

No. 74940-4-I

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

In re the Marriage of
VIRGINIA BERRY,

Appellant,

v.

DAVID BERRY,

Respondent.

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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

REPLY BRIEF OF APPELLANT VIRGINIA BERRY

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D. REPLY ARGUMENT

(1) The Record On Appeal Complies With RAP 9.1.

David Berry challenges the record designated on appeal.¹ Brief of Respondent at 6-7. Specifically, he asserts that RAP 9.1 prohibits the designation of papers filed with the trial court but not specifically considered by the trial court as part of the decision being appealed. He is mistaken. RAP 9.1 includes no such prohibition. Rather, it states that the record on review “may” consist of clerk’s papers, defined as “pleadings, orders, and other papers filed with the clerk of the trial court.” RAP 9.1(a), (c). Furthermore, RAP 9.6(b)(1) states that certain papers, including the summons and complaint in a civil case, “shall . . . at a minimum” be included in the clerk’s papers. Under these rules, a party may properly designate as clerk’s papers any materials in the trial court record (and therefore available for the trial court’s consideration) whether or not the trial court actually considered particular items in the decision on appeal.

Here, Virginia Berry designated the challenged clerk’s papers in order to give this Court a background of the parties’ relationship, dissolution, and child support disputes. Virginia does not, as David suggests, rely on any of these papers to argue that the trial court abused its

¹ Because all parties have the same last name, this brief refers to each party by his or her first name.

discretion in terminating Rachel Berry's post-secondary support.² Rather, her argument rests squarely on a question of law: whether the trial court abused its discretion in terminating Rachel's support because its decision was based on an improper interpretation of the Order of Child Support Final Order ("Order of Child Support"). Therefore, there is no problem with the designated record.

(2) The Order Of Child Support Is Ambiguous And The Trial Court Abused Its Discretion By Interpreting It In A Way That Does Not Account For Rachel's Best Interests.

David argues that the Order of Child Support is unambiguous and that the trial court did not abuse its discretion in applying its plain language. But the language of the Order of Child Support is ambiguous because it is unclear whether termination or suspension is appropriate if Rachel fails to attend school full-time due to a medical issue.

A writing is ambiguous if it is susceptible to two different, reasonable interpretations. *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 733, 837 P.2d 1000 (1992). When there is an ambiguity in a child support order, this Court, under a de novo review standard, may determine the intent of the trial court who entered the order. *Sagner v.*

² David challenges the "facts referenced in pages 3 – 8 and footnote 5 on page 10 of Virginia Berry's Brief . . ." Brief of Respondent at 7. These pages are part of Virginia's statement of facts, not her argument, which begins on page 12 of the Brief of Appellant.

Sagner, 159 Wn. App. 741, 749, 247 P.3d 444 (2011); *Kruger v. Kruger*, 37 Wn. App. 329, 331, 679 P.2d 961 (1984).

Washington law requires that parental responsibilities be allocated based on the best interests of the child. *See* RCW 26.09.002. Failure to explicitly state that a certain provision of a relevant statute was intended to be excluded in a child support order results in automatic inclusion. *Sagner*, 159 Wn. App. at 749 (citing *In re Marriage of Briscoe*, 134 Wn.2d 344, 348, 949 P.2d 1388, *as modified by* 971 P.2d 500 (1998)). Furthermore, the purpose of post-secondary support is to encourage and aid children in pursuing higher education and to decrease any financial disadvantage they might suffer in this regard as a result of their parents' divorce. *Kruger*, 37 Wn. App. at 331-32 (citing *Childers v. Childers*, 89 Wn.2d 592, 598, 575 P.2d 201 (1978)).

Here, the Order of Child Support states that support "shall" be suspended upon the failure to attend full-time. CP at 243. Then, the next paragraph states that support "shall" be terminated upon the failure to attend full-time. *Id.* Because both outcomes (termination and suspension) are mandated, without explanation when one applies versus the other, the order is ambiguous and this Court must determine the intent of the court who entered the order. Given that the best interest of the child is the primary consideration in child support matters, it is unlikely that the court who

entered the Order of Child Support intended for Rachel's support to terminate if, due to temporary medical issues, she fell below the full-time enrollment requirement during one quarter.

But on the motion for revision, the trial court failed to find any ambiguity. The minute entry shows that the trial court affirmed termination because the order is "clear" and there is "no provision in that order for any medical or other reason for reducing work load to that of less than a full-time student." *Id.* at 42. Therefore, the trial court abused its discretion because it incorrectly interpreted the Order of Child Support.

David does not explicitly argue that termination is in Rachel's best interests or that the court who entered the Order of Child Support intended support to terminate in the event of a temporary medical issue.³ He also does not dispute, below or on appeal, that Rachel suffers from Grave's disease or that her disease caused her to drop one class in Spring 2015. Rather, he argues that the Order of Child Support is not ambiguous and the trial court correctly chose termination over suspension. Brief of Respondent at 8-11. He explains that the Order of Child Support "clearly"

³ David's only attempt at offering a competing "best interest" is his statement that "the best interest of the child is not furthered by condoning the obtaining of funds through falsified documents." Brief of Respondent at 13. It is ridiculous to suggest that Rachel's interests are better served in teaching her a lesson for her mother's alleged falsifications than in continuing her post-secondary support when she was only two credits shy of full-time status due to a medical issue beyond her control.

states that termination of support is “one possible result” of failing to attend school full-time. *Id.* at 11. But that is not what the order says. As explained above, it mandates two different outcomes under the same circumstances. This language results in an ambiguity.

David also argues that the trial court’s minute entry does not show that the trial court found that termination was the only option. *Id.* at 8-9. Virginia respectfully disagrees. The trial court’s minute entry shows that it believed the Order of Child Support was unambiguous, that there was no medical exception to the full-time requirement, and that termination was, therefore, proper. *See* CP at 42 (“[t]he court finds the support order was clear”). This is essentially a finding that termination of Rachel’s support was the only option given her failure to attend school full-time.

In any event, this Court does not have to defer to the trial court’s interpretation. *Sagner*, 159 Wn. App. at 749 (interpretation of a child support order is reviewed de novo). If this Court holds that the Order of Child Support is ambiguous, remand is necessary so that the trial court can apply a correct interpretation of that order. This Court may clarify on remand that such an interpretation is one that takes Rachel’s best interests into account and allows an exception to full-time enrollment where a medical issue outside of her control caused her part-time enrollment and she

immediately regained compliance with the Order of Child Support the following quarter.

David also attempts to distinguish *Kruger v. Kruger*, 37 Wn. App. 329, 679 P.2d 961 (1984), arguing that the language at issue in this child support order is different than the language at issue in *Kruger*. Brief of Respondent at 13. That is true, the language is different. But the analysis is the same. *Kruger* holds that the purpose of post-secondary support is “clearly . . . to encourage and aid the children in pursuing higher education and to decrease any financial disadvantage they might suffer in this regard as a result of their parents’ divorce.” *Kruger*, 37 Wn. App. at 331-32. As such, a restrictive interpretation of an award that does not further this purpose is improper. *Id.* at 332. Applying that holding here, David’s restrictive reading of the Order of Child Support should not be adopted because it frustrates the purpose of Rachel’s post-secondary support award: to encourage and aid her pursuit of higher education.

Finally, David argues that *Cossette v. Cossette*, 76 P.3d 795 (Wyo. 2003), is inapplicable because that child only missed some classes whereas Rachel was not enrolled full-time. Brief of Respondent at 15-16. This distinction is irrelevant. In *Cossette*, the Wyoming Supreme Court held that terminating a child’s support because she was unable to attend school on a regular basis due to a medical condition was not consistent with the

legislative intent of the child support statute where the child intends to complete her education and takes steps to do so. *Cossette*, 76 P.3d at 798-99. Similarly, here, termination of Rachel's post-secondary support is contrary to the purpose of the dissolution and post-secondary support statutes. *See* RCW 26.09.002; RCW 26.19.090. Therefore, *Cossette* is persuasive.

(3) The Record Does Not Indicate That The Trial Court Relied On David's Alternative Reasons For Terminating Support And, Even If It Did, Those Reasons Also Indicate An Abuse Of Discretion.

David argues that the trial court did not abuse its discretion because there were additional facts supporting termination. Brief of Respondent at 11-13. Specifically, he argues that the trial court's decision was reasonable because it was based upon (1) the fact that Rachel already used her "one free pass" in Fall 2014, (2) the commissioner's finding that Virginia falsified counseling invoices for reimbursement, and (3) Rachel's failure to provide him with a transcript and her alleged submission of a falsified transcript.

As an initial matter, none of these rationales are included in the record. The hearing on revision was not recorded, so there is no verbatim report of proceedings available. But, the trial court's minute entry clearly states its reason for terminating Rachel's support: "that there was no

provision in that order for any medical or other reason for reducing work load to that of less than a full-time student.” *See* CP at 42. Virginia did not provide a narrative report of proceedings because the record on appeal included the information necessary to present the issue raised on review, in accordance with RAP 9.2(b). David has not moved to supplement the record with a narrative report of proceedings or objected to the content of the report of proceedings filed. Therefore, he may not rely on rationales that are not part of the record and his argument that the trial court’s decision was proper for these additional reasons is irrelevant. But, even assuming that those reasons were part of the record, they would also indicate that the trial court abused its discretion in terminating Rachel’s support.

First, David argues that termination was proper because Rachel already used her “one free pass” in avoiding termination or suspension of her post-secondary support in Fall 2014. Brief of Respondent at 11. This comment is a callous attempt to trivialize the emotional hardship Rachel endured when her grandmother died at the beginning of that quarter and she received a hardship withdrawal from Western Washington University. The court has discretion to order what is necessary and fair regarding post-secondary education. *In re Marriage of Kelly*, 85 Wn. App. 785, 795, 934 P.2d 1218 (1997) (citing *Childers*, 89 Wn.2d at 601-02). The commissioner hearing David’s first motion to terminate determined that it would not be

fair to terminate or suspend Rachel's post-secondary support under those circumstances and the trial court denied David's motion to revise that decision. CP at 148-49, 154-55. Given the circumstances of her withdrawal, it would be an abuse of discretion if the trial court based its current decision to terminate Rachel's support on the outcome of David's previous attempt to terminate.

Second, if the trial court based its decision to terminate Rachel's support on a finding that Virginia falsified counseling invoices, its decision improperly punishes Rachel for Virginia's wrong-doing. In dissolution proceedings between parents, "the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities." RCW 26.09.002. "Child support is designed with the primary goal of preventing a harmful reduction in a child's standard of living, in the best interests of children whose parents are divorced." *Mattson v. Mattson*, 95 Wn. App. 592, 599-600, 976 P.2d 157 (1999) (citing *In re Marriage of Oakes*, 71 Wn. App. 646, 649-50, 861 P.2d 1065 (1993)). RCW 26.09.100(1) requires that child support be determined "after considering all relevant factors but without regard to misconduct" In matters of child custody, "[t]he custody of the child is not to be used as a reward or punishment for the conduct of the parents. The best interest of the child is the paramount and controlling consideration." *Shaffer v.*

Shaffer, 61 Wn.2d 699, 703, 379 P.2d 995 (1963) (internal citations omitted) (quoting *Thompson v. Thompson*, 56 Wn.2d 244, 250, 352 P.2d 179 (1960)). The same rationale is persuasive as applied to child support.

Here, Rachel's opportunity to pursue her post-secondary education should not be terminated as a punishment for Virginia's actions or as a reward for David's loss. Such a result is clearly not in Rachel's best interest. To the extent the trial court intended its termination of post-secondary support to serve such a purpose, its decision was manifestly unreasonable and based on untenable reasons.

Third, the record does not show that Rachel failed to make her grades available to David in violation of the Order of Child Support. Where a child support order requires a child to "make available" her grades, she is not required to actually provide or give the parent that information unless requested to do so. *In re Marriage of Jess*, 136 Wn. App. 922, 928, 151 P.3d 240 (2007). Here, the evidence shows that David requested an official transcript on July 29, 2015, which was provided to him.⁴ CP at 59, 108. Therefore, based on the evidence presented to the trial court, Rachel did

⁴ Rachel ordered an official transcript on August 26, 2015, and notified David the next day that she ordered the transcript and would send him a copy when she received it (although the email is sent from Virginia's Gmail address). CP at 57. The official transcript correctly states Rachel's classes and grades. *Id.* at 108. Nothing in the record, aside from David's statement in his Motion and Declaration, indicates that there were repeated requests for an official transcript. *See id.* at 93.

“make available” her grades in accordance with the Order of Child Support. And, even if she did not, the remedy for her failure under the Order of Child Support is suspension, not termination. *See id.* at 242-43.

David’s falsification arguments involve the unofficial transcript previously sent to him, apparently without prompt, by Virginia on July 8, 2015. *Id.* at 100-01. He claims that this transcript was intentionally falsified to mislead him. But the transcript was sent to him by Virginia, not Rachel. As stated above, to the extent that the trial court terminated Rachel’s post-secondary support to punish Virginia for her alleged wrongdoings, including falsification of the unofficial transcript, termination was an abuse of discretion. Rachel should not suffer because of an allegation that her mother intentionally sent David a falsified transcript.

Furthermore, this argument is a red herring meant to distract the court from the undisputed facts in this case. Rachel suffers from Grave’s Disease and her double vision symptoms so interfered with her reading assignments in her Philosophy class that she was forced to drop the class midway through Spring 2015, making her two credits shy of full-time status. But, she immediately enrolled in and completed fifteen credits in Fall 2015. David’s post-secondary support payment to Cascadia Community College (“Cascadia”) for Fall 2015 was not used for nefarious purposes. It was used as intended: to support Rachel’s post-secondary

education. Terminating Rachel's right to further post-secondary support (and David's parental responsibility to provide that support) under these circumstances is an abuse of discretion.

(4) Virginia Was Not Required To Seek Modification Of The Order Of Child Support.

David argues that Virginia "could" have moved to modify the Order of Child Support and waive the full-time requirement before his motion to terminate. Brief of Respondent at 14-15. While this was, arguably, an option available to Virginia, it was certainly not a requirement and should not support termination of Rachel's post-secondary support. David's inference that termination is proper because Virginia failed to make such a motion is not supported by the authority he cites. RCW 26.09.170 sets out the general criteria for modification of a child support order but contains no requirement for modification in this circumstance. *Balch v. Balch*, 75 Wn. App. 776, 880 P.2d 78 (1994), and *In re Marriage of Anderson*, 49 Wn. App. 867, 746 P.2d 1220 (1987), both involve original motions to modify child support orders to include post-secondary support, not modifications of an existing post-secondary support award. Therefore, neither stands for the proposition that Virginia was required to modify the existing post-secondary support award before David's motion to terminate.

Additionally, David attempts to distinguish the Missouri cases cited by Virginia on procedural grounds, arguing that they also show that a motion to modify would have been more prudent. Brief of Respondent at 14-15. But, the procedural posture of these cases do not in any way suggest that termination of Rachel's post-secondary support is proper where there was no pre-emptive motion to modify. Rather, they highlight the persuasive reasoning of the Missouri courts that termination of post-secondary support is not appropriate where a child intends to complete her education, takes the necessary steps to do so, but cannot attend full-time due to a medical condition outside of her control.⁵

(5) The Evidence Challenged as Inadmissible is Irrelevant on Appeal.

David argues that Virginia's statement that a software error at Cascadia caused the errors in the Rachel's unofficial transcript is

⁵ *Braun v. Lied*, 851 S.W.2d 93, 96 (Mo. Ct. App. 1993) (waiver of the continuous enrollment requirement was appropriate where a child's temporary inability to attend classes was due to illness or physical disability, the interruption was temporary, and the child intended to continue her education); *Daily v. Daily*, 912 S.W.2d 110, 112-13 (Mo. Ct. App. 1995) (continuous enrollment requirement may be waived where interruption from enrollment is temporary, intent to re-enroll is evident, and manifest circumstances prevented continuous enrollment); *Harris v. Williams*, 72 S.W.3d 621, 625 (Mo. Ct. App. 2002) (waiver of continuous enrollment requirement upheld where child's withdrawal from school and enlistment in the National Guard in order to afford college tuition were manifest circumstances beyond his control); *Schubert v. Schubert*, 366 S.W.3d 55, 67-69 (Mo. Ct. App. 2012) (failure to take twelve credits due to a medical condition was not grounds for terminating support); *Sullins v. Knierim*, 308 S.W.3d 241, 248-49 (Mo. Ct. App. 2010) (termination of post-secondary support not proper where child intends to complete his education and has taken the necessary steps to do so but cannot attend full-time due to a learning disability).

inadmissible hearsay. Brief of Respondent at 7; *see* CP at 63. He also argues that the note from Rachel's doctor stating that she had surgery in July 2015 was not signed under penalty of perjury and, therefore, is inadmissible. Brief of Respondent at 7-8; *see* CP at 74. Virginia concedes that both items of evidence are likely inadmissible. But these documents are only referenced in her statement of the case, not in the argument section of her opening brief. *See* Brief of Appellant at 9-10. Because Virginia does not rely on this evidence to show that the trial court abused its discretion in terminating Rachel's support, David's objections are irrelevant.

(6) If This Court Determines That Reversal Is Necessary, The Trial Court's Related Judgments for Reimbursement And Attorney Fees Should Be Vacated.

In addition to denying Virginia's motion to revise the commissioner's order, the trial court also ordered Virginia to reimburse David's Fall 2015 tuition payment and pay \$1,000 in attorney fees. These judgments were based on its improper decision to terminate Rachel's support. Therefore, if this Court reverses the trial court's decision to terminate Rachel's post-secondary support, it should reverse these related judgments for reimbursement and attorney fees.

RAP 12.2 states that "[t]he appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require." In this case, because the

trial court improperly terminated Rachel's support, it is unjust to allow the award of attorney fees or reimbursement to survive. If this Court grants reversal, the parties should be restored to their original positions before the errant order was entered.

David argues that the award for reimbursement is proper because support terminated in Spring 2015 and, therefore, he had no obligation to pay for tuition in Fall 2015. Brief of Respondent at 16-17. He cites CR 15(b), addressing the amendment of pleadings to conform to the evidence, as giving the trial court authority to enter a judgment on reimbursement. But, whether or not support was properly terminated is the issue on appeal. Should this Court reverse the trial court's decision to terminate Rachel's post-secondary support, justice also requires that the reimbursement award be reversed. CR 15(b) is not relevant.

David also argues that the trial court's award of attorney fees was proper because Virginia was intransigent. Brief of Respondent at 17-18. The record does not reflect the basis for the award of attorney fees and, as discussed above, to the extent David's arguments are based on rationales not supported by the record, they are irrelevant.⁶ But, even if the record did reflect this reasoning, it is still unjust to require Virginia to pay for David's

⁶ See discussion, *supra* at 7-8.

attorney fees on the motion for revision if this Court holds that termination of support was improper. Reversal of the order terminating support necessitates reversal of the related attorney fee award.

(7) David Is Not Entitled To Attorney Fees On Appeal Because He Has Not Demonstrated That Virginia Was Intransigent.

David argues that he is entitled to attorney fees on appeal because Virginia was intransigent. Brief of Respondent at 18. His claim rests on the commissioner's order that Virginia reimburse him for the counseling invoices and his allegation that Virginia also falsified the unofficial transcript. This is simply not enough to demonstrate intransigence.

“Intransigence is the quality or state of being uncompromising.” *Schumacher v. Watson*, 100 Wn. App. 208, 216, 997 P.2d 399 (2000). Intransigence may involve delay, obstruction, filing unnecessary or frivolous motions, refusing to cooperate with the opposing party, noncompliance with discovery requests, and any other conduct that makes the proceeding unduly difficult or costly. *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992).

Virginia has done none of these things. She did not move to revise the commissioner's decision regarding the counseling invoices and she does not raise any challenge to that decision on appeal. Therefore, she has not been intransigent on that basis. And, David's allegation that Virginia

falsified the unofficial transcript is not a basis for an award of fees. To the extent this allegation has increased his attorney fees on appeal it is because he has chosen to make it an issue. Virginia's sole purpose on appeal is to show that the trial court abused its discretion in terminating Rachel's post-secondary support. She has not engaged in any intransigent behavior in doing so.

David also argues that Virginia has the financial resources to pay her own attorney fees. Virginia plans to file an Affidavit of Financial Need, in accordance with RAP 18.1(c), showing that this is not the case. As the affidavit will demonstrate, Virginia earns significantly less money than David. She asks that this Court exercise its discretion to award her attorney fees and alleviate the financial burden she has shouldered in bringing this appeal to reverse the termination of Rachel's post-secondary support. *In re Marriage of Pennamen*, 135 Wn. App. 790, 807-08, 146 P.3d 466 (2006) (RCW 26.09.140 gives this Court discretion to award attorney fees to either party based on the parties' financial resources, balancing the financial need of the requesting party against the other party's ability to pay).

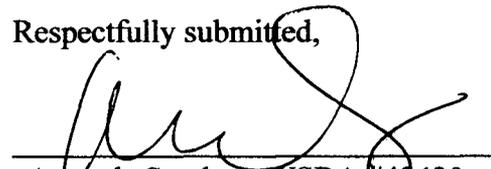
B. CONCLUSION

Virginia respectfully asks that this Court reverse the Order on Revision and Judgment, entered February 2, 2016, and the Corrected Order on Revision and Judgment, entered February 25, 2016, including the

judgments for attorney fees and reimbursement. On remand, she asks that this Court instruct the trial court to consider whether Rachel's post-secondary support should be terminated or suspended under the Order of Child Support, which should be interpreted to allow an exception to the full-time enrollment requirement due to Rachel's temporary medical issues.

DATED this 22nd day of September, 2016.

Respectfully submitted,



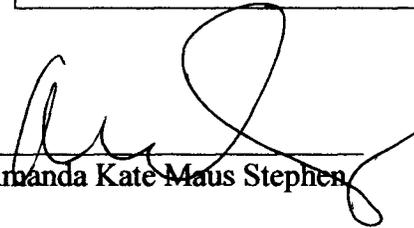
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CERTIFICATE OF SERVICE

I, Amanda Stephen, certify that on the 22nd day of September, 2016, I caused a true and correct copy of this *Reply Brief of Appellant Virginia Berry* to be served on the following in the manner indicated below:

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