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COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

NO. 64807-1

In Re Marriage of: Mitchel Krogseth and Kristin Flanigan

KRISTIN FLANIGEN,

Appellant

v.

MITCHEL KROGSETH,

Respondents.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

Kristin Flanigan assigns the following errors to the trial court.

- A. The trial court erred in entering its December 18, 2009, Judgment and Order for Overpayment of Day Care Expenses without considering and giving effect to the equitable defenses of estoppel and laches.
- B. The trial court erred in not limiting Mitchel Krogseth's claim for reimbursement of day care expenses to that portion of expenses that exceeds twenty (20) per cent of his obligation.
- C. The trial court erred in ordering interest in the amount of 12% per annum to be assessed on the day care reimbursement judgment, without also allowing the judgment to be reduced by all amounts paid by Kristin Flanigen for Mitchel Krogseth's post secondary educational obligation expenses when paid.

II. STATEMENT OF ISSUES

1. Whether the appellant may raise equitable defenses, including equitable estoppel and laches as a bar to the respondent's action for reimbursement for overpaid day care expenses under RCW 26.19.080(3). (Assignment of Error A).

2. Whether the respondent's claim for reimbursement of overpaid day care expenses under RCW 26.19.080(3) must be limited to that portion of the expense that amounts to twenty (20) per cent or more of the respondent's annual day care expenses. (Assignment of Error B).
3. Whether the trial court erred by allowing interest to accrue on the judgment for overpayment of day care expenses while requiring the appellant to finance the respondent's post-secondary educational expense obligation interest free. (Assignment of Error C).

III. STATEMENT OF THE CASE

A. BACKGROUND

This appeal begins with an Order of Child Support entered in the King County Superior Court on October 6, 1998. The Appellant, Kristin Flanigen, and the Respondent, Mitchel Krogseth, were a married couple divorced on October 6, 1998. They had two children of the marriage, Kaitlin, who was seven (7) at the time of the dissolution, and Reese, who was five (5) at the time of the dissolution. Kaitlin and Reese are now 19 and 17 respectively.

At the time of the dissolution and at all times since, the children

resided the majority of the time with Kristin, who was the obligee parent in the 1998 order of support. CP 3. The transfer payment due from Mitchel to Kristen under the 1998 order of support, based upon the standard calculation for both children, was \$887 per month. CP4. The transfer payment did not deviate from the standard calculation. Under paragraph 3.12 of the 1998 order of support, the obligor was to pay certain amounts for expenses not included in the transfer payment for each month the expense is incurred. CP 7. However, no expense is designated and in fact a daycare expense of \$392 was stricken manually from the order. CP 7. Modification of the order was provided as follows:

“Child support shall be adjusted periodically as follows: per RCW 26.09.”

CP 8. The Washington State Child Support Schedule Worksheets attached to the 1998 order of support include a line item for \$790.85 of Day Care Expenses, which were paid each month by Kristin. CP 12. The father’s proportionate obligation for the day care, based on his 49.2% portion of combined net income, was \$389.10. CP 12. That amount when added to his basic support obligation of \$497.90 totaled \$887.00, which was his transfer payment.

The 1998 order of support also provided that,

“either party may move for post secondary educational support of the children until such time as the child for whom support is sought graduates from high school or is no longer dependent upon the parties, whichever is later.”

CP 7.

The parties never adjusted or modified the order of support until October 2009, eleven years after entry of the original order of support, when Kristin moved for post-secondary educational support for the daughter, Kaitlin. CP 15-41; CP 42-57; RP 6, lines 14-15.

Kaitlin turned twelve (12) years old on 4/29/03, but child support for her did not increase based upon her moving into the older age category pursuant to the economic table. Reese turned twelve (12) years old on 12/1/04, but child support for him did not increase based upon his moving into the older age category pursuant to the economic table.

B. THE OCTOBER 23, 2009, CHILD SUPPORT ADJUSTMENT AND ORDER FOR POST-SECONDARY EDUCATIONAL EXPENSES.

A hearing was held before King County Superior Court Commissioner Leonid Ponomarchuk on October 23, 2009. Kristin represented herself, and Mitchel did not appear at the hearing. Commissioner Ponomarchuk entered an Order on Post-Secondary Support in which he ordered the parties to pay their proportionate percentage

obligation for Kaitlin's post-secondary education expenses, which were determined to be \$18,306 annually for the 2009-10 school year. CP 57. The parties respective percentage obligations were 60% to Kristin and 40% to Mitchel. Kristin was required to pay or advance 100% of the expenses when due. Mitchel's was ordered to pay his 40% obligation by reimbursing Kristin at a rate of \$610.20 per month. CP 51, 57.

Also on October 23, 2009, Commissioner Ponomarchuk entered a new order of child support relating to the parties' son, Reese. Support for Reese to be paid by Mitchel was established at \$431.88 per month. CP 20. Because Mitchel had unilaterally reduced his prior obligation by one-half the month Kaitlin graduated from high school, Commissioner Ponomarchuk established and entered an arrearage judgment against Mitchel in the amount of \$1,443.48 for underpayment for the period July, August, and September 2009. CP 20.

C. JUDGMENT FOR DAYCARE EXPENSES NOT INCURRED.

Approximately one month later, In November 2009, Mitchel retained an attorney and filed a Motion for Judgment for Day Care Expenses Not Incurred pursuant to RCW 26.19.080. CP 68. Mitchel requested a judgment calculated as follows:

$\$389.10 \times 84 \text{ months (July 2002 - June 2009)} = \$32,684.40.$ CP

65. This represented the full amount of his child support obligation designated to day care for seven (7) years. Mitchel supported his motion with a declaration, in which he acknowledged that he obtained an attorney following entry of the two orders, dated October 23, 2009, and then he stated that while working with his new attorney, "I learned that I had been paying day care expenses for the past seven years (at least) that were not being incurred." CP 65.

Kristin filed a declaration on December 10, 2009, to respond to Mitchel's motion for judgment, in which she stated:

At no time over the past 11 years since the original Order of Child Support went into effect did Mr. Krogseth seek adjustment to the amount of child support owed, as was allowed pursuant to Section 3.13 of the original Order of Child Support. It was only after the Order of Child Support was modified and a judgment on back child support issued on the 23rd of October, 2009, that Mr. Krogseth hired an attorney and, in turn, sought a judgment against me, retroactive to 2002, in a continued attempt to avoid paying the judgment against him or contribute his proportional share of child support.

CP 80. Kristin explained that, based upon the current child support calculation performed by the court on October 23, 2009, Mitchel's child support obligation would be \$863.75 per month exclusive of any day care obligation. Therefore, had child support been adjusted, Mitchel's

obligation would have likely met or exceeded what he was paying all along under the original order of support. The relevant portion of Kristin's declaration in this regard is as follows:

Pursuant to the attached WSCSS Economic Table and the financial records provided by both parties in the Order of Modification of Child Support, however, his (Mitchel's) child support obligation from May 2008 through June 2009 would have been 40.4% of \$2,138/month, or \$863.75/month. As tax returns will show, Mr. Krogseth's income increased substantially from the time the original Order of Child Support went into effect in October 1998, thus the claim that his child support obligation should have been only \$497.90/month for two teenage kids is both erroneous and misleading.

CP 80. Kristin goes on to state:

If the Court allows the motion to proceed, however, then I request a continuance on this motion, allowing time for both parties to submit all 2002-2009 tax returns (including 2007) to the other party so that modification of child support for the period of September 2002 through June 2009 can instead be based, fairly and accurately, on recalculations using both parties' 2002-2009 tax returns.

CP 80. Kristin's declaration shows that she believed it was unfair for Mitchel to seek reimbursement for day care expenses during the period July 2002¹ through July 1, 2009 for the reasons that (1) Mitchel never

¹ July 2002 appears to be an arbitrary date when day care should no longer have been incurred for the children based upon their ages. On July 2002, Kaitlin would have just turned 11 years old, and Reese would have been 9 ½ years old.

sought to adjust support or otherwise remove the daycare portion of his child support obligation, and therefore, he waited too long to raise the claim for reimbursement; (2) If child support had been adjusted to remove the daycare obligation, it would also at that time certainly been adjusted based upon the incomes of the parties, and Mitchel's child support would likely have increased substantially; and (3) retroactive reimbursement to Mitchel for daycare paid but not incurred would be unfair unless, for the period of reimbursement, child support was also adjusted to reflect the true amount that he should have been paying for basic support.

Mitchel filed a Reply Declaration of Mitchel Krogseth Re: Reimbursement of Day Care and CR 60(b) Motion, dated December 16, 2009. CP 85 - 90. In relevant part, Mitchel's reply to Kristin's declaration is as follows:

Kristin has not provided any substantive response to my motion and by law it should be entered. She continues to believe that none of the rules apply to her, and that she can change court orders to suit her needs. . . . I am entitled to the full judgment since she has not provided even one receipt showing day care expenses for our children.

CP 86.

On December 18, 2009, a hearing was held by Commissioner Ponomarchuk on Mitchel's Motion for Judgment for Day Care Expenses

Not Incurred. Kristin was not represented at the hearing. Mitchel was represented by his attorney, Andrea Taylor. Following a brief argument by Ms. Taylor and Kristin, Commissioner Ponomarchuk concluded that under the terms of the original order of child support, a party who overpays day care was entitled to reimbursement under RCW 26.19.080(3). RP 5, lines 12 - 19. Commissioner Ponomarchuk found that he lacked discretion and was required to order the reimbursement. RP 6, line 9.

In the process of issuing his decision, Commissioner Ponomarchuk expressed displeasure with a result he believed he had no choice but to order. He acknowledged that after subtracting the \$389 daycare portion from the child support obligation, Mitchel's actual child support obligation for the two children from 1998 to 2009 was not appropriate support. Speaking directly to Kristin from the bench, Commissioner Ponomarchuk stated:

Here the order had not been adjusted for many, many years. Do I think \$400 is an appropriate amount? No. But I've never seen you until this proceeding. Had you come in and we'd done the numbers crunching, the support probably would have gone a substantial amount higher.

RP 6, lines 14 - 19. Commissioner Ponomarchuk continued:

I take no pleasure in saying that a judgment is owing. The fact is I can't retroactively modify an order.

RP 7, lines 6 - 8. Having considered that several months earlier, Commissioner Ponomarchuk had imposed a post-secondary educational support obligation on Mitchel of 40% of the actual costs, which he allowed to be paid by Mitchel by reimbursement to Kristin in the amount of \$602.10 per month, he allowed the judgment granted to Mitchel to be a credit for his future post-secondary educational support:

It seems to me, in light of this, since there is an obligation for post-secondary educational support, I'm going to designate the judgment owing as a credit towards post-secondary educational support. Meaning, your client (Mitchel) shall continue to pay child support, but the judgment owing is going to be a credit towards college support. . . . that basically Mr. Krogseth has a credit for college support. So you (Kristin) won't be exactly paying him back anything, but you're going to be paying towards the school; and he's going to get credit for that.

RP 8, line 19 - RP 9, line 3. Commissioner Ponomarchuk then entered judgment in the amount of \$32,684.10, against which he offset a child support arrearage judgment in the amount of \$1,443.48, which he had earlier entered against Mitchel. CP 91 - 93. Finally, Commissioner Ponomarchuk gave Kristin thirty (30) days to research her records to locate any amounts she might have paid for day care expenses for the children for 2 ½ years following July 2002:

(To Kristin) Well, the judgment I'm entering is \$32,684.40, unless you can provide some receipts where you can provide some showing that you have paid in the preceding two and a half years to this. . . . Do I think that that's fair for you to have to dig those receipts out(?); I don't. But I'm not the legislature. Okay. I wish the legislators would be the ones having to decide these cases like I have to. I think they'd rewrite the law if they were put in my shoes for even ten minutes. With that being the case, that's my ruling today. . . .

RP 9, lines 14 - 17; RP 9, line 23 - RP10, line 4.

(To Ms. Taylor) Ms. Taylor, I should let you know, I'm going to be fairly liberal in my interpretation of what child care is in light of the incredible judgment that I just entered.

RP 11, lines 7 - 10.

(To Kristin) You have 30 days from today's date to appeal my decision to the Court of Appeals.

RP 11, lines 20 - 22.

Following the hearing, Kristin filed a Declaration of Kristin Flanigen, dated January 19, 2010, in which she explained that while she did in fact incur day care expenses for the children from July 2002 to September 2004, she had not retained records and, therefore, it was impossible to document the expenses due to the passage of time.

I spent thousands of dollars each summer toward all-day daycare for my minor children in the form of summer camps, however all but one of the organizations I contacted (list attached) do not keep records as far back as I requested, i.e. 2002. Nor do banks or the IRS keep records for more than seven years. The length of time

required to retrieve banking records, credit cards in particular, exceeded the 30 days I was given. Thus the attached receipts cover only a small percentage of the expense incurred entirely by me toward summer daycare for Kaitlin and Reese Krogseth, up until September 2004.

CP 126. Attached to the declaration, Kristin showed the following expenses she incurred for child care;

3/21/05 - 8/14/05	Okanagan Hockey School:	\$4,604.60 ²
8/18/03 - 8/22/03	Boys & Girls Club	\$ 105.00
5/26/99 - 4/3/01	Redmond Parks and Rec	\$ 734.00 ³

Kristin explained that she did not know she needed to keep records of day care expenses to use years later in a reimbursement proceeding:

Had I ever imagined that Mr. Krogseth could or would ever seek a judgment against me for daycare not incurred, with the knowledge that I took on the far greater financial responsibility in raising the children and that his proportional share of child support would increase were I to have sought modification of the original order, then I would have had the foresight to keep more intricate records for purposes of reimbursement now. I implore the court to take into consideration the extreme financial hardship incurred by the judgment against me for daycare not incurred, which was not sought by Mr. Krogseth until seven years after he claims overpayment began, and show leniency in this matter.

² The dates of these expenses appear to be slightly outside the dates permitted by Commissioner Ponomarchuk.

³ The dates of this expense appear to be slightly outside the dates permitted by Commissioner Ponomarchuk.

CP 127. Kristin filed a Motion for Reconsideration that was denied on procedural grounds on January 15, 2010. CP 139. This appeal followed.

IV. ARGUMENT

A. THE OBLIGEE PARENT IS ENTITLED TO EQUITABLE DEFENSES TO THE CLAIM FOR REIMBURSEMENT OF DAY CARE NOT INCURRED.

1. Standard of Review.

The Court of Appeals reviews de novo a court commissioner's decision that is based entirely on documentary evidence. In re Parentage of Hilborn, 114 Wn.App. 275,276, 58 P.3d 905 (2002); *citing*, In re Marriage of Balcom, 101 Wash.App. 56, 59, 1 P.3d 1174 (2000). In this case, Commissioner Ponomarchuk's decision was based solely on the declarations of the parties. Therefore, this court reviews the decision de novo.

2. RCW 26.19.080(3).

The issue of Mitchel's right to reimbursement for daycare expenses not incurred is initially reviewed under RCW 26.19.080, titled **"Allocation of child support obligation between parents - Court-ordered day care or special child rearing expenses."** The relevant

portion of this statute is subsection (3), which reads in applicable part:

(3) If an obligor pays court . . . ordered day care . . . expenses that are not actually incurred, the obligee must reimburse the obligor for the overpayment if the overpayment amounts to at least twenty percent of the obligor's annual day care . . . expenses. The obligor may institute an action in the superior court . . . for reimbursement of day care . . . expense overpayments that amount to twenty percent or more of the obligor's annual day care . . . expenses.

RCW 26.19.080. The leading Washington case interpreting this statute and determining its application to reimbursement of daycare expenses not incurred is Marriage of Barber, 106 Wn.App. 390, 23 P.3d 1106 (2001).

In facts almost identical to ours, the Barber Court determined that equitable defenses, such as equitable estoppel and laches can operate as a bar to a claim for reimbursement under the statute, and that the trial court must consider such defenses.

In Barber, an order of child support was entered in 1994, which established a support transfer payment by the father that included \$88.20 per month in day care expenses. Five years later, in 1999, the mother sought a modification of the order. The father responded with a motion for refund of day care pursuant to the reimbursement statute. The trial court ordered the mother to reimburse the father \$5,242.88 for day care

costs not incurred for approximately five years.

The court of appeals held that the superior court erred in failing to consider equitable defenses to the father's claim. Therefore, it reversed the trial court judgment and remanded for further proceedings to consider those defenses. It held that claims for reimbursement brought under the statute are mandatory *unless* the claim itself is barred by equitable doctrines. Barber, at p. 395-396.

3. Equitable Estoppel and Laches as a Bar to Request for Reimbursement of Day Care Expenses.

As in Barber, no findings of fact were entered in our case by the superior court, and there is no evidence that Commissioner Ponomarchuk considered whether equitable estoppel or laches should apply as defenses to Mitchel's reimbursement claim. To the contrary, the oral decision of the Commissioner confirms that he believed he had no discretion to consider any equitable defenses whatsoever. Therefore, as in Barber, this case should be remanded to the superior court for a determination of whether equitable estoppel or laches should be applied as a defense to Mitchel's claim.

Equitable estoppel "rests on the principle that where a person, by

his acts or representations, causes another to change his position or to refrain from performing a necessary act to such person's detriment or prejudice, the person who performs such acts or makes such representations is precluded from asserting the conduct or forbearance of the other party to his own advantage." Barber, at p. 396, *citing* Hartman v. Smith, 100 Wn.2d 766,769, 674 P.2d 176 (1984). The three elements of equitable estoppel are:

1. An admission, statement, or act inconsistent with the claim afterward asserted;
2. Action by the other party on the faith of such admission, statement or act; and
3. Injury resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

Barber, at p. 396, *citing* In re Marriage of Hunter, 52 Wn.App. 265, 271, 758 P.2d 1019 (1988).

The Barber court remanded the case with instructions to the superior court to decide whether equitable estoppel barred the father's action for reimbursement. Barber, at p. 396. In our case, a remand is also necessary to determine whether facts exist that satisfy the elements of equitable estoppel. At a minimum, we know that Mitchel continued making payments for day care expenses for approximately seven years

without objection or even inquiry. Each voluntary payment made without objection, with the knowledge that day care expenses were not incurred, constitutes a distinct act inconsistent with a reimbursement claim asserted years later. Kristin's statements in her declarations disclose that she refrained from pursuing available child support adjustments over the years, relying on the fact that Mitchel was paying a level of support that was comparable to what it would have been upon an adjustment.

Laches is a delay by one person that works a disadvantage to another person. When a person, knowing his rights, "takes no step to enforce them until the condition of the other party has, in good faith, become so changed" that she cannot be restored to her former state, then the delay in enforcing the rights becomes inequitable, and "operates as an estoppel against the assertion of the right. When a court sees negligence on one side and injury therefrom on the other it is a ground for denial of relief." Barber at p. 396-7, *citing*, Crodle v. Dodge, 99 Wash. 121,131, 168 P. 986 (1917) (*quoting* 10 R.C.L. 396) (cited with approval in Brost v. L.A.N.D., Inc., 37 Wn.App. 372, 375-76, 680 P.2d 453 (1984).

The elements of Laches are:

1. A party asserting his rights had knowledge of the facts constituting a cause of action or a reasonable opportunity to discover such facts;
2. There was an unreasonable delay in commencing the action; and
3. The delay damaged the other party.

Barber, at p. 397, *citing Hunter*, 52 Wn.App. At 270. The facts in our case establish that Kristin has a clear laches defense against Mitchel's claim for reimbursement.

First, Mitchel knew that he was paying \$389.10 per month in his child support transfer payment for day care expenses, as that amount was clearly set forth on line 12 of the Washington State Child Support Schedule. CP 11. He also knew that the children stopped requiring day care probably by the time they each turned twelve years old. If he did not know that his children were no longer receiving daycare after July 2002, there is no argument that he did not have a reasonable opportunity to discover the facts by asking either Kristin or the children themselves.

Second, Mitchel delayed bringing his claim for reimbursement until November 2009, almost 7 ½ years after the cause of action arose. His only stated reason for the delay is that he did not know he had been paying day care expenses until he sought an attorney to review another

order regarding post secondary educational support. CP 65. He admits that he did not believe the children incurred day care for at least the past seven years. CP 65. Therefore, there is no reasonable excuse for delaying commencement of the reimbursement action.

Third, the unreasonable 7 ½ year delay by Mitchel caused significant damage to Kristin. By the time he commenced his action, the oldest child, Kaitlin, was over 18 years and in college, and the youngest child, Reese, was 17. Kristin had by that time given up five opportunities to adjust child support every 24 months as was her right under RCW 26.09. Commissioner Ponomarchuk agreed that such adjustments would have resulted in significant increases in the child support transfer payment to Kristin. Further, as was a significant factor in the Barber case, child support for Kaitlin and Reese did not increase when each child moved from the “A” age group into the “B” age group under the economic table of RCW 26.19.020⁴ In her declaration of December 10, 2009, Kristin

⁴ Kaitlin turned twelve (12) years old on April 29, 2003. Under the Economic Table, child support for her would have increased from \$506.00 per month to \$625.00 per month, even without any change to the parents’ incomes. Mitchel’s 49.2% of that increase would have been \$58.55 additional child support due each month. Reese turned twelve (12) years old on December 1, 2004. Under the Economic Table, Mitchel’s child support for him would have increased another \$58.55 per month. Thus, Kristin lost \$7,597.20 in additional child support

articulates the damage to her by asserting that significant child support was lost to her household based upon increases in Mitchel's income over the years and by requesting that the trial court consider the parties' incomes for the purposes of implementing bi-annual adjustments for the period 2002 - 2009. CP 80. Finally, Kristin shows further damage to her caused by Mitchel's delay due to the impossible task in 2010 of obtaining records created as many as seven years earlier to document day care that she in fact incurred after July 2002. Therefore, Laches should operate as a bar to Mitchel's claim for reimbursement under RCW 26.19.080(3), and the judgment entered by Commissioner Ponomarchuk's should be reversed and remanded to determine the applicability of equitable estoppel and laches.

B. CLAIMS TO REIMBURSEMENT FOR DAY CARE EXPENSES NOT INCURRED ARE LIMITED TO OVERPAYMENTS EXCEEDING TWENTY (20) PER CENT OF THE ANNUAL OBLIGATION.

Under the fourth sentence of RCW 26.19.080(3), a party who has paid for day care not incurred, may seek reimbursement of day care expense overpayments only as to amounts that are twenty percent or more

through June 2009, even without any adjustment based on changes to the parties incomes.

of the annual day care expense. “The statutory scheme contemplates that only substantial overpayments exceeding 20 percent of the annual obligation would be subject to the refund,” In re Marriage of Fairchild, 148 Wn.App. 828,833, 201 P.3d 1053 (2009) (Korsmo, J., *dissenting*). Thus, the plain language of the statute limits claims to 80% of the day care expense overpayment.

This limitation was overlooked in our case. Commissioner Ponomarchuk calculated the reimbursement judgment by multiplying 100% of Mitchel’s day care obligation (\$398.10) times twelve (12) months times seven (7) years (July 2002 through July 1, 2009) to reach the total reimbursement judgment in the amount of \$32,684.10. This calculation awarded Mitchel reimbursement for 100% of the annual day care expenses, and, therefore, is contrary to the statute.

Because the statute limits reimbursement to the amount that equals or exceeds twenty percent of the annual day care, the proper method of calculating Mitchel’s reimbursement claim would be to multiply his day care obligation (\$398.10) times twelve (12) months times 80% times seven (7) years. Under this calculation, Mitchel’s proper prima facie claim would be: $\$398.10 \times 12 = \$4,777.20 \times 80\% = \$3,821.76 \times 7 = \$26,752.32$.

Therefore, Mitchel's claim should be limited to \$26,752.32, even prior to application of equitable estoppel and laches.

C. STATUTORY INTEREST ON ANY REIMBURSEMENT JUDGMENT AWARDED TO THE FATHER IS IMPROPER IN LIGHT OF THE OFFSET AGAINST THE FATHER'S POST-SECONDARY EDUCATIONAL EXPENSE OBLIGATION.

After Commissioner Ponomarchuk entered judgment in the amount of \$32,684.10, he provided that the judgment could be paid by Kristin by making the judgment a prepayment of Mitchel's future post-secondary expense obligation under the Order on Post-Secondary Support, dated October 23, 2009. RP 8, line 19 - RP 9, line 3. The post-secondary support order requires Kristin to advance the full amount of Kaitlin's tuition and room and board expenses to Kaitlin's university each year. Commissioner Ponomarchuk found that those amounts were \$17,106.00 for the year 2009-2010. After Kristin advances the full amounts due to the institution, Mitchel then pays his 40% obligation by reimbursement to Kristin at the rate of \$610.20 per month.

Because the day care reimbursement judgment bears interest at a rate of 12% per annum, the practical effect of this offset requires Kristin to finance Mitchel's post-secondary education obligation interest-free, while

she is assessed 12% interest on the balance of the day care reimbursement judgment that declines gradually as if payments were made at the rate of only \$610.20 per month. For example, when Kristin makes her 2009-2010 post-secondary educational expense payment to the institution in the amount of \$17,106.00, she pays not only her 60% portion, but also Mitchel's 40% share, \$6,842.40. In this manner, Kristin is financing Mitchel's portion interest-free. Mitchel then pays Kristin back at the rate of \$610.20 per month by a reduction of that amount from the day care reimbursement judgment. Therefore, assuming that Mitchel's post-secondary educational expense payment is due on the first of every month, his first payment following entry of the day care reimbursement judgment would have been January 1, 2010. Accrued interest on the judgment as of that date would have been \$139.69. Since payments on judgments first apply to interest, the portion of Mitchel's payment that would apply to reduce the judgment would be just \$470.51. The remainder of the payment would merely pay the interest on the judgment.

Since Kristin is not receiving similar interest or other consideration on the amount she pays to the university on Mitchel's behalf, the result to her is inequitable. The more equitable way to handle the offset of

Mitchel's post-secondary obligation against his judgment is to treat the judgement as a "pre-paid" fund in a fixed amount of \$32,684.10, from which Mitchel can draw at a rate of \$610.20 per month to pay his post-secondary educational expense obligation. This appears to be what Commissioner Ponomarchuk intended when he designated the judgment as a credit toward post-secondary educational support. RP 8, line 19 - RP 9, line 3. Alternatively, at such time as Kristin pays any tuition and room and board payments to the institution, she should be entitled to apply a full 40% of her payment to the judgment.

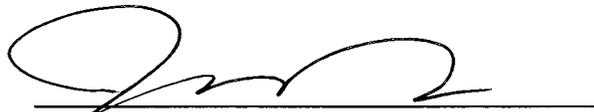
V. CONCLUSION

For the foregoing reasons, this Court should reverse and vacate Commissioner Ponomarchuk's Judgment and Order for Overpayment of Day Care Expenses and remand the matter to the King County Superior Court with instructions to the trial court to (1) consider whether estoppel or laches bars Mitchel's request for reimbursement under RCW 26.19.080(3); (2) limit Mitchel's claim for reimbursement to the portion of Mitchel's day care payments that exceeded 20% of his annual obligation; and (3) in the event a judgment is ultimately entered against Kristin, to ensure that Kristin is not assessed interest on the judgment unless she is

also able to apply the entirety of Mitchel's post-secondary support obligation to the judgment balance when she makes the payment on his behalf to the institution.

Respectfully Submitted this 18th Day of May, 2010.

THE HUNT LAW OFFICES

A handwritten signature in black ink, appearing to read 'J. Hunt', is written over a horizontal line.

JOSEPH T. HUNT, WSBA #22120

Attorneys for Appellant