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No. 64074-7-1

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

KARL E. SAGNER,
Respondent,

v.

RORY B. SAGNER,
Appellant.

BRIEF OF RESPONDENT

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1. TABLE OF AUTHORITIES

A. Statutory Authority

RCW 26.09.1004, 11

RCW 26.09.140 13

RCW 26.09.170 5, 8, 9, 10

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RCW 26.19.090 6, 7, 10, 11, 13

RCW 4.16.170 9

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B. Case Law

In re Marriage of Newell, 117 Wn. App. 711,
718 (2003)7

In re Marriage of Kelly, 85 Wn. App. 785, 792,
793, 934 P.2d 1218 (1997) 7, 10, 12

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In re Marriage of Wright, 27 P.3d 263 (2001) . . .13

2. INTRODUCTION

Father has been the primary residential care of the parties' daughter, Keira, since the *Decree of Dissolution* was entered in this matter on February 27, 2003.

Father timely filed a *Petition for Modification of Child Support* to establish the Mother's obligation for postsecondary educational support for their daughter. Mother was served 128 days after the filing of the Petition. The delay in service occurred because Father did not have available all of the information necessary for him to pursue the Petition at the time at which the Petition was filed.

The Mother filed a *Motion for Summary Judgment* on November 25, 2008, claiming defective service. That Motion was denied on January 27, 2009.

This matter proceeded to arbitration in accordance with Snohomish County Superior Court Rules. An *Order on Modification* was entered on August 3, 2009, which established Mother's obligation to pay postsecondary educational support based upon the Arbitrator's decision. This appeal followed.

3. STATEMENT OF ISSUES

1. Was there a requirement that Father serve Mother within 90 days of his filing the *Petition for Modification of Child Support* and his failure to do so is fatal to his Petition?

2. Did Father's failure to serve Mother within 90 days of the filing of the Petition put his request outside of the statute of limitations in this matter?

3. Was Father's *Petition for Modification of Child Support* defective because it did not plead or show extraordinary circumstances which would justify allowing modification after the statute of limitations had run?

4. STATEMENT OF CASE

Petitioner's and Respondent's marriage was dissolved February 27, 2003.¹ The parties' daughter, Kiera, was 13 years of age at the time the *Order of Child Support* was entered.² Kiera turned 18 years of age on September 4, 2007.³

Kiera graduated from high school on June 6, 2008.⁴ Petitioner filed his *Petition for Modification of Child Support* on June 3, 2008.⁵

The *Order of Child Support* includes the following language regarding duration of that support:

“Support shall be paid until the child reaches the age of 18 or as long as the child remains in enrolled in high school, whichever occurs last, except as otherwise provided below in Paragraph 3.14.”

Order of Child Support of February 27, 2003 at Paragraph 3.13.⁶

The operative language regarding postsecondary educational support was paragraph 3.14 of the *Order of Child Support* of February 27, 2003:

“The right to petition for post-secondary support is reserved, provided that right is exercised before support terminates as set forth in Paragraph 3.13.”

Order of Child Support of February 27, 2003 at paragraph 3.14.⁷

¹ See *Decree of Dissolution*, CP ____.

² See *Order of Child Support* filed February 27, 2003, at CP ____ and *Declaration of Karl Sagner in Response to Motion for Summary Judgment*, CP 77. **Note that *Brief of Appellant* does not reference the correct *Order of Child Support*.**

³ See *Declaration of Karl Sagner*, CP 77

⁴ See *Declaration of Karl Sagner*, CP 77

⁵ See *Petition for Modification*, CP 67

⁶ See *Order of Child Support*, filed February 27, 2003, at CP _____. **Note that *Brief of Appellant* does not reference the correct *Order of Child Support*.**

⁷ See *Order of Child Support*, filed February 27, 2003, CP _____. **Note that *Brief of Appellant* does not reference the correct *Order of Child Support*.**

Father filed his Petition on June 3, 2008,⁸ and served the Mother by mail on October 9, 2008, 128 days after filing.⁹ Prior to that date Father did not have a physical address for Mother and eventually had to use a P.O. Box for completion of service.¹⁰

Mother filed her *Motion for Summary Judgment* on November 25, 2008.¹¹ The court denied the *Motion for Summary Judgment* and found that there was a two year statute of limitations. Service was completed prior to the running of the statute of limitations according to the court's decisions.¹²

The Petitioner then sought arbitration of all issues in this matter as raised in his *Petition for Modification of Child Support*. In accordance with Snohomish County Superior Court Local Rules (SCLMAR 1.2) the matter was submitted to arbitration. No Trial De Novo from the Arbitration Award was sought and final Orders were entered in this matter on August 3, 2009, establishing Mother's obligation for postsecondary educational support.¹³

5. ARGUMENT

This appeal appears to present an issue of first impression before this Court on the issues raised by Mother in her *Brief of Appellant*.

A. Overview.

The *Brief of Appellant* is correct in that the obligation for child support is statutory in nature. RCW 26.09.100 states that:

“(1) In a proceeding for dissolution of marriage ... the court shall order either or both parents owing a duty of

⁸ See *Petition for Modification of Child Support*, filed June 3, 2008, at CP 95.

⁹ See *Proof of Service*, CP 91.

¹⁰ See *Declaration of Karl Sagner*, CP 67.

¹¹ See *Motion for Summary Judgment*, CP 71.

¹² See *Order Denying Motion for Summary Judgment*, CP 54.

¹³ See *Order for Support*, CP 28.

service shall be made by personal service. If the decree to be modified was entered in this state, service shall be by personal service or by any form of mail requiring a return receipt... Proof of service shall be filed with the court..."

RCW 26.19.090 sets for the statutory framework for postsecondary educational support awards. It reads as follows:

“(1) The child support schedule shall be advisory and not mandatory for postsecondary educational support.

(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 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.

(3) The child must enroll in an accredited academic or vocational school, must be actively pursuing a course of study commensurate with the child's vocational goals, and must be in good academic standing as defined by the institution. The court-ordered postsecondary educational support shall be automatically suspended during the period or periods the child fails to comply with these conditions.

(4) The child shall also make available all academic records and grades to both parents as a condition of receiving postsecondary educational support. Each parent shall have full and equal access to the postsecondary education records as provided in RCW 26.09.225.

(5) The court shall not order the payment of postsecondary educational expenses beyond the child's twenty-third birthday, except for exceptional circumstances, such as mental, physical, or emotional disabilities.

(6) The court shall direct that either or both parents' payments for postsecondary educational expenses be made directly to the educational institution if feasible. If direct payments are not feasible, then the court in its discretion may order that either or both parents' payments be made directly to the child if the child does not reside with either parent. If the child resides with one of the parents the court may direct that the parent making the support transfer payments make the payments to the child or to the parent who has been receiving the support transfer payments.”

A trial court has broad discretion to order a divorced parent to pay postsecondary education expenses. RCW 26.19.090(2), *In re Marriage of Newell*, 117 Wn. App. 711, 718 (2003). The trial court’s decision regarding modification of child support is reviewed for an abusive discretion. *In re Marriage of Kelly*, 85 Wn. App. 785, 792, 793, 934 P.2d 1218 (1997). The court’s discretion was abused if it exercised that discretion on untenable grounds for untenable reasons. *In re Marriage of Tang*, 57 Wn. App. 648, 653, 789 P.2d 118 (1990).

B. Argument Regarding Assignment of Error No. 1.

The first assignment of error contained in the *Brief of Appellant* claims that Father failed to serve Mother within 90 days of filing and, therefore, service was defective. *Brief of Appellant* at 2.

First of all, there is no statutory guidance regarding the time for service in child support modification actions. As stated above, RCW 26.09.175 states only that the petitioner shall serve the respondent and may do so by either personal service or any form of mail requiring a return receipt. RCW 26.09.175(2). Therefore, the law is silent as

there is no statutory requirement that service be completed within 90 days in the child support statutes.

RCW 26.09.175 states that a proceeding for modification is commenced with the filing of the petition and worksheets. RCW 26.09.175(1). It states nothing about any requirement of service in determining when the action was commenced. RCW 26.09.175. Therefore, this action was commenced in a timely fashion under the terms of Paragraph 3.14 of the *Order of Child Support*.¹⁴

C. Argument Regarding Assignment of Error No. 2.

The court in its *Order Denying Summary Judgment* ruled that RCW 4.16.130 is the controlling statute of limitations.¹⁵

RCW 4.16.130 reads as follows:

“An action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued.” RCW 4.16.130 (emphasis added).

Mother argues that RCW 4.16.170 should be dispositive of the issues presented in this appeal. RCW 4.16.170 states as follows:

“Tolling of statute — Actions, when deemed commenced or not commenced.

For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. If following service, the complaint is

¹⁴ See *Order of Child Support*, CP ____.

¹⁵ See *Order Denying Summary Judgment*, CP 54

not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.”

Mother’s argument is that RCW 4.16.170 dictates when service must be completed in this action. *Brief of Appellant* at 2.

RCW 4.16.170 is the statute which pertains to the tolling of statutes of limitation. It is not a statute of limitation. Which statute of limitation applies if not RCW 4.16.130? The Brief of Appellant provides no guidance for the answer to that critical question. Furthermore, the Brief of Appellant does not address the issue as to when the statute of limitations began to run. RCW 4.16.170 is not helpful as it speaks only to the tolling of the statute of limitations. RCW 4.16.170.

In addition, the language of RCW 4.16.170 is in direct conflict with the language of RCW 26.09.175. Since RCW 26.09.175 directly addresses the issue of modification child support, rules of construction would indicate that statute controls rather than one addressing issue of the tolling of a statute of limitations in general fashion. RCW 26.09.175, RCW 4.16.170.

The statutes of limitation listed in the remainder of RCW 4.16 do not mention child support modification or postsecondary educational support orders. Therefore, the general statute of limitation controls this action or stated by the trial court. RCW 4.16.130.¹⁶ This action was filed and served within that two year period.¹⁷ Since the statute of limitations had not run at the time at which the Mother was served, the tolling statute is not applicable.

¹⁶ See *Order Denying Motion for Summary Judgment*, CP 54.

¹⁷ See *Summons and Petition for Modification*, CP 95
Affidavit of Service, CP 91

Since RCW 4.16.170 is a statute pertaining to the tolling of the statute of limitations, the next inquiry of this court must be one directed to when the statute of limitations began to run in this case.

Part of the problem in determining when the statute of limitations began in this case is imposed by statute. RCW 26.19.090(2) states that you must look to:

“... 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...” RCW 26.19.090.

Most of these factors can only be determined when the child reaches an age where application to a college may be made, acceptance to a college may be received, financial resources including scholarships, grants, and student loans are determined, and the financial resources of the parents can be reviewed. This court had generally determined that those factors can only be looked at when the child is ready to go to college. *In re Marriage of Kelly*, 85 Wn.App 785 (1997). Is this at age 18 as in the case of Kiera Sagner or some earlier or later time?¹⁸ In the circumstances of this case, the statute of limitations might be argued to begin when she made applications to colleges for admission or after she received financial aid information. This could be anywhere from when Kiera was 17 years of age until graduation from high school or thereafter. Father admits he did not have all the financial information available to him to proceed with the Petition on June 3, 2008.¹⁹ Does he then lose out on his ability to seek such support on behalf of his daughter? The statute of limitations protects his right to proceed. RCW 4.16.130.

¹⁸ See *Declaration of Karl Sagner*, CP 67.

¹⁹ See *Declaration of Karl Sagner*, CP 67.

Father acknowledges that the *Order of Child Support*²⁰ states that the right to seek postsecondary educational support was reserved and not ordered. Either parent could petition the court for such support prior to the termination of child support. Father filed his Petition before the support terminated.²¹ However, Mother states three days later both parties lost the right to petition the court for such support when the information to proceed on the Petition was not yet available to the parties. *Brief of Appellant* at 2.

RCW 26.19.090 and RCW 26.09.100 force parents into a very small window of time within which to petition for postsecondary educational support.

Mother's cites Civil Rule 3 (CR3) as authority for when this action was commenced for the purpose of the tolling of any statute of limitations. As stated, this is contrary to RCW 26.09.175(1), but it is still not dispositive of this matter because Mother cannot tell us which statute of limitation is applicable for the application of RCW 4.16.170 as contained in CR 3(a).

D. Argument Regarding Assignment of Error No. 3 and Exceptional Circumstances.

As previously stated, RCW 26.09.175 allows for the modification of child support. Mother claims that there was no showing of exceptional circumstances as required by RCW 26.09.100 to allow the court to order postsecondary educational support in the event that the support obligation is terminated and a petition was filed thereafter.

²⁰ See *Order of Child Support*, at CP ____.

²¹ See *Summons and Petition for Modification*, CP 95.

The case cited by Mother is *In re Marriage of Gimlett*, 95 Wn.2d 699, 629 P.2d 450 (1981). The standard elucidated in *Gimlett* is “a substantial change of circumstances.”

“In compelling situations where postmajority support was not originally granted, the courts have the power to modify the decree upon a showing of a substantial change of conditions.”

In re Marriage of Gimlett, supra, at 700.

Here, postmajority support was not granted, but simply reserved.²² This court based its ruling upon the child’s age and the other statutory factors in ordering the support.²³ Father admits the Arbitrator did not label any facts as constituting a compelling situation.²⁴

The case *In re Marriage of Kelly*, 85 Wn. App 785, 790, 934 P.2d 1218 (1997), states that the court retains jurisdiction to order postsecondary educational support for adult children and to modify the decree of dissolution and order postmajority educational support in compelling circumstances when support has already terminated.

In *Kelly*, the court found that the child’s abilities and aptitude for college could not have been known when she was six (when the original decree of dissolution was entered). The court specifically stated:

“Where child support is originally established for young children, the child’s subsequent showing of ability to attend college may be considered a substantial change of circumstances justifying a modification to provide postsecondary support.” *In re Marriage of Kelly*, supra, at 793.

The court has ruled in *In re Marriage of Clark*, 112 Wn. App. 370 (2002), that a substantial change of circumstances occurs when the

²² See *Order of Child Support*, CP ____.

²³ See *Arbitration Award*, CP 45.

²⁴ See *Arbitration Award*, CP 45.

child graduates into the next level of support. The change in age of Kiera in this case was specifically addressed by the Arbitration in his decision and was incorporated as part of the *Findings and Fact, Conclusions of Law* in this case.²⁵

Furthermore, the Mother's claims that somehow she would be prejudice by not knowing that she would have a postsecondary educational support obligation for the future is resolved by the statute of limitations. She knows that if the statute of limitation runs, that she will have no obligation for postsecondary educational support. In no event was she to be responsible for postsecondary educational support beyond the age of 23. RCW 26.19.090(5).

6. ATTORNEY'S FEES.

The Father acknowledges that the Court of Appeals has the ability to award attorney's fees and costs under RCW 26.09.140. In addition, in exercising its discretion under the statute, the Court of Appeals should consider the arguable merit of the issues on appeal and the financial resources of both parties. *In re Marriage of Johnson*, 27 P.3d 654 (2001). In looking at the financial resources of the parties, the analysis has generally been one of need and ability to pay. *In re Marriage of Wright*, 27 P.3d 263 (2001).

Mother has produced no financial information which would indicate any inability to pay the costs of this appeal. She lists gross income of \$48,486.84 per year and household expenses of \$32,409.96 (including her obligation for postsecondary educational expense).²⁶

The *Father's Financial Declaration*²⁷ shows gross income of \$95,454. His income will be shown to have dropped dramatically in

²⁶ See *Appellant's Affidavit of Financial Need*, CP ____.

²⁷ See *Petitioner's Financial Declaration*, CP 99.

2009. In addition, the *Arbitration Award*²⁸ recognized that Father was going to be responsible for all of the costs of the daughter's education beyond those amounts allocated to the daughter and Mother.²⁹ The tuition, room and board, and fees are listed at \$17,879 per quarter or \$53,637 per academic year (not including summer quarter).³⁰

In the first year of the child's college, she was to contribute no money toward the cost of her education.³¹ Thereafter, the child's contribution was 10% for the second year, 25% for the third, and 35% for the final year.³² If tuition does not rise in future years which is unlikely, Father's contribution toward his daughter's tuition, fees, and room and board at the University of Chicago will total the following amounts for each year:

	<u>Father's Obligation</u>	<u>Daughter's Percentage</u>	<u>Mother's Obligation</u>
First Year:	\$48,837.00	-0-	\$4,800
Second Year:	\$43,473.30	10	\$4,800
Third Year:	\$35,427.75	25	\$4,800
Fourth Year:	\$30,064.05	35	\$4,800

Presumably if the child has additional expenses for transportation to and from Chicago and other incidental expenses, Father will be responsible for those as well as the *Arbitration Award* capped the amount that mother would contribute to junior college expenses for the first two years and four year institution expenses for the last two years.³³

²⁸ See *Arbitration Award*, CP 45.
²⁹ See *Arbitration Award*, CP 48, 49 and *Tuition Accounts Statement*, CP 105.
³⁰ See *Tuition Account Statement*, CP 106.
³¹ See *Arbitration Award*, CP 47.
³² See *Arbitration Award*, CP 47.
³³ See *Arbitration Award*, CP 48.

In light of Father's substantial obligation to support his daughter's education, the Court of Appeals should award no attorney's fees based upon need and ability to pay. Father has no ability to pay.

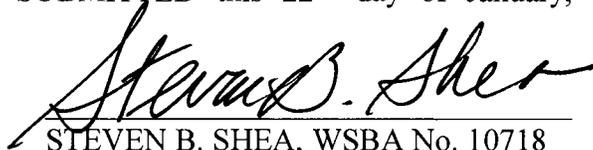
7. CONCLUSION.

As previously stated, this appears to be an issue of first impression. Establishment of a statute of limitations for postsecondary educational support actions will be helpful to parents in the future in determining when the action must be filed and how long they have to pursue such an action.

In the instant case, the statutes and the case law do not give clear guidance to parents as to when the action must be filed and served. The two year general statute of limitations will not unreasonably burden parents with uncertainty as to whether they will owe postsecondary educational support for a child.

Under the facts of this case, the Petition was timely served on the Mother and the court ruled correctly that service was effective on her and that the matter should go forward to arbitration. The decision of the trial court should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 22nd day of January, 2010.


STEVEN B. SHEA, WSBA No. 10718
Attorney for Respondent

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**(Snohomish County Superior
Court Cause No. 01-3-01624-7)**

**DECLARATION OF
SERVICE**

I, Kim A. Biden, hereby declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am a paralegal for Steven B. Shea, attorney for the above-named Respondent.

2. On the 22nd day January, 2010, I had NW Legal Support to be delivered this day a copy of Brief of Respondent filed in the above matter addressed to:

G. Geoffrey Gibbs
ANDERSON HUNTER LAW FIRM, P.S.
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ORIGINAL

DECLARATION OF SERVICE -1

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