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JAN 27 2014

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

Cause No. 31690-4-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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CINDY BROWN, Petitioner/ Appellant

v.

LAWRENCE BROWN, Respondent

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REPLY BRIEF OF APPELLANT

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## I. ARGUMENT

### A. The Attorney Fees Sanctions were an abuse of discretion, based on findings outside the range of acceptable choices and no law directly contrary to the petition.

Respondent claims that sufficient facts were “not developed” in support of RCW 26.19.090(2) and they were also “not present day facts” to explain why the post secondary support request was properly denied and sanctions ordered.

The child support order on Modification says the “petition for post-secondary support is premature and without basis in fact or law. The case is nor ripe for a decision on post-secondary support.” CP 88 Ins 27-29. The commissioner concluded in his oral ruling that he would have to assume and speculate on the facts, “especially for an 11 year old seeking post-secondary support.” CP 4, In 24 – 5, In. 4.

Per Petitioner’s opening brief, to order sanctions, it would have to be patently clear that there is no basis in fact and law for the petition. See Petitioner’s Opening Brief at 4-9.

On opening, Petitioner provided citations to the record that support all of the post secondary education categorical

considerations. Without analysis, Respondent categorizes the facts, as speculative facts. The commissioner stated they were speculative facts for an 11 year old. CP 65 In 24 – 66 In 4. Neither Respondent nor the trial court explain how they are speculative facts for an almost 17 year old. The presented facts will be quoted and analyzed on reply.

RCW 26.19.090 requires the court to look at several non-exclusive factors in determining whether to order post secondary education.

**Dependency:** The one mandatory factor for post secondary education of RCW 26.19.090 (2) is finding that the child is in fact dependent and relying on the parents for the reasonable necessities of life.

There is no dispute here that the children are both dependent on and living with their mother, while their father continues to pay child support. The Respondent suggests that this dependency factor requires a determination of dependency after graduation from high school. Response Brief at 7, 7<sup>th</sup> line from the bottom.

Respondent's interpretation is inconsistent with statute and the parties' previous order of child support, requiring the post

secondary education petition to be brought before the child turns 18 or graduates from high school. RCW 26.09.170 (3) states “Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child. ..” By law, emancipation occurs when the child reaches the age of majority or is emancipated in fact, whichever occurs first. *Rains v. State, Dept. of Social and Health Services, Div. of Child Support*, 98 Wn.App. 127, 136-37, 989 P.2d 558 (1999), *reconsideration denied, review denied* 141 Wn.2d 1013, 10 P.3d 1071; *In re Marriage of Gillespie*, 77 Wn.App. 342, 345-347, 890 P.2d 1083 (1995).

The dependency issue is a jurisdictional issue. Interpreting this factor to require a finding of dependency after high school is contradictory with the parties’ child support order and statute. The factor was uncontrovertibly found.

The next factor of RCW 26.19.090 (2) is the **age of the child**.

At the time of filing the petition, the confidential information from identified Christian’s birthday as 3/14/96 and Carson’s as 6/16/2000. At the time of the hearing, the older child was 16. He

was 17 by the time the order of child support modification was entered. At the time of the hearing, the younger child was 12.

The commissioner wrongly concluded that the older child was 15 and the younger child 11. CP 63 ln 5 – 11. “I don’t feel that the issue is ripe for decision from the court either for the 15 year old or the 11 year old.” *Id.* at CP 63 lns 5-7.

Respondent claims, without legal authority, that basing the post secondary educational support order on the wrong ages of the child is a non-material “difference.” Respondent’s brief at 8.

Obviously, it is not trivial, but material, when the ages are a statutory factor. See RCW 26.19.090(2). And, obviously, it is not trivial when the court based his decision on the wrong ages of the children 8 times in his oral ruling, including the wrong age bases in every finding that was focused on the children, as follows:

Re whether post-secondary support should be ordered: “I don’t feel that the issue is ripe for decision from the court either for the **15** year old or the **11** year old.” CP 63 lns 4-7.

Re exercising discretion on whether to and how long to order secondary educational support: “Here the child is **15** and **11** years old.” CP 63 lns. 11-15.

Re the children's needs: "but at **11** years old it's a little early for thinking that we're going to send the kid to college."

Re children's prospects: "I don't know what the child's prospects would be at **11** years old. At **15** years old at least at this point it looks, you know, likely I guess, but we don't know that for sure." CP 64 Ins. 1 -4.

Re Desires: " we are not exactly sure what the desires are. We certainly don't know what the desires of the **11** year old are. I'm not sure many **11** year olds now what their desires are."

Re aptitudes: "Well the aptitudes of an **11** year old or for that matter even a **15** year old may change pretty dramatically as they get slightly older."

Re abilities and disabilities: "We know what their abilities are at **15** and **11**, but we certainly don't know what their abilities are as they would get closer to college age."

Re nature of the post-secondary sought: "We don't have any idea where they would go because, obviously, I don't think an application for an **11** year old, certainly not one that has graduated from junior high, that their application for post-secondary education would even be accepted."

Conclusions: “Nearly every fact. . . in fact would require the court to assume things that the court simply cannot assume, especially for an 11 year old seeking post-secondary support.”

**The next factor of RCW 26.19.090 (2) is the child’s needs:** The mother provided the court with the tuition and expenses estimates for the three in-state schools that the older child Christian would be most interested and qualified in attending. CP 94 -102. She provided the range of schools and the cost of attendance per year at \$21,707 (CP 96); \$17,157 (CP 99); and \$16,449 (CP 101). See *also* CP 16 Ins. 7 – 21. The evidence shows that the father’s net income is four times the mother’s ( see WSCSSW at CP 52 and the father’s financial declaration at CP 22, vs. the mother’s at CP 28.), and that the children would be living with the mother during the college school breaks, that the mother has no discretionary funds, and that she would need to get a Parent Plus Loan in order to support her children through college. CP 17 In 12 – 20. That is non-speculative evidence of the measure of the need.

The commissioner avoided making any findings or comments on the need of the almost 17 year old, but found that he

could not know the needs for the younger child at 11 (the younger child is 13). RP 2 lines 16-20.

**Re: Expectations of the parties for their children when parents were together of RCW 26.19.090 (2).** The commissioner found that the parties clearly intended for their children to attend college. CP 63, Ins. 22-25.

**The child's prospects, desires, aptitudes and abilities of RCW 26.19.090 (2):** The mother testified about the children's prospects for college at CP 41, Ins 12 through 19:

“ As to the probability that both children will be attending post-secondary education at an accredited college or technical school, of course they will, that's a 100% probability. The majority of our extended family have either graduated from trade schools or college, and both Larry and I have advanced degrees with Larry having 3. As discussed on opening, both children express interests and desires consistent with college bound students and routinely express desires, like assumptions, that they will go to college – I raised them that way. There is very little chance that either will not be attending post-secondary education, and they will need support.”

She also explained why the father did not have a good foundation to know the aptitudes of his children, in support of finding her testimony more reliable as follows at CP 14-16:

“I have shared with this court the great aptitude our children show for higher education. If Mr. Brown would have spent significant amounts of time with them over the past four years, he would not be questioning their abilities – he would know them and that they are college bound. In 2012 he spent two weekends in April with them. In 2011 he spent Thanksgiving week with them in Pennsylvania. In 2010 he spent about a week with them at Christmas in California. He speaks to Christian, probably about 2-4 times per month. Sadly, this is the limit of his contact. He doesn’t spend the majority of his leave with them.”

She explained the children’s aptitudes, desires and abilities as follows at CP 16 ln 4 – CP 17 ln 2:

“ 6. Christian lives with me and is a Junior in High School with a 3.5 GPA. He is college bound, and is interested in such career fields as dentistry or physical therapy. He does not have any scholarship offers yet. He is an Eagle Scout which may give him an opportunity for a limited scholarship. If his ACT score was higher, he would have a better opportunity for scholarships. ACT is a similar testing and rating system to SAT. His current highest score is 19, and he needs to raise that by 4 points, to 23 for scholarships offers to begin via a state system, with free tuition paid if the ACT score is 25. Four points is a very large increase in a score but he is still college qualified and bound. He is able to take the ACT test as many times as necessary. However, with Mr. Brown not paying his mandated extracurricular expenses, he has not taken the test as often as he could. If his score met the scholarship requirement, he would also be eligible to take college courses during his remaining high school years.

7. One of Christian’s best subjects is math. His math teacher is pushing him to go to Notre Dame. Larry wants him to attend ROTC or a military academy, but again, his all around ACT scores are not going to be high enough to get a full ride scholarship and Christian is not interested in a military career. I am being realistic in expecting Christian to attend a state college such as – Louisiana State University,

La Tech, Univ. of LA Lafayette as a math or science major. He should be able to be accepted at any one of these schools. Christian wants to attend college but is waiting to see where he will be accepted and what kind of financial package he can receive, including from his parents, before making a decision on exactly where he'll go.

8. Christian enjoys sports but is having a 1 year recovery of a 100% completely torn ACL which will limit his opportunities. He enjoys running and baseball. In addition to being an Eagle Scout, he is active in 4-H; and FFA; and SBLA for school extracurricular activities.

9. Carson has played percussion instruments for the past four years and also plays the guitar. He plays basketball on an intramural team. He has been in Boy Scouts for the past seven years. He is the 4H president for his school and represents the school district in supporting activities. His interests suggest he would do well in engineering and fine arts. He also will be expected to attend a state college, not private."

The commissioner avoided making any findings on the older child's desires, and dismissed the younger child as too young. CP 64 Ins 5-11.

Without any evidence that the children's aptitudes were changing or ever did change, he found that the children's aptitudes might change prior to college, since the children were only "11 and 15". CP 64 Ins. 12-16.

**Abilities:** The commissioner again chose to decide that the children's ages were too young to make a current determination on their abilities, even though the evidence showed Christian was being encouraged to attend Notre Dame by his high school

teachers and had test scores of a college bound youth with greatest aptitudes in math and science. CP 16 Ins 14-15.

**Nature of the post-secondary education sought:**

The commissioner found, again based on their wrong ages, that the ages were too young to determine this. CP 64 at Ins 20-25.

**Parent's level of education, standard of living and current and future resources:**

The record shows that the father is a lieutenant colonel with a net income four times the size of the mother's and that the father was expected to be promoted to colonel in 2013 with competent evidence on the greater pay provided. CP 43 Ins 15 – 20; CP 3-5. There was no contrary testimony to this fact of future expectations. The father himself anticipated being promoted to colonel with a \$1000/month increase in salary. CP 37 In 4-6.

Even though evidence was presented, the court declined to determine any future resources expectations. See CP 65 at 2-9. He did note that the parties' education level was high, and noted that the standard of living for the father was much higher than the present standard of living for the mother. *Id.*

**Amount and type of support afforded if the parent's had stayed together:**

The mother testified to the parties' expectations while they were married:

"While we were married, there always was an expectation that we would help the children with college as we could, though not to the degree of paying for their entire education. We wanted the children to begin accepting some financial responsibility for themselves while in college and to work for scholarships and other financial opportunities aside from their parents. "

CP 17 Ins 8-12

The father did not offer any other expectation.

Despite the evidence in support of this factor, the commissioner simply considered this fact to be difficult to determine and declined to make a finding. CP 4, Ins 10-13.

Although positive evidence was presented for each factor regarding Christian, the court refused to acknowledge the evidence presented. Thus, the commissioner's determinations were outside the range of evidence for Christian.

Although the commissioner emphasized and centered his findings on the younger child, the mother was not overly concerned about ordering post secondary support for the younger child, it was

just a hope, in order to save on attorney fees and court costs due to her financial hardship. Her emphasis was on the older child who turned 17 before the modification orders were entered:

Not only are the children and I in need of a monthly child support modification effective in April 2012 when I filed the petition, but they are also in need of post secondary education support. Christian is a junior in high school. Carson is in 7<sup>th</sup> grade. I realize that this petition is a bit early for Carson, but I struggle with paying attorney fees to get child support modifications accomplished and make the request now because of that hardship and in hope that Mr. Brown will agree or the court will order it now. Furthermore, about the time our responsibility for Christian is completed, Carson will just be needing post secondary education support. I also do not foresee having the funds to seek an independent post-secondary education support petition for Christian next year when Christian is a senior and after knowing what his financial aid package might be. Since Christian will be attending in-state schools, there is no prejudice to him or anyone else in seeking the post secondary support for him now.

CP 15 In 20 – CP 16 In 3.

Unfortunately, the court punished the mother's effort at frugality with a \$750 sanction. CP 67 Ins 12-18.

This counsel could never have predicted a court would find "no evidence" in support of post secondary educational support when evidence had been offered for each post-secondary factor, especially for the 16 -17 year old.

Although certainly the court, in its discretion, could deny post secondary educational support on any case – that is not the issue on appeal.

This petitioner requests this court find the sanctions are an abuse of discretion as well as the findings of “no evidence”, and remand with instructions.

**B. Attorney fees to the mother are warranted below and on appeal.**

Attorney Fees based on RCW 26.09.140 should have been considered by the lower court. Respondent seems to claim that since awarding attorney fees under RCW 26.09.140 is discretionary, the court can also discretionarily ignore a request.

Even if the court exercised his discretion to not award post-secondary educational support and deny attorneys fees for that request, it could have and should have at least *considered* ordering attorney fees for the other portion of the petition – the straight child support modification. The trial court only had eyes for the father’s request for sanctions, not the mother’s request for attorney fees under RCW 26.09.140.

RCW 26.09.140 requires some things of a court, and allows some things of a court. Although the award of attorney fees in a modification proceeding rests in the sound discretion of the trial court, before that discretion is exercised the court *must* consider the needs of the requesting party and the ability to pay of the other party. RCW 26.09.140 (“after considering the financial resources of both parties”); *See also Urbana v. Urbana*, 147 Wn.App. 1, 16, 195 P.3d 959 (2008); *In re Marriage of Hoseth*, 115 Wn.App. 563, 575, 63 P.3d 164, review denied 150 Wn.2d 1011, 79 P.3d 445 (2003); *Robertson v. Robertson*, 113 Wn.App. 711, 716, 54 P.3d 708 (2002); *Spreen v. Spreen*, 107 Wn.App. 341, 351-52, 28 P.3d 769 (2001); *In re Marriage of Harrington*, 85 Wn.App. 613, 635, 935 P.2d 1357 (1997); *Schumacher v. Watson*, 100 Wn.App. 208, 216-17, 997 P.2d 399 (2000); *In re Marriage of Shellenberger*, 80 Wn.App. 71, 87, 906 P.2d 958 (1995); *In re Marriage of Terry*, 79 Wn.App. 866, 871, 905 P.2d 935 (1995).

Here, the trial court did not consider the relative financial needs of the parties for attorney fees considerations and ignored the mother’s request for fees under RCW 26.09.140. The court only had eyes for the father in his request for \$1,500 in sanctions, ordering ½ of his request.

*Ignoring* the mother's request and *not considering* each parties financial situation under RCW 26.09.140, is not within the court's discretion. Petitioner cannot find one case in support of RCW 26.09.140 providing discretion to *ignore* an attorney fees request, and Respondent provided none.

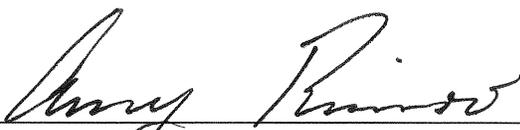
Respondent also claims that RCW 26.09.140 does not require attorney fees if the court considers the request factually baseless. Although a court may exercise its discretion in not allowing attorney fees, but the discretion cannot be based on this mother's petition as factually baseless. The mother's request for a modification of child support was granted. CP 67 In 15-18. And as the mother's briefing explains, the mother's request for post secondary educational support for the 16-17 year old was fully supported.

When the question of attorney fees is before the court of appeals, the court of appeals does consider the arguable merits of issues on appeal as well as the parties' financial resources. See *e.g., In re Marriage of C.M.C.*, 87 Wn.App. 84, 89, 940 P.2d 669 (1997).

**II. Conclusion.**

No reasonable basis exists for ordering the mother to pay \$750 in sanctions to the father. The court should have considered and ruled on the attorney fees request by the mother from the father. Remand is necessary to vacate the order on fees, correct the findings, and order that the trial court properly consider attorney fees to the mother. This court should order attorney fees to the mother.

Respectfully Submitted this 27 day of Jan, 2014

  
\_\_\_\_\_  
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