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No. 63044-0-1

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

In re the Marriage of

ROBERT B. MILLMAN  
Appellant

and

LINDA M. JOSEPHSON  
Respondent.

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FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
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ON REVIEW FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

OPENING BRIEF OF APPELLANT

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

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## I. ASSIGNMENTS OF ERROR

1. The trial court erred when it calculated child support using the two-child formula rather than the three-child formula.

2. The trial court erred when it made the following finding:

While the court at times follows the *dicta* in *Daubert* and includes children from college in calculating support, in this case the parties prefunded college and no monthly payment is outgoing by the father. Therefore in this case a two child family calculation is appropriate.

CP 202.

### *Issues Pertaining to Assignments of Error*

1. Where child support is ordered for minor children and for an adult child who is dependent (e.g., for postsecondary educational support), must the basic support obligation for the minor children be derived from the table that accounts for all of the children, or only for the minor children? In other words, is this a two-child or three-child family for purposes of the child support schedule?

2. Where a parent saves for the children's eventual college expenses, can a court use the fact of this diligence as a reason to increase that parent's child support obligation?

## II. STATEMENT OF THE CASE

Josephson and Millman have three children, two of whom are minors and one who is in college. CP 108-109. Millman has remarried and also has a two-year-old. CP 108. His current wife does not work outside the home. Id.

The children whose support is at issue here reside primarily with Josephson, but spend a substantial amount of time with Millman. Supp. CP \_\_ (Parenting Plan); CP 109. For example, during a typical two-week period, the children spend four of fourteen overnights with Millman and four additional days/evenings with him. Id. In other words, the children spend about half their waking hours in Millman's home and a third of their overnights. See, also, CP 113-114. Accordingly, Millman provides the children with bedrooms in his home and provides for their daily needs when they are in his care. CP 109-110, 114.

Both Josephson and Millman are successful professionals whose earnings allow them to live comfortably. Each has monthly income in excess of \$7,000.00, the top of the advisory portion of the Child Support Table. CP 196. Pursuant to a recent adjustment of child support, Millman pays \$1,392.68 in child support, which the court designated as the standard calculation. CP 189 (¶ 3.7: "does

not deviate”). He also pays 66.4% of the extraordinary expenses (general and health care) for the two minor children. CP 192-193. Pursuant to a 2001 Order of Support, entered by agreement, the adult child receives support for her postsecondary education from a trust funded by Millman’s post-separation earnings. CP 111; see, also CP 111.

In making the current adjustment, the court commissioner used the maximum basic support obligation per child according to the “Two Children Family” column in the support table (i.e., \$946). RCW 26.19.020: CP 196 (¶ 5). Millman argued the appropriate amount was \$790 per child, taken from the “Three Children Family” column, since the adult child is receiving support during her postsecondary education. CP 93, 113. The commissioner rejected this argument, holding as follows:

While the court at times follows the *dicta* in *Daubert*<sup>1</sup> and includes children from college in calculating support, in this case the parties prefunded college and no monthly payment is outoing by the father. Therefore in this case a two child family calculation is appropriate.

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<sup>1</sup>*In re Marriage of Daubert*, 124 Wn. App. 483, 503 n.3, 99 P.3d 401 (2004), overruled on other grounds by *McCausland v. McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007).

CP 202. This Court's decision in *Daubert* is discussed below in the argument section. The commissioner elaborated as follows:

And I will say that normally we do follow the *dicta* as outlined in Footnote 3 in *Daubert*. That is what we normally do. However, in this particular case I find there to be an unusual situation which is that the parties pre-funded the payment for the college expenses for the oldest child. There's no current regular monthly payment going out to support that dependent child. The purpose of using the three-child family would be to take into account current monthly payments or current payments being made to support that dependent child. And in this case those payments were already made, and it's not affecting the monthly budgets of the parties, excuse me, for funding the college. And, therefore, I find it appropriate to use the two-child family, and that's what we will use.

RP 16.

This appeal timely followed entry of the commissioner's orders. CP 221-240.

### III. SUMMARY OF THE ARGUMENT

When child support includes support for an adult but dependent child, the statute requires, without exception, that the basic support obligation be calculated under the table that accounts for all the children receiving support. Any increase above the standard calculation, so derived, must be justified pursuant to the statute and precedent. The fact that a parent has saved in advance to cover the expense of post-majority support should never justify

an increased child support obligation, since that would penalize parents for behavior the state should instead encourage.

#### IV. ARGUMENT

Washington child support policy has two goals: to insure support adequate to meet the needs of children commensurate with the parents' income, resources, and standard of living and to equitably apportion that support obligation between the parents. RCW 26.19.001.<sup>2</sup> In other words, the law aims to provide for the child and to do so fairly. To those ends, the Legislature devised a child support statutory scheme, which operates almost mechanically to allocate the child support obligation between parents. RCWA 26.19. One component of the formula used to determine support is the number of children receiving support. See RCW 26.19.011 (defining basic child support). In this case, for example, the difference between the basic support obligation for a two-child family and a three-child family is \$156 per child. RCW

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<sup>2</sup> The statute provides:

The legislature intends, in establishing a child support schedule, to insure that child support orders are adequate to meet a child's basic needs and to provide additional child support commensurate with the parents' income, resources, and standard of living. The legislature also intends that the child support obligation should be equitably apportioned between the parents.

26.19.020.<sup>3</sup> Nowhere does the statute allow a court to choose how many children it may count in arriving at the basic support obligation. Rather, simply and straightforwardly, the family is comprised of the number of children receiving support. RCW 26.19.011(1) (“basic child support obligation’ means the monthly child support obligation determined from the economic table based on the parties’ combined monthly net income and the number of children for whom support is owed”). A child who has reached the age of majority but, based on a finding of continued dependence, still receives financial support is a child receiving support and must be counted for purposes of deriving the basic support obligation. See RCW 26.19.090 (using “support” in reference to payment of adult child’s education related expenses). In failing to follow the statute, the trial court erred.

While no published opinion directly addresses the issue raised here, this Court tacitly confirmed that trial courts must use an “all children” family formula in calculating child support. *Daubert*,

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<sup>3</sup> In 2009, the Legislature amended the child support table, leaving the existing amounts unchanged, but extending the combined monthly income portion of the table from \$7000 to \$12000, with commensurate increases in monthly support. The presumptive child support obligation for the maximum \$12000 monthly income figure for a two-child family would be \$1440 and for a three-child family \$1206 (a \$234 difference).

124 Wn. App. at 503. In *Daubert*, there was no appeal taken from trial court's use of the one-child family formula where there was a second child receiving post-majority educational support. *Id.*, at 503 n.3. However, this Court observed that "when calculating support for the younger minor children, the schedule applies and requires consideration of the postsecondary child, because this child is still a child receiving support." *Id.*, at 503. In other words, the statute requires the trial court to count every child, a requirement the trial court here evaded.

The statute permits a court to exceed the basic support obligation, provided there is adequate justification set forth in findings of fact. RCW 26.19.070 (reasons may include extraordinary wealth, significant time spent in the obligor's residence, or additional children being supported by obligor). The mere fact of income above the child support table is not an adequate justification. *McCausland v. McCausland*, 159 Wn.2d 607, 620 n.6, 152 P.3d 1013 (2007) (amount of child support must be based on "the correlation to the child's or children's needs").

Here, the court failed to calculate child support according to the actual number of children in the family (i.e., three) and did so because the obligor parent (Millman) had "pre-funded" some post-

majority support and, because that trust adequately covers the educational costs for now, did not have a current expense. CP 202. This cannot be an adequate justification to exceed the economic table, for a number of reasons.

First, any increase in child support above the child support table must be based on the children's needs and be commensurate with the parents' income, resources, and standard of living, and the relationship between the additional child support and these factors must be stated with specificity in findings of fact. RCW 26.19.001; RCW 26.19.065(3); *McCausland*, 159 Wn.2d at 621; *Marriage of Krieger and Walker*, 147 Wn. App. 952, 960, 199 P.3d 450 (2008). The commissioner here did not attempt to justify the additional child support on the basis of the statutory factors.

Second, what the commissioner did consider, and view as a justification for undercounting the children, was the "prefunding" of the college expense. According to the commissioner, because of the educational trust, the father's monthly income stream was unaffected by the post-majority support. CP 202. This view, of course, does not account for the fact that the money placed in trust might have been put to other uses, with an effect on income stream. But, most importantly, in taking this view, the court

penalized the father for taking the financially responsible path of providing for college in advance. The only reason the parties are not paying for Erin's college expense out of current funds is because they earlier set aside the father's post-separation earnings money for that purpose. In not counting that effort, the court violated the statute's mandate to be fair and also undermined the broader policy goal of encouraging and rewarding precisely the kind of foresight, generosity, and responsibility modeled by the father here. Many parents save for their children's college expense, as well as for emergencies and "rainy days." Many more should be encouraged to do so. Yet, if this kind of financial prudence is penalized, as it is here, our child support law both appears and is unfair and unwise. The father is actively engaged in the children's lives, such that the children effectively have two complete homes, and in each home the children enjoy a comfortable standard of living. *Compare Marriage of Krieger and Walker, supra* (children spent no residential time with father). Unlike the father in *Krieger and Walker*, who not only never saw the children but seemed intent on depriving the children of funds adequate to enjoy a lifestyle he could easily afford, the father here provides generously for the children, including by providing for them directly during the

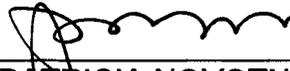
substantial time they spend in his home. All he asks here is that he not be penalized for being prudent in anticipating and providing for the costs of putting his children through college.

V. CONCLUSION

For the foregoing reasons, Robert Millman respectfully asks this Court to vacate the order of child support and remand for recalculation using the proper three-child family table.

Dated this 6<sup>th</sup> day of August 2009.

RESPECTFULLY SUBMITTED,



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PATRICIA NOVOTNY

WSBA #13604

Attorney for Appellant

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STATE OF WASHINGTON  
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DIVISION ONE

In re the Marriage of	)	
	)	
ROBERT B. MILLMAN,	)	No. 63044-0-I
Petitioner,	)	
and	)	
	)	DECLARATION
LINDA M. JOSEPHSON,	)	OF SERVICE
Respondent.	)	
_____	)	

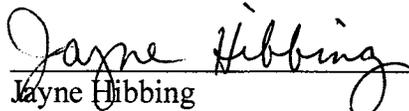
Jayne Hibbing certifies as follows:

On August 6, 2009, I served upon the following copies of the Opening Brief of Appellant, Designation of Clerk's Papers Supplemental and this Declaration, by:

- depositing same with the United States Postal Service, postage paid
- arranging for delivery by legal messenger.

Linda M. Josephson  
431 Halladay Street  
Seattle WA 98109

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

  
 Jayne Hibbing  
 3418 NE 65th Street, Suite A  
 Seattle, WA 98115  
 206-525-0711