

COURT OF APPEALS NO. 44039-3-II
PIERCE COUNTY SUPERIOR COURT NO. 93-3-04576-9

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

AMANDA L. BLANK,

Appellant,

v.

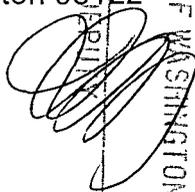
VERNON RUSSELL BLANK,

Respondent.

OPENING BRIEF OF APPELLANT

C. Nelson Berry III
WSBA No. 8851
Attorney for Appellant

Berry & Beckett, P.L.L.P.
1708 Bellevue Avenue
Seattle, Washington 98122
(206) 441-5444

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DIVISION II

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Assignment of Error

1. The court below abused its discretion by refusing to extend post-secondary support for the parties' son, Adam, beyond his 23rd birthday, pursuant to RCW 26.19.090(5), where Adam's inability to complete his post-secondary education sooner was due to Attention Deficit Disorder (ADD), on the ground that ADD is "not uncommon", and therefore does not constitute an "exceptional circumstance", warranting such an extension.

Issues Pertaining to Assignment of Error.

1. What factors should the court consider when exercising its discretion to extend post-secondary support beyond a child's 23rd

birthday, pursuant to the “exceptional circumstances” requirement found in RCW 26.19.090(5)?

2. Is the “exceptional circumstances” requirement in RCW 26.19.090(5) met when a child has “mental, physical, or emotional disabilities” which preclude that child from completing his post-secondary education by his 23rd birthday, or must the “mental, physical, or emotional disabilities” themselves also be uncommon or rare (whatever that might mean) to meet the “exceptional circumstances” requirement?

Statement of the Case.

Russell and Amanda Blank¹ divorced on December 29, 1993. They have two children. Adam was born on April 17, 1989 and Ryan was born on November 11, 1991.

At the conclusion of protracted legal proceedings to modify the support obligation for Ryan and to determine post secondary support for both children², the Honorable Elizabeth Martin observed (CP 191):

I was particularly impressed with Adam and his sincerity and his desire to do well, and I can see he has struggled [academically]. In his case, I think that many of his struggles may be related to his ADD, which, hopefully, is now better under control. He has medication, and he's receiving, also, 504 accommodations, which should enable his ongoing success.

When the court below entered its Final Order of Child Support Nunc Pro Tunc Following Reconsideration, on September 8, 2011, CP 145-284, it adopted RCW 26.19.090(5) which states:

The court shall not order the payment

¹ For ease and clarity, the parties shall be referred to by their first names. No disrespect is intended.

² See this Court's Unpublished Opinion, dated November 2, 2010, in Court of Appeals No. 39483-9-II; See also, Briefs filed in Court of Appeals No. 42959-4-II.

of postsecondary educational expenses beyond the child's twenty-third birthday, except for exceptional circumstances, such as mental, physical, or emotional disabilities.

(CP 193-194). When this Order was entered, Adam was 22 years old. The court knew that he would not complete his AA Degree until the Spring term of 2012 when he turned 23. CP 455.

Adam has always wanted to be an elementary school teacher so he can help students who struggle like he does. CP 286.

Sharlynn Gates, MA, Adam's Bethel Junior High School Counselor, describes Adam as "a persistent, ambitious, empathetic and hardworking student" who "always puts in extra time if needed to see that things are finished correctly no matter how long it takes", but always "makes times to help other individuals", and "was a mentor to younger students". CP 294.

In a letter recommending Adam for college, one of his high school teachers, Tonya Torres-Steen describes Adam as "a very self-motivated young man" who "works very hard at doing a professional job and constantly comes in to do extra work on all of his deadlines." CP 296.

In her letter recommending Adam for college, his high school teacher, Victoria Hallberg, who had taught Adam over the course of three years, wrote (CP 298):

In his sophomore year he was enrolled in my advisory class. This class was designed to improve the reading skills of students who were flagged as students in danger of failing the Washington Assessment of Student Learning and who demonstrated academic struggles that could hinder their GPA in rigorous courses.

Prior to enrolling in the advisory class, Adam was involved in a vehicle accident that left him with trauma to the brain.³ On

³ Ms. Hallberg was mistaken. Adam did not suffer any brain trauma, but the emergency care he received disclosed that he had been born with a heart condition, namely, Wolff-Parkinson-White syndrome. (CP 298). Wolff-Parkinson-White syndrome, or WPW syndrome, is the presence of an extra, abnormal electrical pathway in the heart that leads to periods of a very fast heartbeat (tachycardia). Wolff-Parkinson-White syndrome doesn't cause significant problems for many people, but complications can occur. It's not always possible to know your risk of serious heart-related events. If the disorder is left untreated, and particularly if you have other heart conditions, you could experience the following:

- Sudden death
- Chaotic electrical signals through the ventricles and very rapid beating of the ventricles (ventricular fibrillation)
- Low blood pressure (hypotension)
- Inability of the heart to pump enough blood (heart failure)
- Frequent fainting spells

his road to recovery he has and continues to demonstrate triumph measures of success. Although Adam exited my advisory class still as a struggling reader and writer, his close relationship with his family and his faith, enabled Adam to push himself to overcome the obstacles he faced due to his trauma. In the summer of 2006 he attended a Sylvan Learning Center and devoted countless hours to improving his reading and writing skills.

The following school year, his junior year, Adam enrolled in my American Literature class. Adam shined. He impressed me with the vast growth of his academic abilities. He volunteered to read. He read with confidence and enthusiasm. Without inhibitions, he participated in skits. He created presentations that left his audience remembering what he delivered. He wrote memorable poetry. He did not resemble the student that I was first introduced to. His skills improved 100%.

In all my years in the teaching profession, I have never witnessed a young man who has suffered such tremendous trauma as he has and turn around to make a comeback the way he has. I am extremely proud of Adam. He continues to need time extensions, but they are worth the wait because of the quality he produces. Currently, in his senior year, Adam is

Adam had ablation surgery on his heart the summer of 2009 to correct this condition. CP 287-288.

enrolled in my Creative Writing course. Adam continues to demonstrate a love for learning. He accepts all constructive criticism. He is patient with himself. He is not afraid to ask questions and seek resources that aid him with his work. If I could describe Adam in one work it would have to be determined; after all, last year he received the President's Award in Recognition of Academic Achievement.

After graduating from high school, Adam was thrilled when he was accepted to the University of Idaho. Adam attended one semester. In addition to attending classes, he worked part-time at Pizza Hut, and worked as a manager for the basketball team where he filmed games and assisted the coaching staff with various tasks. Adam was offered a \$5,000 scholarship to assist the basketball team (of which he received \$3,000 due to his departure from University of Idaho mid-season). Adam worked and studied long hours. CP 287.

A week or so before finals, Adam was taken to the emergency room when his heart began racing and wouldn't slow down (a result of Adam's heart condition, Wolff-Parkinson-White syndrome). This created an enormous amount of anxiety. Adam missed a few days of school immediately following the hospital visit.

These absences just before finals had a negative impact on Adam's grades. Adam decided to come home after just one semester because he had promised his father that if he did not do well he would not stay. CP 287-288.

Adam then enrolled as a full-time student at Pierce College. Adam had difficulties in some of his classes, and did very well in others. Despite setbacks Adam worked hard and never complained even when he had to retake a class. His failures were not due to lack of effort. They were due to his learning disability. Nonetheless, Adam remained in good academic standing as defined by the institution, and as required by RCW 26.19.090(3). CP 288.

In the Spring of 2010, Adam underwent neuropsychological testing to determine if there was something impacting his ability to learn and progress as quickly as his peers. Adam had a series of appointments with Barry A. Carlaw, Ph.D. and his staff between May 2010 and August 2010. According to the Report of Psychological Evaluation of Adam Blank, dated August 20, 2011, prepared by Barry A. Carlaw, Ph.D., and included in the Sealed Confidential Reports filed on May 17, 2011, Adam Blank suffers from depression and Attention Deficit Disorder (ADD) which has adversely

affected his educational performance throughout his life. That report is incorporated herein by reference.

Dr. Carlaw found that Adam's Attention Deficit Disorder meets the diagnostic criteria for Health Impaired⁴ which in turn made Adam eligible for Section 504 accommodations. CP 300. Consistent with Dr. Carlaw's recommendations, Adam began taking medication for his ADD and seeing a counselor. CP 288.

In addition, at pages 8-10 of his report, Dr. Carlaw found that Adam's academic skills were quite deficient, and correlated with his Attention Deficit Disorder. According to Dr. Carlaw, on page 10 of his report:

Adam's broad based reading and writing skills are relatively weak, and certainly weak relative to the majority of his college peers. That is, Adam's ability to put his thoughts down in writing in a cogent manner falls to a typical level of performance of a mid-fifth grader. This suggests that Adam will have difficulty with college level papers and probably also have difficulty with note taking in a college classroom.

⁴ See 34 CFR, §300.8(c)(9); See also, Kara Grice, *Eligibility under IDEA for Other Health Impaired Children*, Institute of Government, School Law Bulletin (Summer 2002), which is also found at <http://sogpubs.unc.edu/electronicversions/slb/slbsum02/article2.pdf>
?

In response to Dr. Carlaw's report, Adam's mother enrolled him in Sylvan Learning to help him attain the academic skills he needed to be successful. CP 288-289.

After completing just 36 hours of instruction, Adam's reading comprehension score increased from a grade equivalency of 4.9 to 11.6! His overall reading level became comparable to a student beginning the 10th grade. This showed reading growth of more than 3.5 years.

Adam's math progress was even more impressive. Adam's math progress test computation score showed a grade equivalency of 13.0 and his math concepts and applications score was 13.0. His overall math level improved 3.7 grade levels, after completing only 36 hours of instruction. CP 289, 302-303.

According to Michael Giller, the center learning director for the Sylvan Learning Center of Puyallup, Washington (CP 303):

I feel that one of the most significant contributing factors to Adam's success comes from his exemplary desire to succeed. He arrives for class early, stays focused throughout his class time, and expects only the most from himself.

When Adam graduated from Pierce College with an

Associates of Arts degree, at the conclusion of his Winter Quarter in 2012, he had a cumulative GPA of 2.57, and a cumulative GPA of 2.86 for his college level classes. CP 305.

His teachers at Pierce College were as enthusiastic about recommending Adam for a four year college, as his high school teachers had been in recommending him for college. CP 309, 311, and 313. For example, Greg Grazell, the Business and Social Science Division Chair at Pierce College, described Adam as follows (CP 311):

He is always prompt, attends class on a consistent basis and is eager to participate in class discussions and activities. He completes all assignments to the best of his ability and with full effort. His peers can always count on him to complete his part in group projects and discussions. He is attentive and demonstrates courtesy and a positive attitude. Adam always comes to class with a smile and contributes to a positive learning environment. Life long learning is what Adam is all about.....

...He demonstrates a true desire to continue his academic journey and has taken every step to making sure he has the opportunity to successfully transfer. I believe he has the attitude and ability to succeed at the university level.

As a person, Adam is one of a kind. He is always upbeat and brings a sense of positive energy to a room. He is active in the college community and wants to make a positive impact here. He personifies persistence. He has done everything he needed to do to overcome any challenges that he has faced here. He does not make excuses or play the victim. Adam simply does what he needs to do with integrity and resolve.

His English teacher, Stephen S. Jaech, wrote (CP 313):

Adam is a joy to be around. He tries his best with each academic task. He does not make excuses when signs of trouble appear in the margins of his returned essays. He fixes what needs fixing and moves on to the next task with a hopeful attitude.

He will do well at a senior institution. And he certainly deserves a chance. Without complaint, he simply gets to work and makes his best effort. What more could one ask?

Adam was accepted to Eastern Washington University in Cheney, for the Fall quarter of 2012. CP 307. Ironically, Eastern is the college that his father has always indicated he wanted Adam to attend. CP 290.

Since Adam would be over 23 years old when he commenced school at Eastern, his mother moved the court to

extend postsecondary support, based upon the existence of “exceptional circumstances, such as mental, physical, or emotional disabilities”, pursuant to RCW 26.19.090(5), which states:

The court shall not order the payment of postsecondary educational expenses beyond the child's twenty-third birthday, except for exceptional circumstances, such as mental, physical, or emotional disabilities.

The Honorable Elizabeth Martin recognized that there is presently no case law which provides the lower courts with any guidance about how to apply this statute. RP 13, 21. In particular, while recognizing that Adam had mental disabilities, the court indicated it did not know how to interpret the phrase “exceptional circumstances”. RP 14-15, 17, 19, 21, 27.

THE COURT: I think that the issue for me is, really, do these amount to exceptional circumstances? That's where I was looking for some guidance because there are many, many, many people out there with ADHD. It's not necessarily uncommon.

RP 17. She was also concerned that Mr. Blank had already paid support for five years to enable Adam to obtain his AA degree. RP 24, even though he was not required to pay post secondary support if Adam was not in good academic standing, as required by

RCW 26.19.090(3), or pay for Adam to repeat classes he failed.

RP 23-24; CP 460-462, 509-517.

In the end, Judge Martin concluded that the legislature intended that there be an endpoint to paying post secondary support and that Adam had received his AA Degree. RP 26. She also found that ADHD was not “necessarily uncommon”, RP 17, and thus not an “exceptional circumstance” which would warrant extending post-secondary support to enable Adam to complete a four year degree. RP 27.

Argument.

A. Standard of Review.

A modification of child support is reviewed for an abuse of discretion. *McCausland v. McCausland*, 159 Wash.2d 607, 616, 152 P.3d 1013 (2007).

A court abuses its discretion by exercising that discretion on untenable grounds or for untenable reasons. *Hough v. Stockbridge*, 152 Wash.App. 328, 337, 216 P.3d 1077 (2009).

Substantial evidence must support the lower court's findings of fact. *In Re Marriage of Schumacher*, 100 Wn.App. 208, 211, 997 P.2d 399 (2000), *review denied*, 129 Wash.2d 1014(1996).

B. The Court Below Abused Its Discretion By Exercising That Discretion To Refuse To Extend Post Secondary Support For Adam On Untenable Grounds Or For Untenable Reasons.

RCW 26.19.090 (5) provides:

The court shall not order the payment of postsecondary educational expenses beyond the child's twenty-third birthday, except for exceptional circumstances, such as mental, physical, or emotional disabilities.

This is a case of first impression. There are currently no cases which interpret this statute. In interpreting a statute, the court's primary objective is to carry out the legislature's intent. *McCausland v. McCausland*, 159 Wash.2d 607, 615, 152 P.3d 1013 (2007). But in this case, even though there is no legislative history to speak of from which to discern such intent, Washington has a long history of liberally construing statutes governing child support to promote post secondary support.

Thus, in *Childers v. Childers*, 89 Wash.2d 592, 599-600, 575 P.2d 201(1978), the Washington Supreme Court quoted extensively from *Esteb v. Esteb*, 138 Wash. 174, 244 P. 264, 246 P. 27 (1926), as follows:

As to the amount of education that should be considered necessary, courts have

never laid down a hard and fast rule. . . .

Applying the rule as stated by the courts and the text-writers, it will be seen that the question of what sort of an education is necessary, being a relative one, the court should determine this in a proper case from all the facts and circumstances.

Nor should the court be restricted to the station of the minor in society, but should, in determining this fact, take into consideration the progress of society, and the attendant requirements upon the citizens of today. . . . An opportunity (in the 1800's) for a common school education was small, for a high school education less, and for a college education was almost impossible to the average family, and was generally considered as being only within the reach of the most affluent citizens. While there is no reported case, it is hardly to be doubted that the courts at that time would have even held that a high school education was not necessary, inasmuch as very few were able to avail themselves of it. But conditions have changed greatly in almost a century that has elapsed since that time. Where the college graduate of that day was the exception, today such a person may almost be said to be the rule. . . . That it is the public policy of the state that a college education should be had, if possible, by all its citizens, is made manifest by the fact that the state of Washington maintains so many institutions of higher learning at public expense. It cannot be doubted that the minor who is

unable to secure a college education is generally handicapped in pursuing most of the trades or professions of life, for most of those with whom he is required to compete will be possessed of that greater skill and ability which comes from such an education.

If anything, the importance of a college education, and the State of Washington's public policy "that a college education be had, if possible, by all of its citizens", is even more true today, than it was when the Supreme Court wrote those opinions.

Similarly, in *Kruger v. Kruger*, 37 Wash.App. 329, 330-331, 679 P.2d 961 (1984), the Court concluded that termination of the child support obligation because a child had withdrawn temporarily for health reasons did not comport with a reasonable, fair, or just reading of the child support order. Clay had missed school from September 1978 through June 1979 due to a back injury. At other times, he was only a part-time student because of his back problems. The father did not want to pay support during the time Clay missed school for health reasons. In rejecting the father's interpretation, the Court held:

The purpose of providing for support beyond age 18 clearly was 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. See *Childers v. Childers*, 89 Wash.2d 592, 598, 575 P.2d 201 (1978). The more restrictive reading of the clause urged by the husband would not further this purpose.

Likewise, the lower court's restrictive interpretation of RCW 26.19.090 (5) here, that the child's "mental, physical or emotional" disability must be rare or uncommon to trump the legislature's intent to establish finality to a parent's obligation to provide post secondary support does not further this purpose. The lower court's exercise of its discretion on such grounds or for such reasons is untenable, and thus constitutes an abuse of discretion.

While it may be conceded, as the lower court indicated, that the legislature was interested in some finality to a parent's obligation to provide post secondary support, the legislature did not impose an inflexible bright line. Rather, the legislature recognized in RCW 26.19.090 (5) that some children might not be able to complete their post secondary education by their 23rd birthday due to "exceptional circumstances, such as mental, physical, or emotional disabilities", and that post secondary support be extended where such "exceptional circumstances" were present.

In addition, the Appellant submits, that contrary to the lower court's interpretation, the legislature did not require that the disability itself be rare or uncommon for it to meet the "exceptional circumstances" requirement of RCW 26.19.090 (5).

Words in common usage should be given their plain and ordinary meaning. *Childers v. Childers*, 89 Wash.2d at 597; *Schwarzmann v. Association of Apartment Owners of Bridgehaven*, 33 Wash.App. 397, 401, 655 P.2d 1177 (1982); *State ex rel. Edwards v. Heimann*, 633 F.2d 886, 891 (9th Cir.1980). Thus, the use of the phrase "such as" which follows the term "exceptional circumstances", illustrates examples of what the legislature intended by the term "exceptional circumstances".⁵ Accordingly, if a child has a "mental, physical, or emotional" disability which is adversely impacting the child's educational performance, the "exceptional circumstances" requirement is met.

⁵ Roget's 21st Century Thesaurus, Third Edition (Copyright © 2013 by the Philip Lief Group) identifies the following synonyms for the term "such as":

acting as, being, by its nature, comparatively, equally, essentially, for instance, functioning as, in the manner that, in the same manner with, just as, just for, like, serving as, similarly, **such as**

The Appellant submits that this interpretation is more in keeping with the legislature's intended purpose. Where a child has a "mental, physical, or emotional" disability which is preventing that child from completing his post secondary education by his 23rd birthday, that disability constitutes an "exceptional circumstance", pursuant to RCW 26.19.090 (5), which warrants extending post secondary support beyond the child's 23rd birthday. Such an extension is especially warranted here, where the child is working as hard as he or she can to be successful in spite of that disability.

Indeed, one must ask, if the legislature did not intend for post secondary support to be extended for a child like Adam Blank, who has a mental disability which is adversely affecting his educational performance, and is the reason he has been unable to complete his post secondary education by his 23rd birthday, in spite of his best efforts to be successful, then what is the profile of the child for whom the legislature intended to extend post secondary support beyond that child's 23rd birthday?

C. The Appellant Should Be Awarded Her Reasonable Attorney Fees, Pursuant to R.C.W. 26.09.140.

Amanda should be awarded her reasonable attorney fees

and statutory costs incurred in the course of this appeal, pursuant to RAP 18.1 and RCW 26.09.140.

RCW 26.09.140 provides in pertinent part:

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.

Choate v. Choate, 143 Wash.App. 235, 243, 177 P.3d 175 (2008);
State ex rel. Stout v. Stout, 89 Wash.App. 118, 126, 948 P.2d 851 (1997).

In determining whether to award attorney fees, pursuant to RCW 26.09.140, the court must consider the financial resources of both parties, and balance the needs of the requesting party against the other party's ability to pay. *In re Marriage of Nelson*, 62 Wash.App. 515, 521, 814 P.2d 1208 (1991).

It has long been the policy in this State, legislatively and judicially, that if a spouse is without funds and the other spouse has the ability to pay, denial of fees is an abuse of discretion. *Valley v. Selfridge*, 30 Wn.App. 908, 918, 639 P.2d 225 (1982); *Krieger v. Krieger*, 133 Wash. 183, 185, 233 P. 306 (1925).

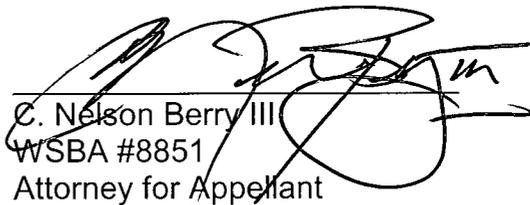
In this case, the Appellant needs the Respondent to pay her attorney fees, and the Respondent has the ability to do so.

CONCLUSION

For each of the foregoing reasons, the Appellant requests that this Court hold that the court below abused its discretion by holding that the “exceptional circumstances” requirement of RCW 26.19.090 (5) is confined to those “mental, physical, or emotional disabilities” which are uncommon or rare.

Rather, this Court should hold that, if a child has a “mental, physical, or emotional” disability which is adversely impacting the child’s educational performance, such that the child is unable to complete his or her post secondary education by his or her 23rd birthday, in spite of his or her best efforts to do so, then the “exceptional circumstances” requirement of RCW 26.19.090 (5) has been met, and post secondary support should be extended beyond that child’s 23rd birthday.

Respectfully submitted this 1st day of March, 2013.


C. Nelson Berry III
WSBA #8851
Attorney for Appellant

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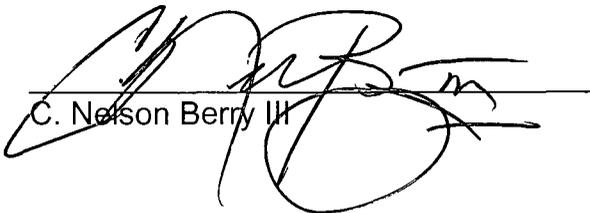
Stephen W Fisher, Clerk

CERTIFICATE OF SERVICE

I certify that on the 1st day of March, 2013, I mailed a true and accurate copy of the foregoing Opening Brief of Appellant, by first class mail, postage prepaid, to:

Stephen W. Fisher
College Park Professional Center
314 19th Street West, Suite 8
Fircrest, Washington 98466

Attorney for Respondent


C. Nelson Berry III

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