

70900-3

70900-3

No. 70900-3-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

PA 50
COURT OF APPEALS
CLERK OF COURT
2014 MAR 21 11:21:13

In re the Marriage of

JULIE DAVIS
Respondent

and

PAUL DAVIS
Appellant

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

REPLY BRIEF OF APPELLANT

PATRICIA NOVOTNY
Attorney for Appellant
3418 NE 65th Street, Suite A
Seattle, WA 98115
(206) 525-0711

TABLE OF CONTENTS

I. STATEMENT OF ISSUES IN REPLY	1
II. ARGUMENT IN REPLY	2
A. THE ONLY ISSUE HERE IS WHETHER THE CHILD SUPPORT STATUTE REQUIRES THE COURT TO CONSIDER THE CHILD RECEIVING POST SECONDARY SUPPORT WHEN CALCULATING THE MINOR CHILD'S BASIC SUPPORT OBLIGATION.	2
B. THE COURT'S AUTHORITY TO ORDER CHILD SUPPORT IS CONTROLLED BY STATUTE.....	2
C. POSTSECONDARY SUPPORT IS CHILD SUPPORT.....	4
D. THE MOTHER FAILS IN HER CROSS-APPEAL TO DEMONSTRATE THE COURT ABUSED ITS DISCRETION WHEN IT DECIDED THE FATHER'S INCOME.	10
E. PARTIES SHOULD BEAR THEIR OWN FEES.	12
III. CONCLUSION	14

TABLE OF AUTHORITIES

Washington Cases

<i>Currier v. Perry</i> , 181 Wash. 565, 44 P.2d 184 (1935).....	8
<i>Holaday v. Merceri</i> , 49 Wn. App. 321, 742 P.2d 127 (1987)	6
<i>Hudson v. Hudson</i> , 8 Wn.2d 114, 111 P.2d 573, 574 (1941)	6, 7
<i>In re Marriage of Daubert</i> , 124 Wn. App. 483, 98 P.3d 1216 (2004)	3, 4, 10
<i>In re Marriage of Dicus</i> , 110 Wn. App. 347, 40 P.3d 1185, 1190 (2002).....	6
<i>In re Marriage of Krieger and Walker</i> , 147 Wn. App. 952, 199 P.3d 450 (2008).....	5, 8, 9, 10
<i>In re Marriage of Oakes</i> , 71 Wn. App. 646, 861 P.2d 1065 (1993)	4
<i>In re Marriage of Thomas</i> , 63 Wn. App. 658, 821 P.2d 1227 (1991)	10, 11
<i>In re Marriage of Zander</i> , 39 Wn. App. 787, 695 P.2d 1007 (1985)...	6
<i>McCausland v. McCausland</i> , 159 Wn.2d 607, 152 P.3d 1013 (2007).....	3, 9
<i>Sanwick v. Puget Sound Title Ins. Co.</i> , 70 Wn.2d 438, 423 P.2d 624 (1967)	7
<i>State ex rel. M.M.G. v. Graham</i> , 159 Wn.2d 623, 632, 152 P.3d 1005, 1009 (2007)	2

Statutes, Rules, & Other Authorities

42 U.S.C. § 654 3

RCW 26.19.001 2

RCW 26.19.011(1) 4

RCW 26.19.020 5

RCW 26.19.035 3

RCW 26.19.065(3) 8

RCW 26.19.090 5

Cases From Other Jurisdictions

Bast v. Rossoff, 91 N.Y.2d 723, 697 N.E.2d 1009 (1998) 3

I. STATEMENT OF ISSUES IN REPLY

1. A trial court abuses its discretion if it erroneously applies the law.
2. Interpretation of the statute is a matter of law reviewed *de novo* by this Court.
3. Child support is calculated based on the parents' incomes and the number of children being supported.
4. A child receiving post-secondary child support is a child receiving support for purposes of the economic table.
5. The mother failed to appeal the trial court's original order that the two-child formula applies when the oldest child goes to college and she is otherwise barred from raising this issue now.
6. The court commissioner's determination of the parties' incomes is supported by substantial evidence. (Cross Appeal)
7. The mother, who received a disproportionate share of the marital property and maintenance so that she could pursue a new career of her choosing, and who invited the court's error by asking for the first time in these lengthy proceedings for an increase in the father's child support because of the residential schedule, contrary to the court's original ruling, should bear her own fees.

II. ARGUMENT IN REPLY

A. THE ONLY ISSUE HERE IS WHETHER THE CHILD SUPPORT STATUTE REQUIRES THE COURT TO CONSIDER THE CHILD RECEIVING POST SECONDARY SUPPORT WHEN CALCULATING THE MINOR CHILD'S BASIC SUPPORT OBLIGATION.

As stated earlier in a letter to the court and respondent, the only dispute remaining in this case is whether the eldest of the parties' two children, who is receiving post-secondary support, should be counted when calculating child support for the minor child, by reference to the economic table. RCW 26.19.020.

Review of this question is *de novo*. *State ex rel. M.M.G. v.*

Graham, 159 Wn.2d 623, 632, 152 P.3d 1005, 1009 (2007)

("Statutory meaning is a question of law that we review *de novo*.").

B. THE COURT'S AUTHORITY TO ORDER CHILD SUPPORT IS CONTROLLED BY STATUTE.

A trial court's authority to order child support is controlled by statute. Here, the mother essentially argues the trial court may

ignore the statute when it thinks it is "fair" to do so. Br.

Respondent, at 18. But the legislature has declared what is fair

when it comes to child support, finding that the child support

schedule insures the parents' obligation is "equitably apportioned"

between them. RCW 26.19.001. Accordingly, the legislature

mandates "[t]he child support schedule shall be applied: ... [i]n all

proceedings in which child support is determined or modified”

RCW 26.19.035. The trial court was not free to bypass the schedule, nor does the mother cite to any statutory authority permitting it to do so, as is further discussed below.

This is more than a technical point. One virtue of the child support schedule is that it strictly limits the court’s discretion, bringing uniformity and predictability to a subject previously plagued by inconsistency and unpredictability. “These purposes cannot be achieved except accidentally if the individual trial courts are left to pick and choose which provisions of the statute to apply...” *In re Marriage of Daubert*, 124 Wn. App. 483, 502-503, 98 P.3d 1216 (2004), *overruled on other grounds by McCausland v. McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007).

Compliance with the statute is not only a good idea, it is mandatory under state and federal law. *See, e.g.*, 42 U.S.C. § 654 (federal government’s mandate that States establish mandatory guidelines for determining child support awards). All fifty states have adopted child support guidelines to achieve fairness, predictability and consistency, rejecting the prior practice of child support decisions that were entirely discretionary. *See Bast v. Rossoff*, 91 N.Y.2d 723, 697 N.E.2d 1009 (1998). In short, child

support is an area where clear, bright lines are not only desirable, but required. Trial courts must comply with the statute.

C. POSTSECONDARY SUPPORT IS CHILD SUPPORT.

Here, the mother does not dispute that the parties' oldest child is dependent or that the post-secondary support she receives is child support. *Daubert*, 124 Wn. App. at 502 ("Postsecondary educational support is child support."). Because it is child support, it must be considered in the calculation of the basic child support obligation for the younger child. RCW 26.19.011(1) (basic child support obligation to be "determined from the economic table based on the parties' combined monthly net income and the number of children for whom support is owed") (emphasis added).

The mother argues this Court should ignore these statutory mandates. For example, she argues it costs more to care for the minor child "individually than if there was another child in the home." Br. Respondent, at 22. There is no support in the record for this proposition, nor does it really make sense here. The mother remains in the family home by choice and her expenses will be less, she argued, with the eldest child away at school. RP 25.

In any case, this Court rejected a similar argument in *In re Marriage of Oakes*, 71 Wn. App. 646, 861 P.2d 1065 (1993), where

each parent had primary residential care of one of their two children. The father in that case argued against application of the “two child family” formula. Inarguably, the legislature has not addressed this particular circumstance (i.e., splitting the two children between residences), which this Court viewed as a “legitimate concern.” 71 Wn. App. at 651. Nevertheless, because child support is controlled by statute, the concern “is one that the Legislature must address.” *Id.* Here, by contrast, the Legislature has contemplated the circumstances, i.e., that parents may simultaneously support minor children and children post-majority. See RCW 26.19.090 (using “support” in reference to payment of adult child’s education related expenses). The father asks only that the statute be given its intended effect.

The mother also argues the court may apply the one-child formula because the children do not reside with the father, citing *In Re Marriage of Krieger and Walker*, 147 Wn. App. 952, 960, 199 P.3d 450 (2008). Br. Respondent, at 18-19. First, it bears mentioning that the adult daughter no longer resides with either parent; she boards at her college. (Where she will live during summers cannot presently be known and is likely subject to many variables.)

Second, the judge who presided over the dissolution trial ordered that the two-child formula would apply upon the eldest daughter's graduation from high school. CP 7 ("Beginning June, 2013, the child support shall be recalculated for two children of 12 years and older."). The mother did not appeal this issue and it is *res judicata*. *In re Marriage of Dicus*, 110 Wn. App. 347, 357, 40 P.3d 1185, 1190 (2002); *see, also, Hudson v. Hudson*, 8 Wn.2d 114, 116, 111 P.2d 573, 574 (1941) (no appeal from order renders it *res judicata*).

Third, the residential schedule is not a new fact or a changed fact; rather, the children have resided full-time with the mother since the parties separated in 2009. With this fact in mind, the parties litigated and negotiated temporary and final child support orders, without this issue being raised. *See, e.g., CP 183*. In effect, the mother asks for a modification of child support without showing any change in circumstances. *See 26.09.170* (no modification without a substantial change of circumstances); *Holiday v. Merceri*, 49 Wn. App. 321, 331, 742 P.2d 127 (1987) (*citing In re Marriage of Zander*, 39 Wn. App. 787, 790, 695 P.2d 1007 (1985)) (change must be unanticipated at time decree was

entered); *see, also, Hudson, supra* (previous order is *res judicata* absent change in circumstances).

Certainly, the parenting plan was before the court at trial (CP 6), presumably influencing the court's decision to grant the mother's request to remain in the family home and to grant her requests for maintenance and additional support with mortgage payments and to grant her request for a disproportionate award of the marital property. The mother did not request any additional compensation in light of the residential schedule. *See, e.g., CP 183.* Instead, she asked that income be imputed to her at half-time, because she said it was "virtually impossible for her to work outside the home." *See, e.g., CP 188.* As a consequence, in effect, the father's share of child support is higher, including his two-thirds contribution the children's recreational activities and uninsured medical expenses. CP 17, 110.

In short, in respect of the residential schedule, nothing about the parties' circumstances has changed for the past four years. Under principles of finality, including *res judicata*, as discussed above, as well as the modification standard, she should not be permitted to raise this new claim now. *See Sanwick v. Puget Sound Title Ins. Co., 70 Wn.2d 438, 441-42, 423 P.2d 624 (1967)*

(internal quotation marks omitted) (quoting *Currier v. Perry*, 181 Wash. 565, 569, 44 P.2d 184 (1935)) (“Res judicata applies both to points upon which the previous court was required to pronounce a judgment, and to every point “which the parties, exercising reasonable diligence, might have brought forward at the time.””).

Finally, the mother successfully contested the father’s complaint that she is imputed income at a level the statute does not permit under her circumstances (i.e., half-time minimum wage), arguing that he agreed to it. See No. 69806-1-I, Slip Op. at 8-9 (attached to Br. Respondent). In the interest of simple fairness, she should likewise be bound by her prior conduct, including her failure to raise the residential schedule argument in all the prior proceedings.

In any case, the mother’s reliance on *Krieger* is misplaced, the case being completely inapposite since it involved the court’s authority when the parents’ combined income exceeds the top of the economic table. In such cases, the statute allows the court to exceed the presumptive amount of support provided in the economic table but only in certain circumstances and “upon written

findings of fact.” RCW 26.19.065(3).¹ This statute does not apply here because the parents’ income does not exceed \$12,000, which is the current top income in the table. Rather, the amount of support in the table presumptively meets the child’s needs.

In addition to the fact that *Krieger* involves a statutory mechanism not available here, the factual underpinning also does not compute. This Court in *Krieger* reversed the trial court’s determination that the father’s “abdication of responsibility” for the children did not justify exceeding the economic table; instead, this Court held the father’s “failure to spend any residential time with the children may provide a basis for a support award above the advisory amount.” 147 Wn. App. at 965. Here, the father did not abdicate his responsibility; in the face of the alienating effects of the mother’s behavior, he chose to spare the children ongoing litigation over the parenting plan. CP 165. Despite this estrangement, and his anguish over it, he agreed to support their college aspirations. He asks only that he made to pay his fair share, not whatever the mother wants him to pay.

¹ In cases where the combined income exceeds the table, the court may engage in an analysis of facts that justify a child support payment above the presumptive amount, considering the parents’ standard of living and the “special medical, educational, or financial needs” of the children. *McCausland*, 159 Wn.2d at 620.

In any case, because this case does not involve an issue of support beyond the economic table, the mechanism approved by the court in *Krieger* is unavailable here.

Here, the father is paying \$1408 monthly for support of the oldest child while she attends college. CP 93. His obligation for her support while she remained a minor was \$830. CP 15. This is permitted under the statute because the economic table is advisory, not presumptive for postsecondary education, since the expenses might be different. *Daubert*, 124 Wn. App. at 504-05. However, this does not render the economic table advisory for the children left at home, as the mother seems to argue. Br. Respondent, at 20. This is the kind of argument that must be made to the Legislature. As written, the statute requires that support for the minor child be calculated accurately to reflect that the father is paying “support” for two children, not one, because that is what he is doing.

D. THE MOTHER FAILS IN HER CROSS-APPEAL TO DEMONSTRATE THE COURT ABUSED ITS DISCRETION WHEN IT DECIDED THE FATHER’S INCOME.

In her cross-appeal, the mother asks this Court to remand for a new adjudication of the father’s income. However, she fails to demonstrate any justification for doing so. See *In re Marriage of Thomas*, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991) (trial court’s

49; RP 7, 20-21. In any case, as the father argued, his tax returns accurately depict the pattern of his income. *Id.*³ After weighing the evidence and these various arguments, the court decided to use the same figures as used at trial six months earlier. RP 28-29; CP 116. The court did not evade a fact-finding, but chose, instead, to rely on the best evidence. Because these findings are supported by substantial evidence, they are verities on appeal. No additional fact-finding is warranted or desirable.

E. PARTIES SHOULD BEAR THEIR OWN FEES.

In his appeal from the decision at trial, the father made and lost his arguments about the unfairness of the proceeding. Here, he asks only that the trial court be required to comply with the mandates of the statute and that the mother, who invited the court's error, despite the trial court's earlier ruling that the two-child formula apply (CP 7), be made to bear her own fees. CP 38, 44. The mother's obligation to support the children is based on income imputed to her at half-time the minimum wage, despite that she has an accounting degree and background, because she has chosen instead to pursue another degree. She received a total award of

³ The father is dyslexic and can makes errors in numeric representations. See RP 414 (Appeal No. 69806-1-I, of which this Court can take judicial notice according to ER 201).

maintenance (including temporary maintenance) of nearly five years duration (beginning 12/01/09). CP 179-181. As recently demonstrated, she is able to find work in accounting. CP 43. She received a disproportionate award of property, as well as the right to remain in the family home, which, upon sale, she will receive 70% of the net proceeds. CP 7-9 (over \$150,000). The father has to make contributions to the mortgage payment, which the court did not designate as maintenance, and pays the property taxes. The father pays for the children's health insurance and contributes 64.7% to other expenses. Despite his substantial income, the father pays over \$80,000 in support of his family.⁴ The trial court did not award fees at trial or at the hearing on child support. In light of the father's substantial obligations and the mother's disproportionate property award, as well as the fact that the original trial judge already ruled on the two-child formula question, from which the mother did not appeal, no award of fees should be made here.

⁴ These payments are as follows:

\$16,896	child in college
\$12,516	child at home
\$42,000	maintenance
\$ 4,056	mortgage contribution
\$ 4,306	property taxes (will be reimbursed from sale proceeds)
\$ 5,000	estimated other child-related expenses
\$84,504	

III. CONCLUSION

For the reasons stated above and in Appellant's Opening Brief, Paul Davis asks the trial court's order of child support for the youngest child be vacated and remanded for recalculation by application of the two-child formula and that the parties bear their own fees in this appeal.

Dated this 23rd day of May 2014.

RESPECTFULLY SUBMITTED,



PATRICIA NOVOTNY #13604
Attorney for Appellant

COURT OF APPEALS
STATE OF WASHINGTON
2014 MAY 27 1:12:13

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Marriage of:

JULIE DAVIS

Respondent

and

PAUL DAVIS

Appellant

No. 70900-3-1

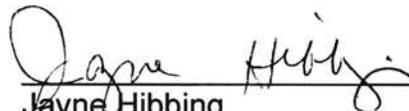
DECLARATION
OF SERVICE

Jayne Hibbing certifies as follows: On May 23, 2014, I served upon the following true and correct copies of the 2nd Supplemental Designation of Clerk's Papers, Reply Brief of Appellant and this Declaration, by: depositing same with the United States Postal Service, postage paid.

Ronald C. Hardesty
Ronald C. Hardesty, P.C.
119 N. Commerical St., St 540
Bellingham WA 98225

Catherine W. Smith
Valerie A. Villacin
Smith Goodfriend PS
1619 8th Avenue N
Seattle WA 98115-7397

I certify under penalty of perjury that the foregoing is true and correct.



Jayne Hibbing
3418 NE 65th Street, Suite A
Seattle, WA 98115
(206) 682-1771