

**FILED**

OCT 13 2015

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

No. 327876

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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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JOSHUA PEZZULLO,

Appellant,

v.

REBECCA PEZZULLO,

Respondent

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BRIEF OF RESPONDENT

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## I. PRELIMINARY STATEMENT

Mr. Pezzullo's sole assignment of error is that the court "applied the wrong law in determining that RCW 26.26 *et seq* governs this case rather than RCW 26.09 *et seq.*" *Petitioner's Brief*, at 1. While Mr. Pezzullo admits that he was required to bring the underlying action pursuant to *RCW 26.26 et seq.*, he argues that child support should have been decided under the different statutory scheme of *RCW 26.09*, "Dissolution Proceedings—Legal Separation." Where the parties' dissolution occurred in another state more than nine (9) years prior, this argument should be rejected on multiple grounds.

First, a plain reading of *RCW 26.26 et seq.* clearly contemplates an order of support entered after a prior dissolution of marriage. For example, under *RCW 26.26.116*, "Presumption of parentage in context of marriage or domestic partnership," the statute addresses parentage arising from a prior marriage. Once parentage is established under the statute, *RCW 26.26.111* states that the parent-child relationship "applies for all purposes[.]" This would therefore include an order of support under *RCW 26.26.130* and *26.26.134*.

Second, even if Mr. Pezzullo is correct that the court should have applied *RCW 26.09 et seq.*, the failure of a decree to provide for the financial support of a child creates an obligation of support owed by both parents. *Hughes v. Hughes*, 11 Wash.App. 454, 524 P.2d 472 (1974). According to *Hughes*, the court has authority to award the primary

residential parent back support following the parties' dissolution. *Id.* at 461-62.

Third, Mr. Pezzullo does not cite a single legal authority stating that child support in an action under RCW 26.26 *et seq.* should be decided under any other statutory scheme. The only court decision cited by Mr. Pezzullo, *In re the Support of Jane Doe*, 38 Wash.App. 251, 684 P.2d 1368 (1984), addressed whether personal jurisdiction under Washington's long-arm statute applied in an action for the non-payment of support. Where personal jurisdiction is not presently at issue, *In re Jane Doe* is simply not instructive.

## **II. STATEMENT OF THE CASE**

The parties' marriage was dissolved in Louisiana in 2004. At the time of the dissolution the parties shared one child in common, G.P., who was born during marriage. However, the final decree did not acknowledge G.P. as a child of the marriage, provide for a parenting plan, or order child support.

For the next nine years, Mr. Pezzullo exercised sporadic visitation by agreement of the parties. This was due in large part to his employment overseas in the United States military and as military contractor. In 2013, Mr. Pezzullo commenced the present action by filing a petition for a parenting plan and child support pursuant to RCW 26.26.375 and 26.26.130(7)(b). The underlying petition acknowledged paternity on grounds that G.P. was born during marriage, requested that the court adopt

a residential schedule, and equally asked the court to address child support.

While a final a final parenting plan was entered by agreement, the issue of a final order of child support was decided by Commissioner Jackie Stam. One issue before Commissioner Stam, which is the subject of the present appeal, was whether the court had jurisdiction to order back support. *RP* at 3-4.

Ms. Pezzullo argued that the court did have jurisdiction to order back support for five years pursuant to RCW 26.26.130 and 26.26.134. *RP* at 13-15. In response, Mr. Pezzullo argued that aforementioned statutes did not apply because the parties were previously married, and that a dissolution of marriage under RCW 26.09. *et seq.* does not allow for back support. *RP* at 7-8 Commissioner Stam was persuaded that the court did have jurisdiction to order back support where Mr. Pezzullo filed the action under RCW 26.26. *et seq.* *RP* at 28-31. Accordingly, Commissioner Stam ordered back support for five years preceding Mr. Pezzullo's petition. *Id.*

Mr. Pezzullo's subsequent motion for revision that was denied by the Honorable Bruce Spanner.

### III. LEGAL ARGUMENT

#### A. Back support is lawful based on the plain language of RCW 26.26 *et seq*

The trial court did not error when ordering back support based on a plain reading of *RCW 26.26 et seq*, which contemplates a prior marriage of the parties.

More specifically, under *RCW 26.26.116*, “Presumption of parentage in context of marriage or domestic partnership,” it is stated:

(1) In the context of a marriage or a domestic partnership, a person is presumed to be the parent of a child if:

(a) The person and the mother or father of the child are married to each other or in a domestic partnership with each other and the child is born during the marriage or domestic partnership.

*RCW 26.26.116(1)(a)*. Certainly, then, the plain language of the provision contemplates a prior marriage of the parties, and Mr. Pezzullo’s argument to the contrary should be rejected.

Further, the same statute goes on to state that the “presumption of parentage established under this section may be rebutted only by an adjudication under *RCW 26.26.500* through *26.26.630*.” *RCW 26.26.116(3)*. If the presumption of parentage established is not rebutted, “[t]he parent-child relationship is established[.]” *RCW 26.26.101*. Once established, “the parent-child relationship established under this chapter applies for all purposes, except as otherwise specifically provided by other law of this state.” *RCW 26.26.111*.

Where the parent-child relationship applies for all purposes under *RCW 26.26 et seq.*, this includes orders of support pursuant to *RCW 26.26.130*. Here, “after considering all relevant factors, the court shall order either or both parents to pay an amount determined pursuant to the schedule and standards contained in chapter 26.19 RCW.” *RCW 26.26.130(6)*. The only relevant limitation is *RCW 26.26.134*, “Support orders—Time limit, exception,” which provides: “A court may not order payment for support provided or expenses incurred more than five years prior to the commencement of the action.”

In summary, it is clear that *RCW 26.26 et seq.* specifically contemplates children born during a prior marriage (*RCW 26.26.116*), and that the statutory scheme applies except as otherwise specifically provided by other laws of the state (*RCW 26.26.111*). The trial court therefore had statutory authority to enter an award of support in the present action (*RCW 26.26.130(6)*), where the only applicable limitation was a five-year look back period (*RCW 26.26.134*). Thus, the trial court did not error as a matter of law when ordering five years of back support.

**B. Back support is lawful even assuming *arguendo* that *RCW 26.09 et seq* applies**

Mr. Pezzullo argues that the question of support should have been decided under *RCW 26.09 et seq*, and that the statutory scheme does not provide for an award of back child support. Even assuming *arguendo* that *RCW 26.09* does apply, Ms. Pezzullo does not cite any legal authority

supporting his argument that the trial court erred when ordering back support under the present facts. On other hand, there is a line of authorities which uphold Ms. Pezzullo's obligation to financially support his child following the parties' dissolution, and Ms. Pezzullo's right to reimbursement in the form of back support.

“A parent's obligation to support and care for his or her child is a basic tenet of our society and law.” *State v. Williams*, 4 Wash.App. 908, 912, 484 P.2d 1167 (1971). (*Lizotte v. Lizotte*). And, under the common law of Washington, this obligation allows a court to order back support when a decree of dissolution fails to provide for support of a child. *Hughes v. Hughes*, 11. Wash.App. 454, 461, 524 P.2d 472 (1974).

In *Hughes*, the court addressed whether a primary residential parent could seek reimbursement for child-related expenses incurred after a decree of dissolution failed to provide for support of the child. *Hughes*, 11. Wash.App. 454 at 456. Although the court found that an award of back support did not apply in the facts of the case, the court nonetheless acknowledged that such a right exists pursuant to a line of cases dating back to 1898. *Id.*, citing *Gibson v. Gibson*, 18 Wash. 489, 51 P.1041 (1898), *Ditmar v. Ditmar*, 27 Wash. 13, 67 P. 353 (1901), *Hector v. Hector*, 51 Wash. 434, 99 P. 13 (1909), *Hillware v. Hillware*, 104 Wash. 361, 176 P. 330 (1918), *State ex rel. Ranken v. Superior Court*, 6 Wash.2d 90, 106 P.2d 1082 (1940), *Scott v. Holcomb*, 49 Wash.2d 387, 301 P.2d 1068 (1956), *Penn v. Morgan*, 7 Wash.App. 794, 502 P.2d 1238 (1972).

According to the court, these prior decisions established the rule that where a divorce decree is silent on the question of child support, the law imposes a financial obligation on both parents. *Id.* at 461. Where the non-primary residential parent fails to meet their financial obligation, the other parent may seek reimbursement for prior child-related costs, i.e., back support. *Id.*

While *Hughes* was decided upon the statutory predecessors of RCW 26.09 *et seq.*, the common law rule remains unchanged. With respect to the common law and RCW 26.09 specifically, our courts have stated:

[T]he authority of the superior courts over matters relating to the welfare of minor children is not derived from statute alone but also from common law[.]

[...]

Although the Legislature may certainly act in derogation of common law, where it has not expressed an intent to change existing law, and where the language of the new act is consistent with past policy, appellate courts will presume that the Legislature intended to continue the policy expressed in a prior statute dealing with the same subject matter, as that policy has been previously construed by the appellate courts.

*In re the Marriage of Possinger*, 105 Wash.App. 326, 334 19 P.3d 1109 (2001), citing *Little v. Little*, 96 Wash.2d 183, 194, 634 P.2d 498 (1981).

The common law rule relied upon in *Hughes* therefore remains unchanged in the present context of RCW 26.09 *et seq.*

Accordingly, Mr. Pezzullo had obligation of financial support for which Ms. Pezzullo may seek reimbursement. Because RCW 26.09 *et seq.*

fails to express a legislative intent to change the rule, the trial court did not error as a matter of law when ordering back support.

**C. Back support is not refuted by Mr. Pezzullo's sole citation to *In re Jane Doe***

Mr. Pezzullo has failed to carry his burden of persuasion when arguing that the trial court erred as a matter of law by ordering back support. The sole legal authority cited by Mr. Pezzullo in support of his present appeal is *In re the support of Jane Doe*, 38 Wash.App. 251, 684 P.2d 1368 (1984). However, *In re Jane Doe* is wholly unrelated to the present question of whether back child support may be ordered in an action under *RCW 26.26 et seq* following a prior dissolution of marriage. In *In re Jane Doe*, the issue before the Court was whether personal jurisdiction under Washington's long-arm statute may be asserted in a paternity action based on the theory that the failure to provide support is a "tortious act." *Id* at 253. In the case, the petitioner/mother relied on *In re Miller*, 86 Wash.2d 712, 548 P.2d 542 (1976) when arguing that a parent's failure to provide support constitutes a "tortious act" under the long-arm statute. The Court did not find *In re Miller* controlling because the parties in *Miller* were married, and there had yet to be a conclusive determination of whether the alleged father in *In re Jane Doe* was in fact the biological father. Only when distinguishing *In re Miller* did the court make the statement presently relied upon by Mr. Pezzullo that: "The primary issue

in a paternity action is whether the defendant is in fact the father; the issue of support is ancillary.”

**D. Attorney’s fees**

An award of statutory attorney’s fees is warranted for having to respond to the present appeal. Under RCW 26.26.140, “The court may order that all or a portion of a party’s reasonable attorney’s fees be paid by another party, except that an award of attorney’s fees assessed against the state or any of its agencies or representatives shall be under RCW 4.84.185.”

An award of attorney’s fees as sanctions is also warranted for having to respond to the present appeal. RAP 18.9(a) permits an appellate court to award a party attorney fees as sanctions, terms, or compensatory damages when the opposing party files a frivolous appellate action. *Reid v. Dalton*, 124 Wash.App. 113, 128, 100 P.3d 349 (2004). An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal. *Tiffany Family Trust Corp. v. City of Kent*, 155 Wash.2d 225, 241, 119 P.3d 325 (2005). All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant. *Id.*

Statutory attorney’s fees and sanctions are warranted where Mr. Pezzullo elected to file the underlying action pursuant to RCW 26.26 *et seq* and request for an order of child support. He has not cited a single

court decision or statute to date which holds that child support should not have been decided under the statutory scheme.

**IV. CONCLUSION**

Based on the foregoing facts and arguments, Ms. Pezzullo respectfully requests that this Court dismiss the present appeal in its entirety, and award reasonable attorney fees and costs.

  
Ben Dow, WSBA #39126  
Attorney for Respondent

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**SUPERIOR COURT OF WASHINGTON  
COUNTY OF BENTON**

In re the Matter of:	)	
	)	NO. 327876
JOSHUA PEZZULLO,	)	
	)	DECLARATION OF
Appellant,	)	MAILING
and	)	
	)	
REBECCA PEZZULLO,	)	
	)	
Respondent	)	

I, Brian Gieszler, hereby declare as follows:

1. I am over the age of eighteen (18) years of age, I make these statements on personal knowledge, and I am competent to testify to the matters stated herein.

2. That on the 9<sup>th</sup> day of October, 2015, I provided true and correct copies of the **Respondent's Brief** upon Michael Everett, Attorney for Apellant, by faxing copies and mailing copies in the U.S. mail to to the following address:

Everett Law Office  
Attn: Michael Everett  
PO Box 668  
Grandview, WA 98930

2 I declare under penalty of perjury under the laws of the State of Washington that the  
foregoing is true and correct.

4 Dated this 9 day of October, 2015 at Richland, Washington.

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8   
9 Brian Gieszler, Licensed Legal Intern  
10 ID# 9130103

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