

No. 45608-7

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of

ANNE SPRUTE f/k/a ANNE BRADLEY
Respondent

and

ERIC BRADLEY
Appellant

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

I. THE COURT LACKS AUTHORITY TO RULE ON AN ACTION FOR POST SECONDARY EDUCATIONAL SUPPORT UNLESS MODIFICATION COMMENCED PROPERLY.

Our courts have stated that the interpretation of a statute requires the court to determine the legislative intent. *In re the Marriage of Scanlon*, 109 WnApp 167, 172, 34 P3d 877, 882 (2001). When the language of the statute is unambiguous, the intent is clear. *Fraternal Order of Eagles, Tenino Aerie No. 564 vs. Grand Aerie of Fraternal Order of Eagles*, 148 W2d 224, 242-43, 59 3d 655 (2002) *Scanlon, supra at 172*. RCW 26.09.175 requires to commence a modification of support action a party must file a petition and worksheets. The statute specifically states “(1) A proceeding for the modification of an order of child support shall commence with the filing of a petition and worksheets”. It further states that “(2)(a) The petitioner shall serve upon the other party the summons, a copy of the petition, and the worksheets in the form prescribed by the administrator for the courts”. The intent of the statute is clear. It requires the filing of a petition **and** worksheets. If the first statement is not sufficiently clear, the intent is further made clear in the second section in which it states that the summons, petition **and** worksheets shall be served. Nowhere in the statute does it provide an

exception to this requirement. A ruling that allows the Respondent to commence an action for modification without the required worksheets would be contrary to the plain meaning of the rule.

The Respondent has not only asked the courts to overlook the plain meaning of the law, but also states worksheets are not usually filed until later in the case. The Respondent cites no authority to justify practicing outside the parameters of the statute. There has also been no authority presented to this court that would suggest that the filing of the petition alone constitutes proper commencement of an action for the modification of child support. Appellant argues that according to the plain meaning of the statute, the filing of the petition and worksheets constitute a perfected filing of the modification and effects judicial authority.

The Respondent suggests that *In re the Marriage of Morris*, 176 WnApp 893, 309 P3d 1216 (2011) somehow justifies this lack of filing worksheets in context of the dicta from *In re Pollard*, 99 WnApp 48, 991 P2d 1201 (2000). Appellant disagrees. *Morris* is distinguished from the current case in that *Morris* involved the filing of a wrong form in the place of the petition as required by statute. Worksheets were timely filed in *Morris*. The court ruled the mistakenly filed motion for adjustment acted in place of the petition, ergo, no error and judicial authority was sustained.

The suggestion that *Morris* stands for the principle that worksheets need not be filed would mean the legislative intent was to only require the filing of a petition. The plain meaning and the intent of the statute is to require both the petition and worksheets. This court cannot render meaningless the inclusion of the word “worksheets” in the statute for a modification to commence. *Davis v. Dep’t of Licensing*, 137 W2d 957, 963, 977 P2d 554 (1999)

This court should not rule that the failure to file worksheets can be excused unless it is given authority to do so. RAP 10.3(a)(6) *In re the Marriage of Fahey*, 164 WnApp 42, 59, 262 P3d 128 (2011.) *Regan v. McLachlan*, 163 WnApp 171, 178, 257 P3d 1122 (2011). Practice by some attorneys or their clients to hide the ball or sandbag the process should not be tolerated. There is an obvious reason why worksheets and the information on them should be presented up front in any modification procedure. The worksheets set forth valuable financial allegations of the petitioning party.

Respondent intimates the information was not known so that if worksheets had to be filed they would have been blank. This statement is ridiculous and contrary to the Respondent’s own admissions within the Respondent’s brief. While in normal circumstances it is incorrect to report prior negotiations between the parties in a proceeding. ER 408.

Respondent did so in the courts below and does so again in the Statement of the Case by referencing to the earlier negotiations. See Page 9 of Respondent's Opening Brief. This reporting should be referenced in one respect. The Respondent admits to preparing "completed child support worksheets", prior to negotiations terminating. CP 257-259. Regardless of whether these worksheets were agreed to or not, at the time of the filing of the petition, there **were** worksheets that had been produced by the Respondent's attorney which could have been filed. The initial worksheets required to be filed with a petition for modification are not intended to be the final expression of discovery in a case. They simply require that the filing party sign under penalty of perjury that the figures are believed to be true. Respondent withheld these worksheets and by doing so, failed to perfect her filing for modification.

Respondent claims *In re Marriage of Gillespie*, 77 Wn. App. 342, 348, 948 P.2d 1338 (1995) should not be followed as to losing judicial authority because the facts are different. In *Gillespie*, Respondent points out a modification had to be filed prior to the child's 18th birthday. It was not; so judicial authority was lost. In this case Respondent says she had until the child graduated from high school. The variation in facts between *Gillespie* and this case do not change the principles applied. The question this court must address is whether the Respondent timely filed for

modification prior to termination of child support when the filing of a modification means the filing of a petition and worksheets.

Respondent did not provide any authority to her argument for continued judicial authority to render a decision if there was not a perfection of filing for modifications. If the obligation to support a child ends before the issue of an obligation for adult support for post secondary educational support commences, then there is no judicial authority to order post secondary educational support. By failing to file worksheets, the Respondent has failed to properly commence a modification and as such, the Appellant's obligation as administered by the court system ended.

II. TREATMENT OF THE 9/11 G.I. BENEFITS

Respondent continues to rely on an out-of-state case for the proposition that if her 9/11 Benefits are applied in any fashion between the parties it is prohibited by Federal Law. However, Appellant argues that this is not the case. The Appellant has never claimed that the benefit should be divided between them. He acknowledges that the benefit is the Respondents to use or withhold as she sees fit. However, if the Respondent chooses to use the benefit for the child, it should be considered either a gift to the child, a resource for the Respondent, or as a payment from a third party.

Certain other federal benefits payments are not divisible between the parties in any family law context. Veteran's Benefits and Military Disability Benefits are discoverable and are included in the determination of resources between the parties for setting child support. RCW 26.19.071. But the spouse not receiving said benefits has no right to be paid any portion thereof. Under this pattern these benefits should be considered a resource to the Respondent and should be listed on the worksheets for determination of the percentage split between the parties to compute minor child support and to determine what each parent should be obligated to pay the adult child for post-secondary educational support.

Respondent states that her use of this benefit for the older son cannot be considered a gift to the child. She relies on the ruling from the out-of-state case, but gives no authority this court should follow that state's decision. She claims the supremacy clause should spur this court to adopt the decision. However, the supremacy clause has been argued in other cases and our State's requirement that all resources, whether they be earned income, statutory benefits or federal benefits must be used to determine the support issue. *In re the Marriage of Kraft*, 119 W2d 438, 832 P2d 871 (1992) (regarding VA benefits) and *In re Marriage of Maples*, 78 Wa App 696, 899 P2d 1 (1995) (regarding disability payments). Our court has found, as it stated *In re Marriage of Correia*, 47

Wn App 421, 735 P2d 691 (1987) the supremacy clause is rarely exercised in the family law context.

This is even true when one reviews how our court has taken such benefits into consideration when there is a division of property or award of maintenance. Respondent states that, if her 9/11 Benefit is considered in any way, it is the same as dividing it between these parties as though Appellant has an interest in the same and a right to have it as a credit.

In the cases of *In re the Marriage of Zahm*, 138 W2d 219, 978 P2d 498 (1999) and *Kraft*, the benefits of one of the parties, Social Security in *Zahm* and future receipt of military disability pay in *Kraft* were at issue. Our court stated the receipt of these benefits could affect how the court divided the maintenance or property between the parties. The non-receiving spouse could not have access to these benefits in any way as a division, but the non-benefited spouse might get a maintenance award or more value in the community property distribution because the benefits were being paid to the receiving spouse.

Based on this argument, the use of the 9/11 benefits should be treated as a gift to the son. When he applies it to his educational expense, then the remainder owed between the parents changes. Such application would not detract from the purpose the 9/11 Benefit which was designed assist in the retention of trained soldiers.

Once designated to a child, there is no sound reason why it should not be considered part of the child's contribution to his/her own education. As the court stated *In re Marriage of Shellenberger*, 80 Wn. App. 71, 906 P. 2d 968 (1995): "The court should consider the adult children's ability to contribute to their own education through grants, scholarships, student loans and summer and/or part time employment during the school term". *Shellenberger* at pg 84. In the alternative, if it is not a gift or a resource for calculation, it may be considered a payment from a third party which changes the obligation of the parents. *In re Marriage of (Burgess) Boison*, 87 Wn. App. 912, 943 P.2d 682 (1997)

III. USE OF A STATE SCHOOL WITH A LIKE PROGRAM TO DETERMINE THE MAXIMUM (OR) CAP FOR POST SECONDARY EDUCATIONAL SUPPORT

The Respondent first argues on this issue the parties are not historically paying more for the education of their children by this support award (combining the education costs of the adult son and the minor daughter). However, that discounts the entire support amount he is obligated to pay.

There is more money owed on the minor support order, such that between all the expected payments, the Appellant is now expected to pay 48.5 percent of his net income. This is a significant change. The record shows that the Appellate was paying 34.6 percent of his net income

towards support and education based on the order entered with the court on March 4, 2011. This order also shows that the Appellant was responsible for 43 percent of the children's total support and expenses. CP 164-177.

The Respondent's comparison argument is meant to mislead the court. Respondent keeps mentioning that both parties are well off, that they both have six figure incomes. This is also misleading. While the Appellant may have a gross income of \$115,728; however, after taxes, pension and support payment he is left with \$3,192 per month to meet all of his living expenses, obligations and personal needs. The Respondent has no such financial constraints due to the additional substantial income of her husband. The Respondent, even with a 40 percent decrease in her income, together with the income of her husband has a net household income of \$18,106 per month which includes their incomes and the support payments she is receiving from the Appellant for the minor daughter. CP 415-430. The Respondent's use of 9/11 GI Benefits also ensures that the payment of post secondary educational expenses have little or no impact on the financial status of the Respondent's household. The Appellant is living in the DC Metro area and must support a higher cost of living than in the Pierce County area where the Respondent lives.

Appellant in his financial statements and declarations to the court pointed out that he cannot, even with an assumed “good” income afford to purchase his own house. Regardless of the Respondent’s financial situation, the Appellant is of a modest or middle class income. The Respondent suggests that the case law, particularly *Shellenberger*, supra, applies to a modest income situation only. The Appellant argues that the principles of *Shellenberger* should be applied to this case based on his own modest income which is supported by the documents filed with the court.

Recall the Appellant was not included in the decision making of the adult son’s review of programs. Appellant did not have a chance to discuss the son’s plans or his needs for post- secondary educational support. Only after he was presented with “this is the plan,” did the Appellant learn there was an alternative program at the University of Washington which had not been explored.

The requirement to provide post secondary educational support is based on the concept that, if the parents had remained married, the parents together would have found a way to provide for the support of the adult children. *Childers v. Childers*, 89 Wn.2d 592, 575 P.2d 201 (1978), RCW 26.19.090(2). Parents together can decide to go into debt, negotiate with a child for staying at home doing a junior college two years to save

expenses, or a myriad of methods that assist the child with obtaining an education.

When people are no longer a couple, living together, then it becomes a fight where one parent wants one outcome and the other parent wants another. The *Shellenberger* principle should not be one applied only to parents of modest (poor) means. It should be universal. The court should not have to find facts to justify forcing one parent to pay more than he/she can afford just because the other parent wants a more expensive, out of state, private (or even public, where there is out of state tuition because the child's residence is here) or even better program than would be reasonable if the parents had remained together.

Appellant said he could not afford the program the Respondent wanted for their adult son. He said he could afford the program at the University of Washington. Respondent ignored his request and asked the trial court to order Appellant to pay for a program that would force him to go into debt and/or draw down his retirement savings. This is not fair or reasonable.

If this court will not order that the trial court exceeded its discretion in ordering the parents to pay for this program against any other option, then non-custodial parents everywhere will continue to feel they are not being heard or treated fairly by the court. Appellant would never

have agreed to this educational plan for this adult son if he was still married to his mother, particularly if her income and earning status was so in flux so they could not be sure how to pay for it.

The trial court did not find facts justifying its reversal of the commissioner's ruling to cap the support obligation at the in state price. But on remand, the court will find such facts because of the "historic" commitment to paid education. Assuming the trial court "has found" that because of historic reasons and better than average income, Appellant could not seek a cap on the educational expense. Appellant asks this court to find that the trial court exceeded its discretion by refusing to follow *Shellenberger*. Appellant asks this court to apply *Shellenberger* to this case. The educational expense for the adult son should have been capped at the University of Washington amount and have each parent pay the percentage split with recalculated figures where the 9/11 Benefits are counted as a resource for the Respondent.

IV. DISCOVERY

In addition to the failure to provide worksheets, the Respondent frustrated the efforts of the Appellant with regards to discovery. The Respondent would have this court believe that she provided all relevant documents and as such has met the requirements of discovery. She omits the fact that she did so after a court order compelled her additional

financial document. Respondent also fails to admit she did so only 26 days before the commissioner's hearing and 42 days prior to the revision hearing being held.

Appellant contended in the court below that he did not have a clear understanding of Respondent's income and had asked for an order directing answers to interrogatories that were ignored initially. Appellant has made it clear in the prior issues that Respondent's income and resources are critical factors in the outcome of this matter. The resources available to the Respondent and the adult child from the 9/11 Benefits are unknown. Issues and concerns regarding the Respondent's income and benefits from her new company still exist and the Respondent did not provide proof of her gross income from retirement benefits. The court below should not have ruled to terminate discovery when genuine issues regarding the income and resources of the Respondent remained.

Without the conclusion of proper discovery, Appellant believes that the order of the court below inaccurately and unjustly shoulders the burden of post secondary educational support onto the Appellant. A rush to judgment on this matter and the discovery cut off ruling exceeded the court's discretion. Depending on how this court rules on other issues presented herein, the information Appellant sought in discovery, which

was cut off, may still have to be gathered to affect this court's rulings on the other issues.

While the trial court made a provision that the parties could review the post-secondary educational support issue yearly, without the discovery requested information, any review would be pointless. Appellant contends that the trial court's order should have been temporary so as to permit a final order after the completion of discovery, or alternatively the issue of determination of judicial authority, would have allowed the case to be properly finalized.

V. 45 PERCENT RULE

Respondent states Appellant made no argument to the trial court that its rulings violated the 45 percent rule. Appellant agrees he did not ask the court to reconsider its ruling. He did not realize the court had violated the 45 percent rule until after the order was fully understood and the two support orders were added together. He is out of state. The time limit for filing for reconsideration is a short one. And in light of how the trial court had ruled, Appellant is not sure the court would not have just said that "education need" was a good cause to exceed 45% of the net income.

When a trial court violates a statutory rule, particularly in rendering the final order on a matter, Appellant argues it is timely to

present such issue to this court in any case. It is a violation of statute. RCW 26.19.065(1). The trial court entered two support orders, the first being for the minor which followed one child worksheet calculations, resulting in support payment of \$1,501.44 per month. CP 434-435. The second order being for the post secondary educational support of the adult child resulted in a second support payment of approximately \$18,032 per year, 46 percent of the annual expense of attending Colorado State University, or \$1,503 per month. CP 528-529. Separately neither order exceeds 45 percent of Appellant's net income. However, combined the two orders result in a support obligation of \$3,001.44 per month

Respondent argues that Appellant is also in possession of "substantial wealth." As we have previously argued, this is totally untrue. The order of support entered on October 1, 2013, shows a net income of \$6,193.71. CP 434-435. His financial declaration and declarations to the court show that he has expenses totaling \$3,755. The Appellant lives pay check to pay check having only a modest retirement account. He has no equity in a home. He has no stock portfolio or savings. He has an income which disappears to zero dollars every month except for the modest payment to that retirement account. He has available approximately \$2,400 a month for the support of his children, the commissioner found similarly that Appellate has \$2,500 a month for payment of support. CP

460-521. There are no findings to support a combined support payment of greater than \$3,000 per month.

Post-secondary educational support is child support for purposes of applying the 45 percent of net income rule. *In re the Marriage of Cota*, 177 WnApp 527, 312 P3d 695 (2013) citing *In re Marriage of Schneider*, 173 W2d 353, 268 P3d 215 (2011). Respondent notes that if substantial wealth or education need, the only two factors which might be a good cause finding to allow the trial court to violate the 45 percent statute, could be proved, Appellant might be precluded from raising this issue. Appellant contends that neither educational need nor substantial wealth can be shown from the record.

If such cannot be proved, then Appellant should have the right to raise this under the 2nd grounds for raising this issue for first time on appeal under RAP 2.5(a), namely there were no facts to establish what the trial court granted, namely the required payment of more than 45 percent of his net income for support of two dependent children. Appellant believes he has the right to raise this issue with this court without having asked the trial court for reconsideration.

This is similar to where one wants to set aside a default order. CR60(b). There a party can claim mistake, inadvertence or excusable neglect as a reason for the court to grant relief. Appellant did not realize

the total amount of ordered payment of support required him to pay 48.5 percent of his net income. He should be, on appeal, granted the right to the relief that one or both of the support orders should be ordered changed to bring the two combined to no more than 45 percent of his net income.

VI. USE OF THE TWO CHILD WORKSHEET FOR CALCULATING SUPPORT FOR MINOR CHILD

Respondent admits that by using the one child schedule versus two child schedule, the court ordered support that Appellant must pay for the minor child is approximately \$150 more than if it had used the two child schedule. Respondent argues the court did this in recognition of the combined incomes of the parties were at the top of the support schedule. The Respondent gives no authority for this statement. The court did not state this as part of its rulings. It does not appear in the findings of the order. It is mere speculation.

There are two children here receiving some form of support. The Attorney for Respondent presented the worksheets to the court. CP 460-521. Appellant's attorney objected as they did not appear to be accurate. CP 460-521. The Commissioner without comment signed the ones presented by Respondent's attorney.

The Respondent is dismissive of the effects of a \$150 difference in support. However, for the Appellate, who is currently ordered to pay \$600

per month more than what he has available from his income, this is an important difference. The savings helps bring down the percentage owed by the Appellant who is presently ordered to pay 48.5 percent of his net income for supporting his two children.

If there was no finding as Respondent presents, then this court should tell Respondent that so long as there are two children being supported, the two child column should be used to calculate support for this minor child.

And if this court rules that the 9/11 Benefits are a resource, so that the pro rata division between the parents for child support calculation changes, there will probably be a relief on the amount of owed support to resolve the 45% rule violation. Each factor works together to get a correct picture on what Appellant should be paying; a fair amount for the support of his children.

VII. RESPONDENT'S REQUEST FOR ATTORNEY FEES

Respondent in section J of her Opening Brief asks for an award of attorney fees. Appellant believes it was Respondent who caused the problem which led to a court order that is unfair and was beyond the authority of the court to act, or was beyond the court's discretion or certain rulings were out right error on what the law should have been as applied to those argued issues. It should be Appellant who is awarded fees because

of the Respondent's withholding of information, refusing to answer discovery and pushing forward hoping to get the court to order what she wanted, namely to shoulder the majority of the cost for post-secondary educational support on Appellant, while having it cost her very little because of her 9/11 Benefits. Cost to her is not an issue considering her combined monthly household income of \$18,106.

If these two persons were still married, Appellant believes that the extensive costs of the post secondary education of the adult son would have been mitigated. The Appellant's financial situation, accurately reflects that the supporting the order of the court below was oppressive and Appellant had no choice but to appeal what is an incorrect proceeding. The Appellate should have to support the burden of the cost of defending this action when the court below lacked the authority as a matter of law to rule on the issue of post secondary educational support.

Attorney fees for Respondent should be denied. Attorney fees for Appellant should be granted for both the appeal and for having to defend a flawed proceeding below.

B. CONCLUSION

Both the Appellant and the Respondent have cited the local rules as to how modification proceedings are commenced in Pierce County. However, the Respondent's argument begs the question whether she

presented a perfected modification proceeding. If she failed to file for a modification by failing to file a petition *and* worksheets timely, prior to the termination of the prior court order, namely prior to the child graduating from high school, then the procedures were done without judicial authority. Appellant raised the issue of judicial authority at every step in the process laid out. The final order Respondent believes she has is not a final order. It cannot be.

Appellant has raised other issues than the question of judicial authority in case this court determines the filing of worksheets months after the adult son had graduated was sufficient in retrospect to have a valid (or perfected) modification proceeding in any case. If there was not a proper procedure, then issues 2, 3, and 5 are moot. What the court purported to do died with the fact that the court lacked the authority to do the things ordered.

If Respondent did perfect or start a modification without worksheets being filed until much later, and after the child had graduated, (which event is what is looked to, to determine if the modification was properly filed, namely having to file it before graduation), then issues 2, 3 and 5 must be decided as they flowed from this modification procedure. And Appellant believes they were decided beyond the court's discretion or the decisions were in error.

Issue 4 on Discovery, and Issue 5 on which column to use in calculating minor support when there is an adult child being supported, must be addressed either way. Any non-custodial parent needs to know whether he/she can count on the court to help them get the information they need and have the worksheets calculated correctly.

Respectfully submitted this 22nd day of July, 2014

A handwritten signature in black ink, appearing to read "C. David Lutz", written over a horizontal line.

C. David Lutz WSBA# 26728
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 22nd day of July, 2014, I caused a true and correct copy of this Reply Brief of Appellant to be served on the following in the manner indicated below:

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