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COURT OF APPEALS  
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STATE OF WASHINGTON

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Nos. 39540-1-II and  
37400-5-II

COURT OF APPEALS, DIVISION TWO,  
STATE OF WASHINGTON

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STATE OF WASHINGTON, PAULA  
HARMES-BOWSER,

Respondent,

vs.

TROY A. NYLANDER,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR PIERCE COUNTY  
THE HONORABLE COMMISSIONER LINDSAY  
THE HONORABLE COMMISSIONER MARSHALL  
THE HONORABLE COMMISSIONER GELMAN

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BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by entering the Order for Support on November 1, 2005. (CP 204-219)
2. The trial court erred by entering the Order re: Child Support on November 17, 2005. (CP 243-244)
3. The trial court erred by entering the Order of Child Support on January 17, 2008. (CP 357-367)
4. The trial court erred by entering the Order on Motion for Judgment re: Past-due Child Support, on June 15, 2009. (CP 481-482)

Issues Pertaining to Assignments of Error

1. Did the trial error by ordering back child support and interest thereon that exceeded the limitation periods from in RCW 4.16.020(2) and/or 26.26.134? (Pertaining to Assignments of Error Nos. 1-4)
2. Did the trial court error by “imputing” higher income based on submitted documents and material that contain hearsay, double hearsay, irrelevant, conclusionary evidence, that did not meet the burden of proof, and that do not establish the figures used by a preponderance of the evidence? (Pertaining to Assignments of Error Nos. 1-4)
3. Do interest and principal errors and miscalculations from the first orders entered permeate all the subsequent Orders? Was RCW 26.19.035 violated in the entry of any of these Orders? (Pertaining to Assignments of Error Nos. 1-4)

## II. STATEMENT OF THE CASE

This action, pursuant to the RCW 26.26 Parentage Act was initially commenced by the State of Washington, on or about August 24, 2004 by the filing of a Summons and State's Petition For Establishment of Parentage in the Pierce County Superior Court. (CP1-7) After initially appearing **pro se** ( CP 8-9), appellant Troy Nylander accepted service of the said Summons and Petition. (CP 10-13) Blood tests were ordered in September, 2004 (CP 16-18), with the results filed in November, 2004, showing paternity of the daughter Jolena (CP 19-24) That paternity result was then acknowledged later by the appellant. (CP 39)

In the (first) Order of Child Support, on or about January 19, 2005 (CP 42-52), temporary support of \$25 @ month was ordered, **id**, as "the mother is unemployed and receives State medical assistance" and the father (appellant) "is unemployed and has applied for GAU assistance. The father had an L&I claim which was terminated 10/3/04. The father receives food stamps. (CP 51) The starting date for payments was fixed at January 15, 2005. (CP 44-45)

In the Judgment and Order Determining Parentage and Granting Additional Relief (CP 53-58), entered at the same time as the Order of Child Support, **supra**, the Court struck out and deleted the proposed "back judgment" award of \$6,175

from September 1, 1999 to October 1, 2004, and, from Oct. 1, 2004 to January 1, 2005; instead the Court wrote in “Reserved” at that time. (CP 53; 56)

Next, a Guardian Ad Litem was appointed for the daughter on February 18, 2005 to investigate and write a report. (CP 59-62) In the later filed report (CP 66-78), the GAL addressed the preliminary question as to when the appellant first was aware of the pregnancy and possible paternity:

“Both parties agreed that they had a relationship for 5-9 months during the time in which Jelena was conceived. However, this is all the parties agree on.

Ms. Bowser states that the relationship ended when she informed Mr. Nylander that she was pregnant with Jelena, and ‘he threatened to kill me and my daughter’ should I ever ask for child support. She has given two names of individuals, including her ex-husband, whom she states are witnesses to this fact. She states he assaulted her with a vehicle and that she still has a scar on her right arm as proof of what he did to her.

Mr. Nylander categorically denies that he was ever made aware by Paula Harmes that she was pregnant, and states he recalls his relationship with Paula as being caught up in her ‘fatal attraction.’ He states he agreed to meet Paula at her therapist’s office, ‘Phyllis’ who has since deceased, and that Paula ‘flipped out, went nuts’ as they discussed the need for their relationship to end . . . He states this was his last encounter with Paula until she started the action for child support . . .

On each interview, Ms. Bowser has been extremely upset, crying and highly emotional . . .

Whether or not Mr. Nylander willfully abandoned this child and threatened to kill her and her mother as alleged by Ms. Bowser in 1990 **cannot be confirmed either way by this GAL. Ms. Bowser states she has witnesses, but they will not be interviewed without further direction from the court.**” (emphasis added)

(CP 68-71)

Even while that report was being prepared for the Court, and was about to be submitted, the GAL had an “emotional confrontation” with the respondent Paula

Harmes-Bowser. (CP 107-108). Said confrontation was witnessed by her office sharer, Amy Dura, who submitted a declaration to the court:

“I currently share office space with Rae Lea Newman appointed Guardian ad Litem for this matter. I was taken back when I walked into our office on April 8<sup>th</sup>, 2005 due to presence of a highly emotional charged woman. I would describe woman’s behavior as excessively dramatic. It would be fair to say the woman appeared to be having a temper tantrum. I later came to know this woman as Ms. Paula Harmes-Bowser. During the time that I was present in the office I witnessed Paula crying and yelling at Rae Lea. She was hovering over Rae Lea. I heard her repeatedly say to Rae Lea, ‘Are you hearing me?’ Rae Lea continued to reassure Paul that she was listening to her. Paula then loudly proclaimed, ‘Look what he did to me.’ Paula proceeded to show Rae Lea Newman a scar on her right arm. I watched Rae Lea inspect Paula’s right arm. It appeared that Rae Lea Newman had a hard time finding the scar. This is my recollection of my observations of Paula Harmes-Bowser.”  
(CP 107-108)

In any event, after hearing, the Parenting Plan (relating to these child support payments at issue herein) was entered on August 25, 2005 (CP 115-125), which ordered Mr. Nylander have no contact with his daughter “until age 14.” (CP 116) Then, in October, 2005 the original Petitioner, i.e. State of Washington, filed a motion for Order of Child Support (CP 126-127), asking for \$475@ month, commencing November 15, 2005. **Id.** That motion also indicated that the issue of back support could then be addressed if brought on by either party. (CP 126)

Following the submission of several documents, affidavits and declarations on all sides (CP 128-203), the Superior Court Commissioner on November 1, 2005 entered a final order of “back child support” of \$53,011 “from 1-1-98 to 11-30-05” (CP 204-219) which appears to be calculated at \$392.56 from 1-1-98 through 12-31-00 and \$661 after 1-1-01. (CP 206). Shortly thereafter, with the filing of even more

alleged documentation, much repetitive of the earlier hearing documents, i.e. CP 222-223, Superior Court Commissioner Gelman further ordered “child support shall be owed from 6-91 through 12-97 from Troy Nylander to Paula Harmes-Bowser. The amount of support is tentatively set at \$100 per month subject to adjustment when information on the parties income is available. The Court finds that the father avoided the jurisdiction of the court and/or concealed himself after he was told of the pregnancy, RCW 26.23.134.” (CP 243-244) As a follow-up to that Order, *id*, Paul Harmes-Bowser brought on a further motion to set more child support. (CP 258)

When appellant Nylander retained new counsel, he filed a petition to Modify Child Support because of changed circumstances (CP 286-290), and resisted any further efforts to set back child support. Nonetheless, a new Order on Child Support, “imputing” \$6000@ month to appellant Nylander was entered on January 17, 2008. (CP 357-367) (1-17-08 RP 2-29) At that hearing, Ms. Harmes-Bowser continued to argue that Mr. Nylander had secreted himself (even though there was no attempt to serve him) and she then “proposed” using the figure of \$6000 “gross” income per month. (RP 5 ff) The Court, in fact, later used that figure without any more than that proposal. The Court at that hearing appeared to rely on the earlier Order from November, 2005 (CP 204-219), when setting the obligations as back as 1991. (1-17-08 RP 12-28) The Court “fixed” the principal balance on that January 17, 2008 Judgment for past due child support from June 1991 through December 31, 1997 at \$62,056.08. (CP 357-367 ; RP 11-28 )

From that Order, and encompassing the earlier Orders on which it was based, Troy Nylander appealed for the first time. (CP 368-380) That first appeal was opened as COA 37400-5-II.

While the first appeal was pending, and even through a dismissal and Recall of Mandate through this Court, hearings continued to be held in the Court below because of the lack of a supersedeas bond on the first appeal, until a “final” hearing on the child support was held June 15, 2009, that now determined the interest on the \$53,000 from November 1, 2005 through June 1, 2009 to be \$22,794.73, while the interest on the Judgment of 1/17/08 from June, 1991 until June, 2009 to now be \$105,472. (CP 481-482; 6-15-09 RP 2-8) From that hearing and orders, appellant Nylander filed his second appeal which this Court opened under COA 39540-1-II,

### III. ARGUMENT

#### A. THE ORDERS ENTERED ON CHILD SUPPORT HEREIN VIOLATED THE STATUTES OF LIMITATIONS, APPELLANT’S DUE PROCESS RIGHTS AS TO BURDEN OF PROOF, TOGETHER WITH RCW 4.16.020; 26.19.055, AND 26.26.134.

##### 1. THE ORDER OF NOVEMBER 1, 2005.

As noted earlier in the Statement of the Case, this action was commenced in late August, 2004 (CP 1-7) That would make the first sentence of RCW 26.26.134, “A court may **not** order payment for support provided or expenses incurred more than **five years** prior to the commencement of the action.” (emphasis added) the initial applicable time limitation. The State of Washington recognized the same in the

first Order of Child Support by using a starting date of January 15, 2005, for the temporary support payments going forward of \$25 @ month (CP 42-52), and in the Judgment and Order Determining Parentage and Granting Additional Relief (CP 53-58) where the State proposed (although the Court struck it out by writing “Reserved” over the top), a “back judgment amount of \$6,175, from **September 1, 1999** to October 1, 2004, and from October 1, 2004 to January 1, 2005. (emphasis added) (CP 53-56). That was the last time the “correct” date was used under the applicable limitations statute above.

Ten months after the first, correct order, on or about November 1, 2005 the trial court entered an Order of Child Support for \$53,011 in back child support for a period now from **January 1, 1998** through November 30, 2005. (CP 204-219) Clearly, this violates the statutory language cited above (by at least a year and one-half) and thus imposed principal and interest, **infra**, that wasn’t owed by the appellant. This had the unfortunate burden of affecting all the future calculations on interest and principal of the other appealed orders, **infra, Sections 2-4**.

## 2. THE ORDER OF NOVEMBER 17, 2005.

On November 17, 2005, the mother (Paula Harmes-Bowser) moved for another order setting back child support from June 1991 to December, 1997. (CP 243 -244 ) The State of Washington appears to have taken no part in this subsequent

motion. The Court Commissioner did enter an Order setting back child support as due, and setting the matter then at \$100@ month. It appears the mother (and the Court) relied on the second sentence of the earlier statute cited, RCW 26.26.134, which reads: “Any period of time in which the responsible party has concealed himself or avoided the jurisdiction of the court under this chapter shall not be included within the five-year period.”

a. Statute of Limitations

A ten-year statute of limitations applies to any judgment for back child support even arguably falls outside the initial five-year time period allowed in the first sentence of RCW 26.26.134. *See* RCW 4.16.020(2); *In re Marriage of Ulm*, 39 Wn.App. 342, 344, 693 P.2d 181 (1984); *In re Marriage of Maccarone*, 54 Wn.App. 502, 504, 774 P.2d 53 (1989). Any arrearages not falling within the statutory limitation period is barred. *Roberts v. Roberts*, 69 Wn.2d 863, 866, 420 P.2d 864 (1966); *Maccarone, supra*, at 504; *see also Kruger v. Kruger*, 37 Wn.App.329, 333, 679 P.2d 961 (1984)

Courts in the past have applied equitable principles to mitigate the harshness of some claims for retrospective support where it didn't work an injustice to the child or her custodian. *Parentage of I.A.D.*, 131 Wn.App. 207, 216, 126 P.2d 79 (2006); *Schafer v. Shafer*, 95 Wn.2d 78, 81-82, 621 P.2d 721 (1980); *Martin v. Martin*, 59 Wn.2d468, 473, 368 P.2d 170 (1962). It has been held that one of the aims of RCW 26.26.134 is to protect putative fathers from oppressive financial obligations. *O'Brien v. v.*

v. *Cooperrider*, 76 Wn.App. 699, 702, 887 P.2d 408 (1995).

b. Burden of Proof, Rules of Evidence Violations

Ms. Paul Harnes-Bowser had the burden of proof to resolve the factual dispute as to whether the appellant was concealing himself and/or avoiding the jurisdiction by a preponderance of the evidence, *see State ex rel, Coyle-Reite v. Reite*, 46 Wn.App. 7, 728 P.2d 625 (1986), which she failed to meet by the insufficient, sometimes inadmissible evidence she submitted. (CP 140-203 ) The test here on appeal when determining whether said burden has been met is whether there is substantial evidence in the record to support the challenged finding. *Thorndike, v. Hesperian Orchards, Inc.* , 54 Wn.2d 570, 343 P.2d 183 (1959). It isn't. In all her submissions before the hearings, she resorts to hearsay, hearsay on hearsay, and speculation that Mr. Nylander was concealing himself and avoiding the Court's jurisdiction when all through that time period he was available. (CP 128-136;298-338) ER 801 defines hearsay as testimony or written evidence of a statement made out of court, being offered in court to prove the truth of the matters asserted. *See also*, Broun, *McCormick on Evidence*, sect. 246 (6<sup>th</sup> ed.).

c. Interest errors on calculations

While it is true that interest normally accrues for unpaid child support from the due date of each installment, *see In re Marriage of Sandborn*, 55 Wn. App. 124, 777 P.2d 4 (1989), interest may be denied if it is not possible to calculate the amount of arrearage without resorting to interpretation of the support order of the

court. *In re Marriage of Bodanegra*, 58 Wn. App.271, 792 P.2d 1263 (1991).

That is because the amount is unliquidated. That is the situation here; the amount of principal is unliquidated from the earlier order(s), and therefore interest should be denied, or, at a minimum recalculated anew of remand when the corrected figures are know.

### 3. THE ORDER OF JANUARY 17, 2008.

This third Order, in addition to the problems already set out above regarding faulty interest calculations, unsupported claims that appellant tried to secrete himself and avoid the child support obligations, has the additional legal barrier to enforcement in that the mandates of RCW 26.19.035 were not complied with. (CP 357-367)

RCW 26.19.035 (2)& (3) read, in pertinent part:

(2) Written findings of fact supported by the evidence. An order for child support **shall** be supported by written findings of fact upon which the support determination is based and **shall** include reasons for any deviation from the standard calculation and reasons for the denial of a party's request for deviation from the standard calculation. . . .

(3) Completion of worksheets. Worksheets in the form developed by the office of the administrator for the courts **shall be completed under penalty of perjury and filed in every proceeding in which child support is determined** . . . (emphasis added)

In the instant case, neither written findings of fact upon which the support is based nor any reasons for the deviation/denial were added to this Order. In addition, neither party signed the worksheets under penalty of perjury. (CP 366-367). This alone warrants reversal and remand for another hearing. In an analogous case

involving the next section of the same statute, i.e. RCW 26.19.035 (4), Division One wrote the following in *Custody of C.C.M.*, 149 Wn.App. 184 (2009) at 206-07:

The Mecums also challenge the back child support judgment. We review a support award for abuse of discretion. *In re Marriage of Peterson*, 80 Wn.App. 148, 152-53, 906 P.2d 1009 (1995) After such review, we find errors in the judgment that warrant reversal and, accordingly, remand.

In a nonparental custody action, the trial court determines back child support based on the child support schedule and the standards adopted under chapter 26.19 RCW. RCW 26.10.045. Worksheets used to calculate support “shall be attached to the decree or order or if filed separately shall be initialed or signed by by the judge and filed with the order.” RCW 26.19.035(4). “There are no exceptions” to this rule. *In re Marriage of Sievers*, 78 Wn. 287, 305, 897 P.2d 388 (1995). Here, the trial court did not initial or attach a worksheet, making it impossible for us to review the accuracy of the support award. Therefore, remand is required. *Sievers*, 78 Wn.App. at 306.

Here, neither party signed the worksheets attached to the Order under penalty of perjury nor were findings entered explaining the deviation/or the reasons for the denial of Mr. Nylander’s requested child support deviation amounts as mandated by the language of the statute. It is now impossible for this court to review the accuracy of this support Order, and, therefore remand is necessary and required for that reason alone.

In addition, the statute of limitations legal limitations set out in section (2) above are also present here for this Order, and said arguments are adopted here as if set out in full again.

#### 4. THE ORDER OF JUNE 15, 2009

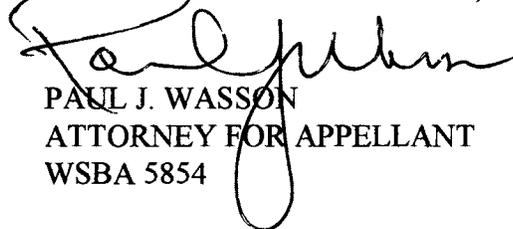
The legal challenges to this order are basically the same as the earlier three Orders, *supra*, without repeating them all unnecessarily. The interest calculations are wrong, beginning from the first Order in November, 2005, and carrying through to this last order. As argued in section 2 above, from the holding in *Bodanegra, supra*, may result in no interest being award, or a substantially reduced interest award if this court finds the other figures to be unliquidated and impossible to calculate under the earlier orders. *Kruger v. Kruger, supra at 333*.

#### IV. CONCLUSION

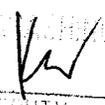
V.

The Court below used the wrong time period from the earliest stages to calculate child support due, and interest thereon. That miscalculation affected and permeated all subsequent Orders on Child Support. In addition, the Court relied on unproven hearsay to “impute” \$6000 @ month earnings to Mr. Nylander in order to boost both the principal and interest owed on back child support. This matter must be remanded for new hearings before a different judge(s) to enter corrected amounts of child support due, credit amounts already paid or overpaid, and determine whether there is any proper amount for interest on the unliquidated portions.

RESPECTFULLY SUBMITTED,



PAUL J. WASSON  
ATTORNEY FOR APPELLANT  
WSBA 5854

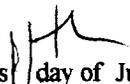
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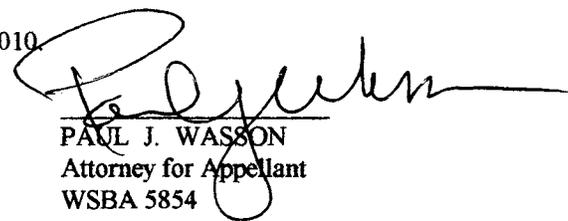
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STATE OF WASHINGTON, PAULA )  
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 Respondents, )  
 ) CERTIFICATE OF  
vs. ) MAILING  
 )  
TROY A. NYLANDER, )  
 )  
Appellant. )

Paul J. Wasson, Attorney at Law, certifies under penalty of perjury under the laws of the State of Washington, that he mailed a copy of the APPELLANT'S BRIEF, together with MOTION FOR EXTENSION TO FILING in the United States mail, postage prepaid, on June 11, 2010 addressed as follows:

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Dated this  day of June, 2010.

  
PAUL J. WASSON  
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