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No. 69430-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

KELLY REYES fka KELLY S. MORRIS,

Respondent,

and

GREGORY CHARLES MORRIS,

Appellant.

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APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE ANDREA DARVIS

BRIEF OF RESPONDENT

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I. INTRODUCTION

The father appeals the trial court's order awarding postsecondary support for the parties' "A"-student daughters. The father earns a six-figure salary. The father does not deny that the daughters need postsecondary support. Nor does the father deny that the mother timely requested postsecondary support before child support terminated for the older daughter, who was accepted to the University of Washington. Instead, the father's challenge is that postsecondary support was awarded in an "adjustment" rather than in a "modification" action.

Neither statutory nor decisional law limits the court's authority to award postsecondary support to modification actions. The mandatory forms drafted by the Supreme Court Committee on Pattern Forms "to accurately follow the statutes" clearly provide that when postsecondary support is "reserved" in an earlier child support order, as was the case here, a parent need only file a motion for adjustment. In any event, the father can show no harm because the mother, using the mandatory form, filed a motion for adjustment rather than a petition for modification, and he was offered and provided additional time to respond to the mother's

request and received the same financial information he would have had the mother filed a modification petition.

This court should affirm and award the mother her fees for having to respond to this appeal. To do otherwise would leave the parties' smart and deserving daughters without needed support.

II. RESTATEMENT OF FACTS

A. **The Parties Divorced In 1996 When Their Daughters Were Toddlers. When Their Child Support Order Was Modified In 2008, Postsecondary Support Was Reserved For Later Determination.**

Appellant Gregory Morris and respondent Kelly Reyes divorced on December 6, 1996. (CP 26) Kelly was designated the primary residential parent for the parties' daughters, then ages three (DOB 12/4/1993) and nineteen months (DOB 4/21/1995). (CP 26-27)

Gregory moved outside of Washington State shortly after the parties divorced and remarried; he is the father of a 5-year old son. (CP 27 ,59) Kelly remarried in November 2010; she and her husband are the parents of infant twins. (See CP 106)

In August 2008, the parties' child support order was modified in a contested proceeding. (CP 35-46) The bases for modification were that the previous order had been entered more

than two years ago; the parents' incomes had changed; and the daughters, then ages 13 and 14, had moved to a new age category. (CP 33, 36)

When the 2008 order was entered, Gregory was earning monthly net income of \$8,003 as a golf pro. (CP 36) Kelly was earning \$8,488 as a dentist. (CP 37) Having sought and been granted a downward deviation from the standard calculation of \$918 because of his son from his new marriage, Gregory was ordered to make a monthly transfer payment of \$800 for the parties' daughters. (CP 37-38) Gregory was ordered to pay child support "until the children reach the age of 18, or as long as the children remain enrolled in high school, whichever occurs last, except as otherwise provided" for postsecondary support. (CP 39) The 2008 order "reserved" the issue of postsecondary support:

The right to petition for post-secondary support is reserved, provided that the right is exercised before support terminates.

(CP 39)

B. In 2012, The Older Daughter Was Accepted To The University Of Washington And The Mother Filed A Motion To Adjust Child Support And Establish The Parents' Obligations For Postsecondary Support.

The parties' daughters excelled academically. (CP 27-28) In March 2012, the parties' older daughter was accepted to the University of Washington, where she intendeds to major in engineering. (CP 27, 50) The parties' younger daughter also hoped to attend the University of Washington after she graduated from high school in 2013. (CP 28)¹

Gregory refused to commit on whether he would provide support for his daughters while they were in college. (CP 28) On June 8, 2012, the day before the older daughter graduated from high school, Kelly moved to adjust child support and establish the parents' obligations for postsecondary support. (CP 14-19) Using WPF DRPSU 06.0800 Mandatory Form, Kelly asked the court to adjust child support because a periodic adjustment was required and because postsecondary support had been reserved in the earlier order:

¹ The younger daughter has since been accepted to the University of Washington, and plans to attend starting in Fall 2014.

2.4 Periodic Adjustment Required

- Does not apply.
- It has been 12 months since the order was entered and the order provides for support to be periodically adjusted and the court should order an adjustment as follows:

See Declaration of Kelly Reyes filed concurrently herewith.

2.5 Post Secondary Support

- Does not apply.
- The right to request post-secondary support was reserved in the support order and the court needs to determine each parent's obligation;
- The previous support order provided that the parents shall pay for post-secondary support and the court needs to allocate the expenses;

And the factual basis is as follows:

See Declaration of Kelly Reyes filed concurrently herewith.

(CP 15) Although a motion for adjustment is typically considered on a 14-day calendar, King County Local Family Rule (KCLFR) 6, 14(a)(3), Kelly noted her motion six weeks out. (*See* CP 14)

Gregory responded to the motion with the assertion that the court had no jurisdiction to determine the parents' obligations for postsecondary support because Kelly had brought her request by filing a motion for adjustment instead of a petition for modification.

(CP 60) Gregory also complained that, while he was "in favor" of providing postsecondary support for his daughters, he thought he should not be ordered to do so if it created a financial hardship for his new family:

I am in favor of contributing to my daughters' postsecondary educations, but not to the extent that it creates a financial hardship to provide for my household as a result.

(CP 61; *see also* CP 82: "Although this court cannot properly order Respondent to provide postsecondary support to his oldest daughter, Respondent does want to affirmatively state that he intends to assist her. He values education and is proud of his daughter and her academic achievements thus far.")

When Kelly filed her motion, Gregory was earning monthly net income of nearly \$7,700. (CP 85) While complaining about paying postsecondary support for his daughters to attend a public university, he was paying tuition for his son, age 5, to attend private Montessori school. (CP 86) Kelly was earning monthly net income of \$8,699, but anticipated taking unpaid maternity leave when her twins were born.² (CP 21, 29)

² The twins were due in December 2012, but were born prematurely in October 2012.

C. The Trial Court Awarded Postsecondary Support For Both Daughters Based On The “Broad Equitable Powers” To Consider Postsecondary Support Whether Raised In A Timely Adjustment Or Modification Action.

The initial hearing on Kelly’s motion for adjustment was continued to July 31, 2012, nearly two months after she filed her motion. King County Superior Court Commissioner Bonnie Canada-Thurston (“the commissioner”) concluded that the court did not have jurisdiction to address postsecondary support for the parties’ older daughter, “since this request was brought as a motion instead of by Petition under RCW 26.09.170.” (CP 134) The commissioner considered the request for postsecondary support for the younger daughter (CP 135) and ordered Gregory to be responsible for 46% (his proportionate share) of the cost of postsecondary support for the younger daughter, in an amount “not [to] exceed that for a full-time, in-state student attending the highest cost in-state public institution.” (CP 123)³

³ The younger daughter was required to be responsible for her personal expenses from an inheritance and part-time employment. (CP 124) Each daughter had inherited \$12,000 from their great-grandfather. (CP 28, 124)

The commissioner also adjusted the transfer payment for the younger daughter. Based on the parties' incomes, the standard child support calculation was \$851.93. (CP 122) The commissioner deviated Gregory's transfer payment down to \$665.28 "because the father has a child from another relationship." (CP 121-22)

Kelly moved to revise the commissioner's ruling denying postsecondary support for their older daughter. (CP 140-43) Gregory did not ask the trial court to revise the commissioner's ruling ordering postsecondary support for the younger daughter. (CP 192)⁴

On September 14, 2012, the parties appeared before King County Superior Court Andrea Darvas ("the trial court"). The trial court noted that even after its own extensive research, it found no authority requiring a parent to file a petition to modify child support to request postsecondary support that was previously reserved. (*See* RP 14-17) Recognizing that the "broad principles are that the court sits in family law matters as a court of equity and with broad statutory and constitutional powers," the trial court believed

⁴ Gregory's counsel acknowledged that not moving for revision was "inconsistent" with his position that the court could not order *any* postsecondary support as part of a motion for adjustment. (*see* RP 9-11)

“the fine distinction between a motion and a petition is overthinking [the] problem.” (RP 21) Accordingly, the trial court granted revision, “given the broad grant of equitable powers in family law matters in the absence of any on point case law that affirms [the father]’s theory. [] Postsecondary support for the older child should have been considered.” (RP 21)

The trial court acknowledged that had Kelly filed a petition for modification, more time would have been allowed before the court reached the merits of her request. (RP 22) The court therefore offered Gregory a continuance setting the hearing over. (RP 22) Gregory did not accept the offer. (*See* RP 22)

With the exception of including the older daughter in the child support order for postsecondary support, the court confirmed the commissioner’s other rulings. The trial court entered its order revising the commissioner’s ruling on September 14, 2012. (CP 195, 198, 201) Gregory appeals. (CP 216)

III. ARGUMENT

A. **When Postsecondary Support Is “Reserved” In A Prior Child Support Order, A Parent Need Only File A Motion For Adjustment To Establish Each Parent’s Obligation For Postsecondary Support.**

1. **“Reserved” Postsecondary Support Is Not A “Change of Circumstances” And Does Not Require A Modification.**

The mother properly brought her request for the court to establish each parent’s postsecondary support obligation as an “adjustment” of child support, rather than a “modification.” A child support adjustment is a “form” of child support modification. RCW 26.09.170; *Marriage of Scanlon/Witrak*, 109 Wn. App. 167, 173, 34 P.3d 877 (2001), *rev. denied*, 147 Wn.2d 1026 (2002). While a full modification action is “significant in nature and anticipates making substantial changes and/or additions to the original order of support,” an adjustment action “simply conforms existing provisions of a child support order to the parties’ current circumstances.” *Scanlon/Witrak*, 109 Wn. App. at 173.

There are some procedural differences between modification and adjustment. A full modification requires the petitioning party to show a substantial change of circumstances or to meet one of the limited exceptions of RCW 26.09.170(6); an adjustment does not

require proof of a substantial change of circumstances. RCW 26.09.170 (7). While a modification action is commenced with a petition and summons and is resolved on trial by affidavit under RCW 26.09.175, an adjustment is commenced by filing a motion for a hearing. *Scanlon/Witrak*, 109 Wn. App. at 173. For both types of actions, however, the parties are required to submit identical financial information to the other party, including pay stubs, tax returns, and a financial declaration. KCLFR 10, 14.

Here, the order on appeal establishing the parents' proportionate share of postsecondary support is an "adjustment," because it "simply conforms existing provisions of a child support order to the parties' current circumstances." *Scanlon/Witrak*, 109 Wn. App. at 173. The 2012 order "conformed" the provisions of the 2008 order to the parents' and children's current circumstances by requiring the parents to pay their share of postsecondary support based on their current incomes in 2012, limited to the cost of a public university.

A modification based on a substantial change of circumstances, by contrast, is "not contemplated at the time the original order of support was entered." *Scanlon/Witrak*, 109 Wn. App. at 173. The 2012 order is not in the nature of a modification

because the parties contemplated that their daughters would attend college, and that they would provide for their support, when the 2008 order was entered reserving postsecondary support. The 2012 order confirming the obligation is not “significant in nature” and does not make “substantial changes” to the 2008 order of support.

The father had ample “notice” that his obligation to provide support could continue after the daughters graduated from high school. Under “termination of support,” the 2008 child support order expressly referenced the parents’ right to pursue postsecondary support. (CP 5) *See Marriage of Balch*, 75 Wn. App. 776, 780, 880 P.2d 78 (1994) (language of order was “sufficient to put the payor parent on notice that the child support obligation may continue after majority”), *rev. denied*, 126 Wn.2d 1003 (1995). The mother was not required to show a “substantial change of circumstances” warranting an award of postsecondary support, as would be required for a full modification. The daughters were 13 and 14 when the 2008 order was entered. It was reasonable to “reserve” how postsecondary support would be determined, because it was still another 4 years before the older daughter would

graduate high school and the parents' incomes might change during that period. The situation was unlike when the parties first divorced in 1996, "[w]here child support [was] originally established for young children, [and] 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." *Marriage of Kelly*, 85 Wn. App. 785, 793, 934 P.2d 1218, *rev. denied*, 133 Wn.2d 1014 (1997).

2. The Statute And Mandatory Forms Confirm That Postsecondary Support Is An Adjustment When "Reserved" In A Prior Order.

The father cites no authority to support his argument that the mother was required to seek postsecondary support as a full modification – fact that he acknowledged below. (*See* App. Br. 7-20; RP 20: "there doesn't seem to be any authority on point" on this issue) To the contrary, RCW 26.09.170, the statute governing both child support modifications and adjustments, contemplates that when postsecondary support is "reserved," as here, a parent need only seek an adjustment of child support without the procedural hurdles of a full modification. To the extent the statute is ambiguous (which respondent does not concede), it must be "construed in the manner that best fulfills the legislative purpose

and intent.” *Marriage of Kovacs*, 121 Wn.2d 795, 804, 854 P.2d 629 (1993); *Leslie v. Verhey*, 90 Wn. App. 796, 803-04, 954 P.2d 330 (1998) (in “interpreting the child support statute, our primary objective is to carry out the legislature's intent”), *rev. denied*, 137 Wn.2d 1003 (1999). Related provisions make clear that adjustment, not modification, is the proper action when postsecondary support has been “reserved” in a prior support order:

The Legislature requires the parties to use mandatory forms when seeking to modify child support. RCW 26.18.220 (1) (“The administrative office of the courts shall develop not later than July 1, 1991, standard court forms and format rules for mandatory use by litigants in all actions commenced under chapters 26.09, 26.10, and 26.26 RCW effective January 1, 1992”); RCW 26.09.006 (“effective January 1, 1992, a party shall not file any pleading with the clerk of the court in an action commenced under this chapter unless on forms approved by the administrator for the courts.”). The Task Force of the Supreme Court Committee on Pattern Forms developed these mandatory forms to “accurately follow the statutes.” 1 Kunsch Wash. Prac. Methods of Practice §21.31 at 367-69 (1997). A comparison between the mandatory forms for adjustment and modification clearly show that a party should bring

an adjustment motion, not a modification petition, where, as here, postsecondary support is “reserved” in a prior order:

Motion for Adjustment:
WPF DRPSCU 06.0800

2.5 Post Secondary Support

“the right to request post secondary support was reserved in the support order and the court needs to determine each parent’s obligation.”

Petition for Modification:
WPF DRPSCU 06.0100

1.4 Reasons for Modifying Support

“the order of child support should be modified for the following reasons... no post-secondary child support was ordered and the right to request post-secondary child support was not reserved.”

Similarly, the mandatory form for orders adjusting child support include as a basis for adjustment “the right to request post secondary support was reserved in the support order and there is a need to allocate the expenses.” (See WPF DRPSCU 06.0900 Mandatory Form)

3. No Case Law Supports The Father’s Argument That Postsecondary Support Must Be Addressed In A Modification Action.

The cases relied on by the father do not support his argument. Instead, they demonstrate that a party *can* file a petition for modification to establish postsecondary support, not that a party is *required* to do so, and that the only limitation on the court’s authority to award postsecondary support is that the request must be made before support terminates. See *Marriage of Gimlett*, 95

Wn.2d 699, 704, 629 P.2d 450 (1981) (App. Br. 10) (postsecondary support not reserved; holding that because the mother failed to petition to modify child support before the child was emancipated, the court no longer had authority to award postsecondary support); *Marriage of Sagner*, 159 Wn. App. 741, 752, ¶ 26, 247 P.3d 444 (App. Br. 10) (postsecondary support reserved; holding that court had jurisdiction to award postsecondary support because the father filed a petition for modification before the daughter graduated from high school and served the mother by certified mail), *rev. denied*, 171 Wn.2d 1026 (2011). Here, as the appellant concedes, “by filing one day before the daughter’s official date of graduation, the mother complied with the deadline, that is, before support terminated under the terms of the child support order.” (App. Br. 8)

B. Even If The Mother Was Required To File A Petition For Modification, The Father Can Show No Harm In Having The Court Consider The Request In An Adjustment Action.

The father complains that “the mother did not seek this relief [postsecondary support] by the requisite mechanism,” because she did not “petition” for postsecondary support. (App. Br. 9) Even if the mother was required to file a “petition,” the appellant fails to explain how he was harmed. As the trial court recognized, the

major procedural difference between adjustment and modification actions is the “shorter time frame” allowed for an adjustment. (RP 22) The trial court offered “to entertain a motion to continue actually setting the [hearing] if you want to do that,” but the appellant declined the court’s offer. (See RP 22) “Error without prejudice [] is not grounds for reversal.” *Welfare of Ferguson*, 41 Wn. App. 1, 5, 701 P.2d 513, *rev. denied*, 104 Wn.2d 1008 (1985); *Ford v. Chaplin*, 61 Wn. App. 896, 899, 812 P.2d 532 (appellant must show that her case was materially prejudiced by a claimed error. Absent such proof, the error is harmless), *rev. denied*, 117 Wn.2d 1026 (1991).

Further, contrary to father’s claim, the trial court did in fact consider the factors under RCW 26.19.090(2), which governs awards of postsecondary support, before making its determination

that postsecondary support should be awarded.⁵ (See RP 22, 26-27) Even had the father not waived this argument by failing the request specific findings below, there is no authority that the trial court is required to make specific findings on the statutory factors, and it is clear the trial court had the factors “in mind” in making its decision. *Marriage of Kelly*, 85 Wn. App. at 793 (although the trial court could have been more “explicit” in its findings, absent appellant showing that the trial court “failed” to consider the factors, the court will affirm); *Edwards v. Edwards*, 47 Wn.2d 224, 227, 287 P.2d 139 (1955) (trial court does not abuse its discretion when findings reflect that it had statutory factors “in mind” when making its decision).

There was substantial evidence supporting an award on each of the RCW 26.19.090(2) factors, including the daughters’ aptitude

⁵ “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.” RCW 26.19.090(2).

for college, the parties' expectations that the daughters would attend college, the daughters' intentions to attend public university, both parents' desire to assist the daughters in their postsecondary pursuits, and the parents' resources. *Compare Scanlon/Witrak*, 109 Wn. App. at 181 (holding that award of postsecondary support was premature when "the record is devoid of any evidence concerning the children's needs, prospects, desires, aptitudes, and nature of the postsecondary education sought"). The trial court also recited the RCW 26.19.090(2) factors concluded that postsecondary support was "appropriate" for the daughters. (*See* RP 22, 26-27)

Finally, while the appellant now complains on appeal that the trial court should have found a "substantial change in circumstances" before it awarded postsecondary support, he did not make that argument below, even though the trial court specifically inquired of his counsel whether "there's something else that the court needs to consider in actually setting the postsecondary support as opposed to making a determination that its appropriate." (RP 22) Appellant cannot complain that the trial court failed to find a substantial change in circumstances when it is clear that the trial court would have made a determination on that

point had appellant sought the determination. *Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) (under the doctrine of invited error, a party cannot complain about an alleged error at trial that he set up himself).

C. It Was Well Within The Trial Court's Discretion To Order The Father To Provide Postsecondary Support For His Daughters.

Trial courts have “broad discretion” to award postsecondary support if in the children’s “best interests.” *Marriage of Kelly*, 85 Wn. App. at 793. A trial court only abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). A decision is manifestly unreasonable if “it is outside the range of acceptable choices, given the facts and the applicable legal standard.” *Littlefield*, 133 Wn.2d at 47. It is based on untenable grounds if the factual findings are unsupported by the record. *Littlefield*, 133 Wn.2d at 47. It is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Littlefield*, 133 Wn.2d at 47.

Here, it was well within the trial court’s broad discretion to order the father to pay his proportionate share of his daughters’

postsecondary support when they clearly have the aptitude for higher learning and he earns \$10,300 gross per month as a golf pro.⁶ The father has never denied that the daughters are in need of postsecondary support, and has conceded that he has the financial ability to provide support. (See CP 61, 82) Instead, the father's apparent complaint is that he does not want to be *ordered* to provide support: "respondent intends to continue supporting his daughter, but without the court's involvement, like the vast majority of parents who support their children in college." (CP 82)

The parents here are not the "vast majority," but a "large minority" - they are divorced. Our courts have long held that divorced parents can be ordered to pay their children's postsecondary support, and for precisely the reason demonstrated by this misguided appeal - that the divorced parent otherwise will find others things on which to spend his or her money. *Childers v. Childers*, 89 Wn.2d 592, 604, 595 P.2d 201 (1978) ("In all

⁶ Once the court determines that postsecondary support should be ordered, "it must be apportioned according to the net income of the parents as determined under the chapter." *Marriage of Daubert & Johnson*, 124 Wn. App. 483, 505, 99 P.3d 401 (2004) *abrogated for other reasons by McCausland v. McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007). Here, the father does not dispute that his proportionate share of the parties' incomes is 46%.

probability more married parents will be making sacrifices financially for their children 18 and up than will the divorced parents who, in the sound discretion of the court, will have a legally imposed ability to do so.”). The trial court properly awarded postsecondary support for the daughters to prevent them from being left to the whims of a father who would rather litigate his responsibilities than provide for their college education.

The father complains that he should not be ordered to pay postsecondary support because it may “impose a financial hardship” on his new family. (App. Br. 16) But as the trial court recognized, it is common that when children go to college, parents must make “financial sacrifices.” (RP 25) And here, the father’s “financial sacrifice” is in reality quite limited. According to his financial declaration, his household net income is \$8,508.54 and his household expenses are \$6,067.94, leaving him a monthly surplus of \$2,440. (CP 85-88) The father complains that when both daughters are in college, he will be required to pay \$1,840 per month for their postsecondary support, (See App. Br. 15) but that still leaves him with a monthly surplus of \$600.

This case is nothing like *Marriage of Shellenberger*, 80 Wn. App. 71, 906 P.2d 968 (1995), on which the appellant relies. (App.

Br. 16) There, the father was a former firefighter with a “permanent, total psychological disability,” who was the sole custodian of his minor child, for whom he received no support from the child’s mother. The father’s net income, including his disability pay, was \$2,500, he had household expenses of \$2,531, and he was heavily in debt. The trial court imputed income to the father and ordered him to pay over \$1,400 per month towards his older children’s postsecondary support, including a child attending a private university.

In reversing, the appellate court “observe[d] that the combined sums of his monthly living expenses, debt service and the college education obligation imposed by the court greatly exceed the amount of his actual and imputed income.” *Shellenberger*, 80 Wn. App. at 83. The court held that “a postsecondary education support obligation that would force the obligor parent into bankruptcy, or force that parent to liquidate the family home because he or she cannot make both the support payment and the mortgage payment will, in most cases we can presently envision, amount to a patent abuse of discretion.” *Shellenberger*, 80 Wn. App. at 84.

The only relevant observation in *Shellenberger* is that “every case must be decided on its own facts.” 80 Wn. App. at 83. Here, even after the father pays postsecondary support for his daughters, his monthly income will still exceed his monthly expenses.⁷ There is no evidence that the father will be forced into bankruptcy or have to liquidate his home because he is required to provide postsecondary support for his daughters. The trial court’s decision requiring the father to pay his proportionate share of the daughters’ postsecondary support was well within its discretion.

D. In The Event Of Remand, The Mother Should Be Allowed To Renew Her Request For Postsecondary Support In A Petition For Modification.

If this court concludes that the mother should have submitted her request for postsecondary support as a petition for modification, it should allow her to renew her request on remand notwithstanding that both daughters may have already graduated from high school by the time this court reaches its decision. *See*

⁷ If he wants to save more, he, like most parents, will have to “tighten his belt.” There are lots of notches left in it. The father lists over \$500 for “tournament” expenses; \$180 for “hair care/personal care expenses;” \$147 for “clubs and recreation;” and a monthly clothing budget of \$200 for his 5-year old son. (CP 86, 88) The mother, by contrast, lists monthly expenses of \$80 for “hair care/personal care;” \$30 for “clubs and recreation;” and \$150 for clothes for the parties’ two teenage daughters. (CP 23, 24)

Custody of E.A.T.W., 168 Wn.2d 335, 349, ¶ 26, 227 P.3d 1284 (2010).

In *E.A.T.W.*, the Supreme Court reversed a determination of adequate cause on a third party custody petition because the grandparents failed to allege in their petition that it would be detrimental if the children were to reside with their only living parent based on an “incorrect interpretation of the law.” *E.A.T.W.*, 168 Wn.2d at 349, ¶ 25. The Court concluded that remand to the superior court was “appropriate” to allow the grandparents to renew their petition alleging the necessary facts if possible. *E.A.T.W.*, 168 Wn.2d at 349, ¶ ¶ 26, 27 (purpose of statute should not be undermined “merely because of a remediable deficiency in the petition. Although the rights of parents are strongly protected, so are the rights of children.”).

Here, if a petition for modification was necessary to pursue postsecondary support, the mother’s failure to file one was due to an “incorrect interpretation of the law,” and is a “remediable deficiency.” To protect the rights of the daughters, whose support during their college years is at stake, the mother should be allowed to file a petition on remand if this court holds that a modification was necessary to establish postsecondary support.

E. The Father, Who Earns Over \$120,000 Annually, Should Be Responsible For His Own Fees, And Should Pay The Mother's Fees For Responding To This Senseless Appeal.

There is no basis for the father's request for attorney fees based on his alleged need and the mother's alleged ability to pay under RCW 26.09.140. The father earns over \$120,000 annually and has proven himself more than able to pay his own attorney fees. When the mother works full-time her gross annual income is \$143,000, but she gave birth to twins in October 2012 and was taking an unpaid maternity leave. (CP 29) Even after she returns from her maternity leave, the mother anticipated working fewer hours until her twins were older. (CP 29)

The mother has no greater ability to pay the father's attorney fees than he has. If any party should be awarded attorney fees, it should be the mother, who has been forced to respond to this appeal. *Marriage of Greenlee*, 65 Wn. App. 703, 711, 829 P.2d 1120, *rev. denied*, 120 Wn.2d 1002 (1992). Funds that could be otherwise used to assist the parties' daughters in their pursuit of higher education are unnecessarily being expended on attorney fees. This court should award the mother her attorney fees on appeal.

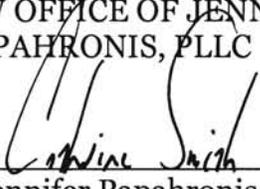
IV. CONCLUSION

It was well within the trial court's discretion to order the parents to pay postsecondary support. The prior child support order contemplated that the parents would provide postsecondary support, and the order establishing their obligation was consistent with the parents' current financial circumstances and their daughters' current academic circumstances. The trial court properly rejected the father's "gotcha" defense (RP 21: "I think this defense, while its creative, is really in the nature of kind of gotcha sort of defense."); the father's complaint that the trial court could not award postsecondary support absent a petition for modification elevates form over function to no end other than to deprive his daughters of support that he acknowledges they need and deserve. *First Fed. Sav. & Loan Ass'n of Walla Walla v. Ekanger*, 22 Wn. App. 938, 944, 593 P.2d 170 (1979) *aff'd*, 93 Wn.2d 777, 613 P.2d 129 (1980) ("the law in this state is to interpret rules and statutes to reach the substance of matters so that it prevails over form"). This court should affirm and award the mother her attorney fees.

Dated this 1st day of April, 2013.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 1, 2013, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 1st day of April, 2013.



Victoria K. Isaksen