

64074-7

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No.64074-7-I

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

Karl E. Sagner,

Respondent,

v.

Rory B. Sagner,

Appellant.

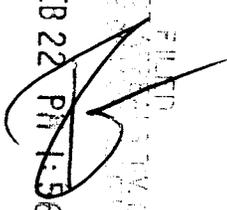
Reply Memorandum of Appellant

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1. SERVICE WAS DEFECTIVE.

In the Father's argument, he states that there is "no statutory guidance regarding the time for service in child support modification actions".¹ We beg to differ with his position inasmuch as RCW 4.16.170 applies to "any statute of limitations" and specifically requires that if service within the timeframe (90 days from the date of filing) is not effectuated, "the action shall be deemed to have not been commenced for purposes of tolling the statute of limitations". RCW 4.16.170. In his Brief, and as specifically established by the pleadings, the Father acknowledges that he failed to effectuate service within 90 days of "filing".² Therefore the action, pursuant to the cited statute, should have been dismissed. Then the remaining issue is whether he may re-file without a showing and finding of "exceptional circumstances".

In addition, it is acknowledged that the Father failed to file "child support worksheets" at the same time he filed the *Petition* and thus was not even in compliance with the statutory provision in RCW 26.09.175 and his modification action was thus defective in its initiation for this reason as well.³

¹ Brief of Respondent at pg. 7

² Brief of Respondent at pg. 2.

³ CP 92-92 (Declaration of Service) and CP 67 (Summons & Petition for Modification).

2. MANDATORY LANGUAGE LIMITING RIGHT TO PETITION SHOULD BE ENFORCED.

The *Order of Child Support* herein⁴ uses the language from the state-approved mandatory form and as adopted by the court specifically states as follows:

“Support shall be paid until the child reaches the age of 18 or as long as the child remains in enrolled in high school, whichever occurs last, except as otherwise provided below in Paragraph 3.14.” *Order of Child Support* of February 27, 2003, at Paragraph 3.13.

The operative language regarding post-secondary educational support was Paragraph 3.14 of the *Order of Child Support* of February 27, 2003:

“The right to petition for post-secondary support is reserved, provided that right is exercised before support terminates as set forth in Paragraph 3.13.”
Order of Child Support of February 27, 2003, at Paragraph 3.14.

The fact that the statutory provision related to modification of child support speaks in terms of the “filing of the petition and worksheets”, a general comment about the commencement of such an action, does not relieve the Father of compliance with the “specific” language from the *Order of Child Support* set forth above, nor excuses failure to comply with RCW 4.16.170.

⁴ CP 71-90 (Exhibit A to Motion for Summary Judgment). Also, CP 126-142.

In this particular case, the Father (who has been the primary residential parent and the recipient of child support for at least five years preceding the initiation of this action) clearly had ample notice of the necessity to properly initiate a modification action if he wished to establish post-secondary educational support. The Court should note that the *Order of Child Support* in question was drafted by the Father's attorney.⁴

Further, the Father acknowledges that the process to petition the court to establish post-secondary support began "in April 2008", more than two months prior to the time he actually "filed" his petition and almost six months before he sought to effectuate service "by mail".⁵

The Father's claim that service was delayed because he did not know the physical or mailing address of the Mother is false. As the Mother noted in her *Reply Declaration* of January 21, 2009:

"Mr. Sagner is perjuring himself when he states that he had no street or mailing address for me until October 7, 2008. Mr. Sagner has had both my physical address and my mailing address for many, many years. I have had my current (and only) post office box, which is my mailing address, and my current physical address for well over seven years. In fact, during the divorce proceedings in 2001-2003, Mr. Shea sent me many documents to my current post office box. Mr. Sagner has mailed correspondence to my post office box (and to my current physical address before I had the post office box) many

⁵ CP 67 (Declaration of Karl Sagner in Response to Summary Judgment).

times over the last seven years and has actually been to my home address in person.” *Reply Declaration of Rory Sagner* of January 21, 2009.⁶

Further, the Father had known for more than a year before his daughter graduated from high school that she was going to attend the University of Chicago. Their daughter was granted “early acceptance” at that school in the late fall of 2007, and had committed to attend.⁷ (See *Reply Declaration of Rory B. Sagner*, Page 2, lines 3-5.)

It should be noted that in the trial court’s *Order Denying Summary Judgment* of January 27, 2009, the court made absolutely no reference or confirmation that the claim regarding lack of information about the Mother’s mailing address formed any portion or basis for the court’s decision. The court limited its decision to its ruling that a generic 2-year statute of limitations applied to child support modifications irrespective of the limiting language in the *Order of Child Support*.⁸

⁶ CP 56 (Reply Declaration of Rory Sagner).

⁷ CP 57 (Reply Declaration of Rory Sagner).

⁸ CP 54-55 (Order Denying Summary Judgment).

3. THE FATHER HAS FAILED TO SHOW EXCEPTIONAL CIRCUMSTANCES THAT MAY EXCUSE A DELAY IN FILING THE ACTION.

At Page 10 of the *Brief of Respondent*, the Father attempts to assert that the limiting language in the *Order of Child Support* requiring him to initiate an action should be excused because of difficulties that “might” arise in determining whether or not post-secondary support should be ordered and the allocation thereof, citing RCW 26.19.090(2). However, this is a hollow argument. Had the Father properly initiated a petition to establish post-secondary support, the issues he notes in the foregoing statute would have been decided during the course of that action. If specific issues or facts were uncertain, the ultimate ruling by the Court could have been delayed until the same were resolved. His claims bear no relationship nor do they excuse failing to properly serve the obligor parent. The issue here is the initiation of the action, not whether or not post-secondary support was established or the allocation appropriate between the parents.

In this case, the Father unilaterally (and in violation of the joint decision-making required in the *Final Parenting Plan* of February 27, 2003) chose to send his daughter to an expensive out-of-state college, the

University of Chicago.⁹ This was clearly not a “joint decision”. We do not, in making this statement, intend to malign the University of Chicago or diminish the educational opportunities that it provides to its students. However, if the Court examines the Father’s *Petition for Modification of Child Support* filed June 3, 2008, it will find that the Father made no references to “exceptional circumstances” or any circumstances that would fall within that definition.

As previously noted, the Father had known since approximately April of 2007 that he intended to have his daughter attend the University of Chicago, had more than ample time to make arrangements therefore and simply failed to prosecute his petition in a timely or effective manner. Nor did the Father make any claim of “exceptional circumstances” in his *Response to the Motion for Summary Judgment*, only claiming falsely that he did not have the Mother’s address. While the Court may (under existing case law) “retain jurisdiction” in certain exceptional cases to establish post-secondary educational support, no exceptional circumstances have been shown here and, in fact, the opposite is reflected by the record.

⁹ CP 69 (Declaration of Rory Sagner).

4. RE: ATTORNEY'S FEES

The Mother has filed an *Affidavit of Financial Need* in this matter documenting that her total monthly expenses, which are relatively modest at \$3,400.00 per month, exceed her net income of just over \$3,000.00 per month.¹⁰ The only financial documentation of the Father's income in this case is reflected in his 2007 Federal Tax Return filed on October 9, 2008, showing a gross income of \$105,454.00, payment of \$17,231.00 in federal income tax, leaving him with a net annual income of \$88,223.00 (or \$7,351.91 per month).¹¹ The Father's income is more than twice that of the Mother. She could ill-afford to respond to the Father's petition, participate in arbitration and now prosecute an appeal and is in need of an award of attorney's fees. The same is justified under the "need and ability to pay" doctrine.

In addition, as the Father's attorney notes, this is a case essentially of first impression. The trial court, in applying a generic 2-year statute of limitations to these actions, had created a situation that could well result in substantial differences between courts who generally heretofore have enforced the provisions limiting modification petitions to the date of emancipation or date of graduation, whichever ever occurs later.

¹⁰ Appellant's Affidavit of Financial Need (filed herein on 11/30/2009).

¹¹ Sealed Financial Source Documents filed with trial court on 10/9/2008, including 2007 Tax Return. (CP to be assigned)

RESPECTFULLY SUBMITTED this 22nd day of February 2010.

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