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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAR 10 PM 1:34

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NO.

**COURT OF APPEALS, DIVISION I OF THE STATE OF
WASHINGTON**

**SANDY S. OU, Appellant / Petitioner
vs.**

HUNG K. CHEUNG, Respondent

BRIEF OF APPELLANT

SANDY S. OU, Pro Se
Appellant

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A. Assignments of Error

Assignments of Error

1. The trial court erred in entering the order of July 18, 2013, terminating the child support.
2. The trial court erred in entering the order of July 18, 2013, denying the appellant's petition for modification of child support for the dependent child during his post-secondary education.

Issues Pertaining to Assignments of Error

1. Was the trial court's termination of the child support an abuse of its discretion?
2. Did the trial court erred in denying the petition for modification of child support to extend support beyond the high school years of the dependent child for the duration of his post-secondary education or until his twenty-third birthday, whichever concludes earlier?

B. Statement of the Case

The petition for modification of child support at front of the trial court addressed the post-secondary support of than minor child. The Appellant, Sandy Ou and the Respondent, Hung K. (Paul) Cheung met in early 1994 while Ms. Ou attended college. They are both of Chinese origin. Their initial attraction to each other was the fact that the Ms. Ou pursued higher education that the Mr. Cheung only aspired to, but was not able to attain since he had already worked for years as a cook. Clerk Papers (CP) at 37.

The couple got married in 1994 following a brief dating period. Their common child, Henry Cheung was born in early 1995. Mr. Cheung deserted his family and Ms. Ou raised Henry alone. CP at 38.

In 1999 the couple's marriage was dissolved and Ms. Ou was designated as the custodian of Henry in the Parenting Plan—Final Order issued by the court on November 5, 1999. This order was never modified by the court or by the parties. The Order of Child Support, issued on the same date, reserved the right to request post-secondary support before Henry turned 18 years old or graduated from high school, whichever occurred later. Respondent Cheung was ordered to pay 538.69 a month in child support. CP at 7 and at 8.

Ms. Ou petitioned the court to modify and establish post-secondary support for Henry in October 2012. He would turn 18 in early 2013 and graduated from high school in May 2013. Mr. Cheung failed to respond to the summons and the court issued an order awarding post-secondary support by default. Mr. Cheung later hired an attorney and through various filings moved to vacate the default order. On March 22, 2013 the latest child support order granting payment for post-secondary expenses was vacated and the court set the case for trial by affidavit. CP at 4.

Mr. Cheung submitted to the court several documents attesting to their truthfulness under penalty of perjury. Mr. Cheung claimed his wife's adult parents as his dependents and his wife's teenaged son as his own dependent. Mr. Cheung did not disclose his wife's income on his financial declaration or on the child support worksheets filed with the court nor did he disclose the child support his wife collected from the biological father of her child and the income generated or received by the other adult members in his household, namely the two adult parents of his wife. In his financial declaration, Mr. Cheung declared a total monthly net income of \$2,508 and a total monthly expense of almost twice that amount, \$4,960, all the while he was duly represented in these proceedings by an attorney that he had paid for. CP at 14, at 19 and at 24.

Furthermore, Mr. Cheung filed with the court his 2012 tax return. That year on the joint tax return with his wife, Mr. Cheung declared, their combined income was \$59,004.00.

Mr. Cheung stated to the court that he was always timely and never missed any child support payments for Henry since the issuance of the original child support order in 1999.

CP at 8.

The trial court terminated the payment child support for Henry on July 18, 2013 by finding: “that the parties did not form an expectation for the child regarding post-secondary education while they were together and the parents do not have the means to provide post-secondary support.” CP at 2.

C. Summary of Argument

Whether the trial court abused its discretion in denying the timely petition for modification of the appellant by terminating the child support of a child who remains dependent and cannot provide for himself while pursuing his post-secondary education.

D. Argument

1. Was the trial court's termination of an order for child support an abuse of discretion?

The court found that "Discretion is abused where it is exercised on untenable grounds or for untenable reasons." *In re Marriage of Schumacher*, 100 Wn. App. 208, 211, 997 P.2d 399 (2000). *In re Marriage of Tang*, 57 Wn. App. 648, 653, 789 P.2d 118 (1990). Further, the court ruled that the trial court's findings of fact must be supported by substantial evidence. *Schumacher*, 100 Wn. App. at 211 (citing *In re Marriage of Peterson*, 80 Wn. App. 148, 153, 906 P.2d 1009 (1995)). Substantial evidence is that which is sufficient to persuade a fair-minded person of the declared premise. *In re Marriage of Hall*, 103 Wn.2d 236, 246, 692 P.2d 175 (1984).

Regarding financial support of children, the court found that "The State has an interest in requiring parents, rather than the taxpayer, to financially support their children. The Legislature's purpose is to have parents fully financially support their children whenever possible." *State ex rel. Sigler v. Sigler*, 85 Wn. App. 329, 337, 932 P.2d 710 (1997)

Furthermore, by statute, "It is declared to be the public policy of this state that this chapter be construed and administered to the end that children shall be maintained from the resources of responsible parents,

thereby relieving, at least in part, the burden presently borne by the general citizenry through welfare programs.” (RCW 74.20A.010).

Therefore, it can be concluded that parents have a common law obligation, as well as a statutory obligation, to support their children. *State ex rel. California v. Benjamin*, 50 Wn. App. 284, 291, 751 P.2d 1189 (1988).

As part of the Child Support Schedule Chapter of RCW 26.19, RCW 26.19.090 sets forth standards for an award of postsecondary support. The statute provides: “[T]he child support schedule shall be advisory and not mandatory for postsecondary educational support.” RCW 26.19.090(1).

RCW 26.19.090(2) outlines the standard for awarding postsecondary child support. It requires the court to “determine whether the child is in fact dependent and is relying upon the parents for the reasonable necessities of life.” RCW 26.19.090(2). Whether a child is dependent is a matter within the trial court’s discretion. *In re Marriage of Belsby*, 51 Wn. App. 711, 716, 754 P.2d 1269 (1988). A child is dependent if he or she “looks to another for support.” *Balch v. Balch*, 75 Wn. App. 776, 780, 880 P.2d 78 (1994) (quoting *Childers v. Childers*, 89 Wn.2d 592, 598, 575 P.2d 201 (1978)).

Ms. Ou contends that evidence supports Henry is dependent and relying on his parents for support. The evidence established that Henry resides with Ms. Ou and will continue to do so while attending a local community college. Further, the evidence established that Henry was admitted to Embry-Riddle Aeronautical University (ERAU) in Daytona Beach. In order to pay for his education, Henry secured Florida financial aid, scholarship from ERAU, and he has a prepaid scholarship that Ms. Ou contributed to alone during the past several years. CP at 41. Thus, substantial evidence supports Ms. Ou's contention that Henry is dependent.

Further, in considering whether and how long to award postsecondary support, the court must also consider a number of nonexclusive factors:

Age of the child; the child's needs; the expectations of the parties for their children when the parents were together; the child's prospects, desires, aptitudes, abilities or disabilities; the nature of the postsecondary education sought; and the parents' level of education, standard of living, and current and future resources [and] the amount and type of support that the child would have been afforded if the parents had stayed together. RCW 26.19.090(2).

As long as the court considers all the relevant factors set forth in RCW 26.19.090 for determining postsecondary support, it does not abuse its discretion. *In re Marriage of Kelly*, 85 Wn. App. 785, 792-93, 934 P.2d 1218 (1997).

Ms. Ou argues the trial court failed to consider (1) age of the child, (2) the child's needs, (3) the child's prospects, desires, aptitudes, abilities or disabilities, (4) the nature of the postsecondary education sought, (5) the amount and type of support that the child would have been afforded if the parents had stayed together.

Regarding the first factor not considered by the trial court, the evidence showed that Henry just turned eighteen in his fourth year of high school.

Regarding the second factor not considered by the trial court, the evidence showed that Henry he remains dependent on his parents while pursuing his post-secondary studies and is relying upon his parents for the reasonable necessities of life.

Regarding the third factor not considered by the trial court, the evidence showed that Henry had completed his high school graduation requirements and actively pursued his post-secondary studies by earning college credits in his fourth year of high school. He has solid prospects to

pursue his education beyond high school and has been accepted and received offers from four (4) separate universities. CP at 41. Henry displayed high aptitude levels throughout his education and was able to earn college credits while still enrolled in high school.

Regarding the fourth factor not considered by the trial court, the evidence showed that Henry accepted the offer from ERAU, a university in Florida, where he can transfer the college credits he earned in high school and shorten his education to three years only for the missing ninety (90) credits to obtain a bachelor of science degree in aerospace engineering. CP at 41.

Regarding the fifth factor not considered by the trial court, the evidence shows that had the parents stayed together they would have been able to finance Henry's post-secondary education, provided that their son sought out other sources of financing as well.

Ms Ou argues the trial court erred in narrowly considering only (1) the expectations of the parties for the child when the parents are together, and (2) the parents' level of education.

Regarding the first factor considered by the trial court, the evidence showed Mr. Cheung and Ms. Ou have not had a relationship since Henry's birth, and that Henry has always resided with Ms. Ou. In

addition, the original child support order was entered when Henry was only four years old.

"Where child support is originally established for young children, the child's subsequent showing of ability to attend college may be considered a substantial change of circumstances justifying a modification to provide postsecondary support." *Kelly*, 85 Wn. App. at 793. *In re Parentage of Goude*, 152 Wn. App. 784, 791, 219 P.3d 717 (2009).

Thus, based upon these rulings alone, it can be concluded that the trial court erred in terminating the support for Henry who remains dependent and is relying upon his parents for the reasonable necessities of life, as it not only failed to consider at the minimum all the other factors outlined in RCW 26.19.090(2) and discussed above for awarding post-secondary support, but it also failed to address the modification action based upon the substantial change of circumstance of Henry who not only showed aptitude to attend, but prepared for, earned 30 college credits and has been admitted to an undergraduate program at ERAU.

The court also made the findings that a divorced parent may have a duty of support for a child attending post-secondary education if it works no significant hardship on the parent and if the child shows aptitude.

Childers v. Childers, 89 Wn.2d 592, 601, 575 P.2d 201 (1978).

Mr. Cheung failed to establish with facts how continued support of Henry at his historical rate would work significant hardship on him, neither did he establish that support calculation based upon the actual costs of attendance at Henry's selected college would cause him significant financial hardship.

Regarding the second factor considered by the trial court, the evidence showed that Ms. Ou obtained education beyond his high school and that fact of attending college what attracted Mr. Cheung to Ms. Ou.

The trial court also based its decision to terminate support for Henry who remains dependent and is relying upon his parents for the reasonable necessities of life that "the parents do not have the means to provide post-secondary support." CP at 2. However, records show that Mr. Cheung took pride in making timely payments of child support for the past fourteen years. CP at 8. Mr. Cheung never filed a petition to modify his child support payment amount due to substantial change of circumstances, sudden loss of income or extreme financial hardship. Evidence strongly suggests that Mr. Cheung continue to maintain the ability to support his dependent son, Henry while he obtains his sought-after undergraduate degree in his selected field.

Records also show that although Mr. Cheung claims two adults as his own dependents (the parents of his wife) and his wife's child who receives child support from his biological father, he not only manages somehow to pay for the services of a private attorney, but to cover his stated expenses of \$4,960 from his net income of \$2,508. Furthermore, records further show that Mr. Cheung and his wife's earnings for the year 2012 was over \$59,000. CP at 14, at 19, and at 24.

Although in *Goodell* the court found, a trial court may deny a deviation based upon additional children in the obligor's household where the obligor failed to provide the court with a summary of family expenses and information about child support received by the obligor's new spouse, the trial court in this case failed to even calculate the support payment for Henry based upon current and actual income of the parents nor did sought to ascertain the verity of financial information provided by Mr. Cheung. *In re Marriage of Goodell*, 130 Wn. App. 381, 391, 122 P.3d 929 (2005)

A parent's actual income may not be calculated in disregard of the evidence in the record or by guesswork. *State ex rel. Stout v. Stout*, 89 Wn. App. 118, 125, 948 P.2d 851 (1997); *In re Marriage of Bucklin*, 70 Wn. App. 837, 841, 855 P.2d 1197 (1993).

Therefore, Mr. Cheung's monthly income is more than the self-support reserve of \$1197 and it does not work economic hardship on him to continue making child support payments, while Henry is pursuing his post-secondary educational goal of obtaining a bachelor of science in aerospace engineering at ERAU, the university he had been enrolled.

The court ruled in *Daubert* that except as modified or eliminated by the support order, RCW 26.19.090 standards are automatically applicable to all post-secondary support orders. *In re Marriage of Daubert*, 124 Wn. App. 483, 99 P.3d 401 (2004); *Kelly*, 85 Wn. App. at 796.

In *Newell* the court found that the trial court must accurately determine each party's income and proportional share, using the standards of the child support schedule worksheets, before making its decision about the amount each parent should be required to pay for post-secondary education support. *Newell v. Newell*, 117 Wn. App. 711, 72 P.3d 1130 (2003).

Despite the fact that Henry remains dependent and would be relying upon both of his parents for the reasonable necessities of life, and despite the fact that Mr. Cheung has the ability to continue to make child support the payment and it would not work an economic hardship on him;

the trial court's termination of the child support means that Henry can only rely for all his financial support on Ms. Ou who is, in fact, left alone paying for all costs and expenses related to Henry's post-secondary education, as well as Henry's reasonable necessities of life. Mr. Cheung contributes to neither.

The trial court failed to enforce the parents' common law obligation, as well as their statutory obligation, to both support their child when it terminated the support order, and it abused its discretion for failing to consider all evidence at front of it and to consider all factors outlined by statute in determining post-secondary support.

2. Did the trial court err in denying the petition for modification of child support to extend support beyond the high school years of the dependent child for the duration of his post-secondary education or until his twenty-third birthday, whichever concludes earlier?

The trial court stated, "[T]he parents do not have the means to provide post-secondary support" for Henry, however, Ms. Ou is currently paying for Henry's education alone. Although, in *Shellenberger* the court ruled that post-secondary educational support awards that cause severe financial hardship are an abuse of discretion of the trial court, Mr. Cheung

failed to establish, how paying for his only dependent child's post-secondary education from the income he has been making timely payments for his court ordered child support for over ten years, would suddenly cause him "severe financial hardship." *In re Marriage of Shellenberger*, 80 Wn. App. 71, 84, 906 P.2d 968 (1995).

Furthermore in *Shellenberger* the court found, "[T]he trial court must, at the very least, make specific findings as to the cost and availability of college education in the child's chosen field at publicly funded institutions before ordering an objecting parent to support a more expensive private college education. A trial court should not require objecting parents of modest means to pay for private college where the child can obtain a degree in his or her chosen field at a publicly subsidized institution. Where one or both parents is in financial difficulty, community college definitely should be considered, particularly for the first two years, and particularly where credits for basic and degree requirements are transferable to a state supported university. This is especially true where, as here, none of the factors discussed in *Stern* and *Vander Veen* appear, and *Shellenberger*, at least, is in economic distress as a result of the order imposed upon him. In the instant case, the trial court required *Shellenberger* to pay one-half of \$4500 per quarter in private tuition

without making specific findings that no less expensive but academically acceptable option existed.” *In re Marriage of Shellenberger*, 80 Wn. App. 71, 85, 906 P.2d 968 (1995).

The trial court failed to make any findings regarding the cost of education in Henry’s chosen field despite the fact that evidence supports Henry’s 30 transferable college credits, he has earned while still in high school, to the private university of his choice. As the minimal, the trial court should have addressed the option of the education conducted in aeronautical engineering at a publicly funded university and order post-secondary support based upon the cost of education there.

The trial court erred in denying the petition for modification of child support to extend support of dependent Henry beyond his high school years and or the duration of his post-secondary education or until his twenty-third birthday, whichever concludes earlier. The trial court disregarded well-established case laws as well as statutory rules in denying the petition for modification of child support and terminating it. The error of the trial court’s decision to terminate support has been discussed at length above.

Petitions to establish post-majority support must be filed before the existing support obligation terminates, but, once the petition is filed, it is

unnecessary to seek a temporary order preserving the court's authority if the child turns 18 prior to the final order being entered (*Crossland*). *In re Marriage of Gillespie*, 77 Wn. App. 342, 948 P.2d 1338 (1995); *Balch v. Balch*, 75 Wn. App. 776, 779, 880 P.2d 78 (1994), *review denied*, 126 Wn.2d 1003 (1995); *In re Marriage of Crossland*, 49 Wn. App. 874, 746 P.2d 842 (1987).

Accordingly, Ms. Ou timely filed her petition with the trial court to establish post-secondary support; and the court had authority to enter its final order after Henry turned 18 in early 2013. However, the trial court abused its discretion in terminating the support order for a dependent child.

In construing a statute, the court's goal is to give effect to legislative intent, and when a statute is unambiguous, the court derives its meaning from the plain language of the statute alone. *State v. Glas*, 147 Wn.2d 410, 415, 54 P.3d 147 (2002). The postsecondary educational award statute is within chapter 26.19 RCW entitled "Child Support Schedule." The intent of the chapter as expressed by the legislature is to insure that child support orders meet a child's basic need and to provide additional support "commensurate with the parents' income, resources, and standard of living." RCW 26.19.001. "The legislature also intends that the

child support obligation should be equitably apportioned between the parents." RCW 26.19.001. *Newell*, 117 Wn. App. at 719.

After the court accurately determines each parent's income and proportional share, the court has discretion to equitably apportion education expenses and may order "either or both parents" to pay for a child's postsecondary education support. RCW 26.19.090(6); RCW 26.19.001; *Kelly*, 85 Wn. App. at 794. Under the statute, it is within the trial court's discretion to decide whether, for how long, and how to apportion postsecondary educational expenses. But to do so without accurately calculating income and the proportional share of the income as required by the child support schedule, the court is not properly advised or informed under RCW 26.19.090(1). *Newell*, 117 Wn. App. at 720.

Furthermore, the court found that the "Application of the minimum need standard (WAC 388-478-002, but the number changes from time to time) and \$25 minimum support obligation under RCW 26.19.065(2) are mandatory *unless* the court deviates for a reason specified in RCW 26.19.075 *and* states its reasons in its findings and conclusions.. *Stout*, 89 Wn. App. at 123.

The trial court failed to accurately determine each parent's income and equitably apportion post-secondary education expenses for their son as mandated by rules and regulations.

E. Conclusion

Based upon the foregoing, the Appellant respectfully asks the court to overturn the rulings of the trial court to terminate the payment of child support beyond high school and remand the case back to the trial court to establish the level of post-secondary support the Respondent must provide to the child who is still dependent.

F. Appendix

Appendix 1. — Academic Records of Henry Z. Cheung, including proof of enrollment to post-secondary educational institutions.

January 31, 2014

Respectfully submitted,



Sandy Ou, Pro Se
Appellant