

**FILED**

**AUG 03 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 29651-2-III

IN THE COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

MARGARET ANN GRIGG, Respondent,

v.

TRAVIS QUINN CHALARSON, Appellant.

---

BRIEF OF RESPONDENT

---

Patrick Acres  
WSBA 3197  
Attorney for Respondent

1022 South Pioneer Way  
Moses Lake, WA. 98837  
(509) 765-9265

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### III. STATEMENT OF THE CASE

#### A. FACTS

The relevant facts of this case do not start with the amended petition for modification of child support filed by respondent in August, 2010.<sup>1</sup> To understand what has transpired in this case, it is necessary to review the Order of Child Support filed in this case on February 15, 2006.<sup>2</sup> Therein, in paragraph 3.14, the court found that “[*m*]other and father agree to each be responsible for 1/3 (one-third) of post secondary educational support for the child.”<sup>3</sup> That order was incorporated into the Order on Modification of Child Support filed on December 10, 2010.<sup>4</sup>

In her declaration filed in support of her motion for modification of child support, respondent testified that the Order of Child Support entered on February 15, 2006 requires respondent to pay for one-third of DC’s postsecondary educational expenses, that DC had been accepted by Utah Valley University (UVU), that projected tuition, fees and expenses for DC’s first year would be approximately \$24,312, and that respondent’s share would be \$8,104.00.<sup>5</sup>

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<sup>1</sup> CP 20-22.

<sup>2</sup> CP 104-116.

<sup>3</sup> CP 108.

<sup>4</sup> CP 89.

<sup>5</sup> CP 23-29.

## **B. PROCEDURE**

Respondent filed a petition to modify child support in June, 2010.<sup>6</sup> In August, 2010, respondent filed an amended petition.<sup>7</sup> Respondent filed a response to the petition.<sup>8</sup>

In a memorandum opinion filed on September 28, 2010, the trial court found that DC is dependent and relying upon his parents for necessities, that DC was eighteen years old, a graduate of Ephrata High School with a very respectable grade point average, that he had been admitted to a fine university, and that he was motivated to succeed, and that his prospects to succeed were good.<sup>9</sup>

In its memorandum opinion, the trial court also found that DC was unable to fund his postsecondary education by himself, that both DC and his parents expected that DC would go to college, and that while respondent was devoted entirely to the care of her children and petitioners earnings were diminished, undoubtedly due to the economy, it nevertheless appeared that appellant is able to make some contribution to

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<sup>6</sup> CP 4-6.

<sup>7</sup> CP 20-22.

<sup>8</sup> CP 37-38.

<sup>9</sup> CP 83.

DC's education, and would have done so if the parties remained married.<sup>10</sup>

The trial court also found that DC is also to make some contribution.<sup>11</sup>

The trial court concluded that appellant should contribute \$6,000 per year toward DC's education, in monthly installments of \$500 per month.<sup>12</sup> The trial court conditioned those payments upon DC's enrollment in an accredited academic institution of high learning, his active pursuit of a course of study, his being in good academic standing, and DC was to provide appellant with his academic records and grades.<sup>13</sup> The trial court ordered that the payments be made directly to DC's school.<sup>14</sup>

On December 10, 2010, the trial court entered Findings of Fact and Conclusions of Law in which it incorporated the child support worksheet dated February 15, 2006, and the Order of Child Support, found DC in need of postsecondary educational support because he is in fact dependent and is relying upon his parents for the reasonable necessities of life, and that payments should be made to DCS or UVU in the amount of \$500 per month until the sum of \$6,000 per academic school year is paid off.<sup>15</sup>

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<sup>10</sup> *Ibid.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> CP 86-88.

On December 10, 2010, the trial court entered its Order on Modification of Child Support.<sup>16</sup> Therein, the trial court granted the petition for modification, incorporated the Order of Child Support and the child support worksheet dated February 15, 2006, ordered appellant to pay a sum certain of \$6,000 in payments of not less than \$500 per month in postsecondary support for each year DC is enrolled in postsecondary education, and ordered the payments to be paid to DCS or UVU for the account of DC.<sup>17</sup>

On December 10, 2010, the trial court entered its Order of Child Support.<sup>18</sup> Therein, the trial court incorporated the child support worksheet dated February 15, 2006, found appellant's actual monthly net income to be \$8,678, found respondent's actual net monthly income to be \$4,178, ordered appellant to pay \$6,000 to DCS or UVU upon a monthly schedule of \$500 per month, payable to DCS or UVU for the account of DC.<sup>19</sup>

On January 10, 2011, appellant filed a notice of appeal.<sup>20</sup>

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<sup>16</sup> CP 89-90.

<sup>17</sup> CP 89.

<sup>18</sup> CP 91-98.

<sup>19</sup> CP 91-95.

<sup>20</sup> CP 99-101.

#### IV. ARGUMENT

##### A. APPELLANT'S FAILURE TO COMPLY WITH THE RULES OF APPELLATE PROCEDURE PRECLUDES CONSIDERATION OF APPELLANT'S ARGUMENTS.

To present a claim of error regarding the trial court's Findings of Fact or Conclusions of Law, Order on Modification of Child Support or Order of Child Support, appellant was required to assign error thereto in his brief. RAP 10.3(a) (4) (*"The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated: ... (4) Assignments of Error. A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error."*). Appellant's assignments of error fail to indicate which order he is assigning error to. Nor does appellant in his assignments of error make any mention of the trial court's Findings of Fact and Conclusions of Law. Nor does appellant include any issue pertaining to his assignments of error. Because he failed to do so, any argument by appellant regarding the Findings of Fact or Conclusions of Law, Order on Modification of Child Support or Order of Child Support should not be considered. *Escude v. King County Hospital District*, 117 Wn. App. 183, 190 n. 4, 69 P. 3d 895 (2004).

RAP 10.4 (c) provides as follows:

If a party presents an issue which requires study of a statute, rule, regulation, jury

instruction, finding of fact, exhibit, or the like, the party should type the material portions of the text out verbatim or include them by copy in the text or in an appendix to the brief.

Appellant fails to either quote or append any provision of the Findings of Fact or Conclusions of Law, Order on Modification of Child Support or Order of Child Support. As a result, appellant's arguments regarding those orders should not be considered. *Thomas v. French*, 99 Wn. 2d 95, 99-101, 659 P. 2d 1097 (1983).

**B. THE TRIAL COURT'S UNCHALLENGED FINDINGS ARE VERITIES ON APPEAL.**

RAP 10.3 (g) provides as follows:

A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

The trial court entered seven findings of fact and conclusions of law.<sup>21</sup> In addition, in Paragraph 2.2 of the Findings, the Order of Child

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<sup>21</sup> CP 86-88.

Support is incorporated therein.<sup>22</sup> Appellant fails to properly assign error to any of the findings. The trial court's unchallenged findings and the Order of Child Support are therefore verities on appeal. *Moreman v. Butcher*, 126 Wn. 2d 36, 39, 891 P. 2d 725 (1995); *Marriage of Drlik*, 121 Wn. App. 269, 275, 87 P. 3d 1192 (2004); *Boyd v. Kulczyk*, 115 Wn. App. 411, 413, 63 P. 3d 145 (2003).

### **C. STANDARDS OF REVIEW**

The trial court's modification of a child support order is reviewed for abuse of discretion. *In re Parentage of Goude*, 152 Wn. App. 784, 790, 219 P. 3d 717, *review denied*, 168 Wn. 2d 1024 (2010). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *Ibid.*

### **D. THE TRIAL COURT DID NOT ERR IN THE ORDER OF CHILD SUPPORT.**

An award of postsecondary educational support is governed by the standards set forth in RCW 26.10.090 (2):

When considering whether to order support for postsecondary educational expenses, the court shall determine whether the child is in fact dependent and is relying upon the parents for the reasonable necessities of life. The court shall exercise its discretion when determining whether and for how long to award postsecondary educational support based upon consideration of factors that

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<sup>22</sup> CP 87.

include but are not limited to the following: 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.

In her petition filed with the trial court on August 20, 2010<sup>23</sup>, respondent sought to implement the provision in paragraph 3.14 of the Order of Child Support filed on February 15, 2006, wherein the court ordered both appellant and respondent to each be responsible for one-third of postsecondary educational support for DC.<sup>24</sup> Respondent's petition therefore did not seek to add additional obligations upon appellant. Instead, respondent sought to quantify the court's previously established requirement that appellant pay one-third of DC's postsecondary educational support. Respondent's petition, regardless of how it was labeled, was, in reality, a motion to clarify the February 16, 2006 Order of Child Support. Note *Rivard v. Rivard*, 75 Wn. 2d 415, 418, 451 P. 2d 677 (1969):

A modification of visitation rights occurs where the visitation rights given to one of

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<sup>23</sup> CP 20-22.

<sup>24</sup> CP 108.

the parties is either extended beyond the scope originally intended or where those rights are reduced, giving the party less rights than those he originally received. A clarification, on the other hand, is merely a definition of the rights which have already been given and those rights may be completely spelled out if necessary.

In *Rivard*, the Court concluded that the respondent husband's motion, which sought to spell out the rights of visitation awarded to him in the decree of dissolution, constituted a clarification of the decree, and not a modification thereof. 75 Wn. 2d 419. In much the same manner, respondent's motion sought to spell out the nature and extent of the appellant's obligation to pay one-third of the postsecondary educational support for DC. Therefore, as in *Rivard*, respondent's motion is properly viewed as a motion for clarification.

*Marriage of Jarvis*, 58 Wn. App. 342, 792 P. 2d 1259 (1990) does not compel a contrary conclusion here. In *Jarvis*, the trial court's conclusion that the child was to successfully complete a full-time load to retain payments was an unwarranted, retroactive modification of the decree under RCW 26.09.170. 58 Wn. App. 347. No such modification is present in this case. *Jarvis* is therefore distinguishable from the facts of this case.

Even if considered as a modification, the Order of Child Support meets the requirements of RCW 26.19.090 (2). Unchallenged Finding of Fact 2.3 provides, in pertinent part, that the order of child support should be modified because “*DC is in need of post secondary educational support because the child is in fact dependent and is relying upon the parents for the reasonable necessities of life.*”<sup>25</sup>

While the court is required to consider all the non-exclusive factors in RCW 26.19.090 (2), it is presumed that the court considered all of the evidence before it in fashioning the order. *In re: Parentage of Goude*, 152 Wn. App. 784, 791, 219 P. 3d 717, review denied, 168 Wn. 2d 1084 (2010); *In re Marriage of Kelly*, 85 Wn. App. 785, 793, 934 P. 2d 1218 (1997). As indicated by the trial court’s memorandum decision, it gave careful consideration to the statutory factors.<sup>26</sup> In any event, appellant makes no argument that the trial court did not consider the statutory factors.

Appellant argues that the trial court violated RCW 26.19.035, RCW 26.19.071, and RCW 26.19.175 by ordering postsecondary educational support for DC without requiring worksheets from respondent.<sup>27</sup> Appellant fails to recognize that RCW 26.19.090 (1)

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<sup>25</sup> CP 87.

<sup>26</sup> CP 83.

<sup>27</sup> BA 5-7, 11-12.

provides that “[t]he child support schedule shall be advisory and not mandatory for postsecondary educational support.” See also, *In re: Parentage of Goude*, 152 Wn. App. 792-93 (quoting *Marriage of Daubert*, 124 Wn. App. 483, 504-05, 99 P. 3d 401 (2004), abrogated on other grounds, *McCausland v. McCausland*, 149 Wn. 2d 607, 152 P. 3d 1013 (1997)). In any event, unchallenged Finding of Fact 2.2 provides, in pertinent part, that “[t]he child support worksheet dated February 15, 2006 which has been approved by the court and is incorporated herein by reference.” Appellant’s argument therefore fails.

Appellant argues that the trial court violated RCW 26.19.080 by failing to allocate the basic child support obligation between the parties.<sup>28</sup> Appellant fails to recognize that RCW 26.19.080 (1) addresses allocation of the basic child support obligation. That statute nowhere mentions allocation of postsecondary educational support. In any event, appellant fails to recognize the trial court allocated the postsecondary educational support obligation in paragraph 3.14 of the Order of Child Support filed on February 15, 2006, wherein the court ordered both appellant and respondent to each be responsible for one-third of postsecondary educational support for DC.<sup>29</sup> The Order of Child Support filed on February 15, 2006 was incorporated into the Order on Modification of

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<sup>28</sup> BA 12.

<sup>29</sup> CP 108.

Child Support.<sup>30</sup> Appellant's argument therefore fails.

Appellant argues that the trial court violated RCW 26.19.090 by failing to provide that the obligation to pay postsecondary educational expenses shall not exceed beyond the child's twenty-third birthday, absent exceptional circumstances.<sup>31</sup> The Order of Child Support does not require payment of such expenses beyond age 23.

The Order of Child Support is construed by using general rules of construction applicable to statutes, contract, and other writings. *Gimlett v. Gimlett*, 95 Wn. 2d 699, 704-05, 629 P. 2d 450 (1981). In this regard, statutes in existence at the time a contract is made are presumed to be incorporated into the contract. *Cornish School of the Arts v. 1000 Virginia Corp.*, 158 Wn. App. 203, 224, 242 P. 3d 1, *review denied*, 171 Wn. 2d 1014 (2011). Therefore the prohibition in RCW 26.19.090 (5), against payment of postsecondary educational expenses beyond the child's twenty-third birthday, except for exceptional circumstances, is presumed to be part of the Order of Child Support. Appellant's argument therefore fails.

Appellant argues that the trial court violated RCW 26.19.090 (6) by ordering postsecondary educational support payments to be paid to the Washington State Support Registry, instead of being paid to the

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<sup>30</sup> CP 89.

<sup>31</sup> BA 13.

educational institution.<sup>32</sup> Appellant overlooks that paragraph 3.16 of the Order of Child Support provides, in pertinent part, that “*Payments are made to Division of Child Support or Utah Valley University into the account of student DC.* (Emphasis added).”<sup>33</sup> Appellant also overlooks that the Order on Modification of Child Support provides that “[p]ayments for the first academic year of August, 2010 through August, 2011, may be no less than \$500 per month, shall begin October 15, 2010, and every month thereafter on the 15<sup>th</sup>, until the full sum of \$6,000 has been paid to DCS or UVU for the account of student DC.”<sup>34</sup> Appellant’s argument therefore fails.

**E. RESPONDENT REQUESTS AN AWARD OF ATTORNEY FEES AND COSTS ON APPEAL.**

RCW 26.09.140 provides as follows:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment. Upon any appeal, the appellate court may, in

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<sup>32</sup> BA 8-9, 13-14.

<sup>33</sup> CP 95.

<sup>34</sup> CP 89.

its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.

The court may order that the attorneys' fees be paid directly to the attorney who may enforce the order in his or her name.

RAP 18.1 (a) provides as follows:

If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

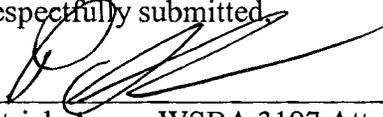
In the event the she prevails on appeal, respondent requests an award of attorney fees on appeal. *State ex rel. M.M.G. v. Graham*. 159 Wn. 2d 623, 637-38, 152 P. 3d 1005 (2007).

## **V. CONCLUSION**

The trial court's unchallenged findings of fact are verities on appeal, and are otherwise supported by substantial evidence. The trial court did not abuse its discretion in entering the Order on Modification of Child Support, or the Order of Child Support. The trial court's Findings of Fact and Conclusions of Law, Order on Modification of Child Support and the Order of Child Support should therefore be affirmed.

DATED this 1<sup>st</sup> day of August, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'P. Acres', written over a horizontal line.

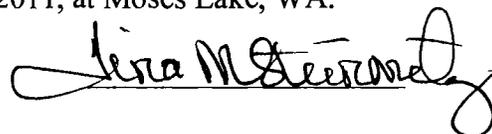
Patrick Acres, WSBA 3197 Attorney for Respondent

**VI. CORRECTED CERTIFICATE OF MAILING**

The undersigned does hereby certify that on August 1, 2011, she served a copy of the Brief of Respondent upon Appellant, by depositing the same in the United States mail, first class postage prepaid, addressed to the following:

Shane L. Kenison  
Law Office of Ries & Kenison  
P. O. Box 610  
404 S. Division St.  
Moses Lake, WA 98837-1957

Dated this 1<sup>ST</sup> day of August, 2011, at Moses Lake, WA.

A handwritten signature in black ink, appearing to read "Lisa M. Stearns". The signature is written in a cursive style with a large, looping initial "L".