented Rachel Berry

from attending college full time. She could have filed a motion to modify the child support order to permit less than full time attendance. RCW 26.09.170; *Balch v. Balch*, 75 Wn. App. 76, 880 P.2d 78 (1994); *Marriage of Anderson*, 49 Wn. App. 867, 746 P.2d 1220 (1987). Instead, of moving for modification, a falsified grade report was sent to Mr. Berry.

In a Missouri case cited by Virginia Berry, *Daily v. Daily*, 912 S.W. 2d 289, 294 (Mo. Ct. App. 1998), the court affirmed the trial court's denial of a request to continue the college support obligation. The proposition for which that case was cited was quoted from *Braun v. Lied*, 851 S.W. 2d 93 (Mo. Ct. App. 1993). Significantly, *Braun* arose on a motion to modify that was filed while the student was still enrolled in college.

Similarly, in the other case cited in *Daily*, *Harris v. Williams*, 72 S.W. 3d 621 (Mo. Ct. App. 2002), a motion directed at the college obligation was filed when the student was enrolled in college and before he withdrew from the school.

Virginia Berry also cites *Schubert v. Schubert*, 366 S.W. 3d 55 (Mo. Ct. App. 2012), but, again, *Schubert* was an original determination of whether the court properly exercised its discretion by ordering college support with less than full time or continuous

attendance and the court of appeals simply held that the court did have such discretion.

*Sullins v. Knierim*, 308 S.W. 3d 241 (Mo. Ct. App. 2010), involved the filing of a 2006 motion to modify the support order to require payment of college expenses. The child did not enroll in or attend the required number of credits in 2007. Again, the issue of whether less than full time attendance should be ordered in light of the child's circumstances was presented to the court by motion before the child failed to meet the statutory requirements.

Therefore, rather than supporting Virginia Berry's position that a medical exception may be read into an order after the fact, the above cases indicate that assertion of a medical exception to attendance should be raised on a motion to waive the full time requirement and prior to the time support terminates under the terms of the order.

Finally, Virginia Berry cites *Cossette v. Cossette*, 76 P.3d 795 (Wyo. 2003). However, the issue in that case was whether the student's failure to be present for all classes during the school term meant that she was not a full time student. The court held that as long as the student was enrolled full time, support would not be terminated if she missed some classes because of a medical

condition. In our case, it was not the fact that she missed some classes that was cited in the trial court minute entry; rather, the court referred to her failure to be enrolled full time. CP 42.

Virginia Berry also requests reversal of the judgment entered by Judge Bowden on the motion for revision for the amount David Berry paid to Cascadia College for the fall 2015 tuition after he was sent the falsified spring 2015 showing that Rachel Berry was attending full time. Evidence of the payment was submitted to the court without objection. CP 105, 63.

CR 15(b) provides in part as follows:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

In *MacCormack v. Robins Construction*, 11 Wash.App. 80, 11 Wn. App. 80 (1974), the Court of Appeals applied CR 15(b) and affirmed judgment. In the words of the court:

To specifically apply CR 15(b) to the instant case, it is clear that under CR 15(b) pleadings may, in the discretion of the trial court, be amended to conform to the evidence at the conclusion of a trial, indeed even after judgment. CR 15(b) allows a new cause of

action, tried without objection, in the discretion of the trial court to be a basis for recovery.

In our case, evidence admitted at the hearing showed that Virginia Berry participated in the submittal of a false college transcript to David Berry and that he paid additional tuition for the next term in the amount of \$2,374 despite the fact that he had no obligation for that payment under the child support order. CP 63, 93, 100. The court properly entered judgment for that amount.

As to the \$1,000 attorney fee judgment entered against Virginia Berry, the basis for the award is set forth in *Mattson v. Mattson*, 95 Wn. App. 592, 976 P.2d 157 (1999), wherein the Court of Appeals held:

An award of attorney fees is within the trial court's discretion. The party challenging the award must show that the court used its discretion in an untenable or manifestly unreasonable manner. Under RCW 26.09.140, the trial court can order a party in domestic relation actions to pay reasonable attorney fees, but generally the court must balance the needs of the party requesting the fees against the ability of the opposing party to pay the fees.

1617 But if intransigence is demonstrated, the financial status of the party seeking the award is not relevant.

A party's intransigence can substantiate a trial court's award of attorney fees, regardless of the factors enunciated in RCW 26.09.140; attorney fees based on intransigence are an equitable remedy. (citations omitted.)

Under the intransigence rule, the trial court properly ordered Virginia to pay a portion of David Berry's attorney's fees.

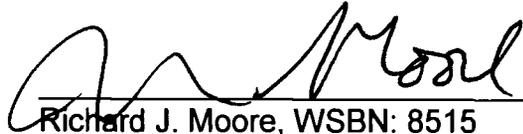
#### 4. Motion for Attorney fees

These proceedings arose solely because Virginia Berry submitted a falsified college grade report and fabricated counseling invoices to induce David Berry to pay amounts that should not have been required under the child support order. Virginia Berry should be ordered to pay the attorney's fees incurred by David Berry on this appeal based on intransigence. Under the holding in *Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197 (1989), when intransigence is shown, financial circumstances are not relevant. Further, Virginia Berry has significant assets and is able to pay her own attorney's fees if need/ability to pay is considered.

#### D. CONCLUSION

As set forth above, the trial court did not abuse its discretion when it terminated college support for Rachel Berry. The trial court's award of judgment against Virginia Berry for the fall, 2015 tuition she claimed with a false college grade report was proper. Judgment for attorney's fee against Virginia Berry was properly entered on account of her intransigence. The order of the trial court should be affirmed.

Respectfully submitted this 2<sup>nd</sup> day of August, 2016.

A handwritten signature in black ink, appearing to read "R. Moore", written over a horizontal line.

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