

69442-1

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NO. 69442-1-1

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

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SHUDAN ZHU ROHDE,

Appellant,

v.

JOSEPH THOMAS ROHDE,

Respondent.

2013 JUL 17 PM 3:23  
COURT OF APPEALS  
STATE OF WASHINGTON

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Sharon Armstrong

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REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

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Sharon J. Blackford  
Attorney for Appellant

SHARON BLACKFORD PLLC  
1100 Dexter Avenue North, #100  
Seattle, Washington 98109  
sharonblackford@gmail.com  
(206) 459-0441

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In addition to the issues and arguments presented on behalf of Ms. Rohde in Appellant's Opening Brief, Ms. Rohde respectfully offers the following for the consideration of this Court.

A. ARGUMENT

1. MS. ROHDE PRESERVED THE ISSUE OF CHINESE NEW YEAR FOR REVIEW

Ms. Rohde requested at trial that her children be allowed to spend Chinese New Year with her. Her proposed parenting plan contained her proposed Chinese New Year allocation and the trial court was aware that Ms. Rohde had told the parenting evaluator, Pam Edgar, that she wanted Chinese New Year; her request was discussed at trial. 7/31/2012 RP 348; CP 12.

It is part of the trial record that during past Chinese New Years, the parties had experienced difficulty negotiating time for the children to celebrate Chinese New Year, thus Ms. Rohde requested that just as the children were designated to spend every Halloween with Mr. Rohde, they would spend every Chinese New Year with Ms. Rohde. Exh. 287. Ms. Rohde's parenting plan offered Mr. Rohde an extra Saturday night in exchange for the Saturday closest to Chinese New Year. Id.

Judge Armstrong was completely aware that Ms. Rohde had requested Chinese New Year, as she acknowledged on the record. 8/10/2012 RP 704-05. Additionally, Ms. Rohde raised the

issue in her Motion For Reconsideration. CP 256, 260. The issue was therefore preserved for review.

2. THE ISSUE OF THE MAINTENANCE  
CONDITION IS ONE UPON WHICH  
MEANINGFUL RELIEF CAN BE GRANTED;  
RELIEF WOULD NOT BE PURELY  
ACADEMIC, THUS IT IS NOT MOOT

An appeal is moot if the court cannot provide effective relief and the issue is purely academic. Marriage of T., 68 Wn. App. 329, 336, 842 P.2d 1010 (1993). Rather than taking the narrow approach suggested by Mr. Rohde, Washington courts have shown themselves willing to take a common sense, realistic view of mootness.

For instance, in State v. Raines, 922 P.2d 100, 83 Wn. App. 312, 315 (1996). Mr. Raines had been convicted of six violations of community placement. Id. at 313. The State argued that because Mr. Raines had already served his sentence and completed his term of community placement, effective relief was not possible. Id. at 315. The Court took a broader view, however: “[i]f the modified sentence remains intact, it could affect future sentencing decisions should Raines reoffend.” Id. at 315. In the Court’s view, the potential impact on Mr. Raines’ future offender score should he possibly reoffend is not academic; meaningful relief includes any potential that the individual may be impacted in any way, whether currently foreseeable or not.

Here, Ms. Rohde would obtain meaningful and effective relief were this Court to modify the maintenance award as requested. The parties' post-trial CR2A settlement agreement does not dispose of this issue. That agreement provides that so long as Ms. Rohde resides inside Creekside Elementary School District boundaries, where their 7 year old is currently enrolled, "little Joe" (the parties' minor child) shall be enrolled at Creekside and the maintenance payments for the remainder of the term provided for in the Decree of Dissolution (entered August 2012) will be paid without the requirement that Ms. Rohde attends school. (Supp. CP \_\_\_, Sub. No. 221).

Should this Court provide the requested relief regarding the maintenance condition, Ms. Rohde would no longer be subject to the CR2A restriction regarding enrollment at Creekside, and no longer in danger of losing her maintenance should she fail to abide by this restriction. This result would be far from academic. (See Stottlemyre v. Reed, 35 Wn. App. 169, 171, 665 P.2d 1383 (1983)(CR2A agreements are governed by contract principles); Christiano v. Spokane County Health Dist., 93 Wn. App. 90, 95, 969 P.2d 1078 (1998)(contracts require offer, acceptance, and consideration); Krause v. Mariotto, 406 P.2d 16, 66 Wn.2d 919 (Wash. 1965) (the failure of a significant, material portion of the consideration for a contract constitutes grounds for its rescission);

Wilkinson v. Sample, 674 P.2d 187, 36 Wn. App. 266, 270, 274 (1983) (failure of consideration will justify rescission of a contract)).

Mr. Rohde has objected to Ms. Rohde's relocation to the more affordable Snoqualmie Ridge community and the parties' relocation trial is currently scheduled for August 19. The issue of the maintenance condition is not moot.

3. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT CONDITIONED FURTHER MAINTENANCE ON MS. ROHDE'S FULL-TIME ENROLLMENT IN SCHOOL

“What is a reasonable length of time for a divorced spouse to become employable and provide for his or her own support, so that maintenance can be terminated, depends on the particular facts and circumstances of each case.” Spreen v. Spreen, 107 Wn. App. 341, 348, 28 P.3d 769 (2001). The maintenance award to Ms. Rohde was not based upon fair consideration of the facts and circumstances of the, making it an abuse of discretion. Id.

The trial court's maintenance award might have been fair and appropriate in some 9 year marriages; in a marriage in which the wife is fluent in English, has two children in good health with no special needs, and has a significant work history in this country, the trial court's award would be workable and fair.

Here, in contrast, Ms. Rohde is not fluent in English, she is characterized by parenting evaluator Pam Edgar as the “majority

parent” of a child with special needs who can require up to 30 hours per week of intensive interventions for which she has the “lion’s share” of responsibility, and she has no significant work history here. 7/31/2012 RP 373, 8/1/2012 RP 483, 487-89, 508.

Ms. Edgar went so far as to characterize the parties’ relationship as “a very traditional” marriage in which Ms. Rohde had total responsibility for the children. 7/31/2012 RP 320. According to Ms. Edgar, it was likely that after the divorce, regardless of the parenting plan, this would continue to be the case. 7/31/2012 RP 373. Ms. Rohde does not have a formal 4 year Chinese degree as suggested by Mr. Rohde’s brief (Brief of Respondent at 21); rather, in China, she simply studied English for several years, a skill which will not gain her a job here. CP 91. When the parties’ oldest child was born, Mr. Rohde refused to pay for her to continue her education beyond the two years of community college she had built up before marriage. 7/31/2012 RP 273.

Ms. Rohde explained to the trial court that given the amount of time required to care for her special needs son, she believed that she could finish up her accounting degree in three more years; she specified that this meant attending part time. 8/1/2012 RP 415.

Ms. Rohde's work history has been spotty since the parties' marriage. She worked at a company performing various duties including some bookkeeping for \$29,000, held a few low-paid, entry level positions for short periods of time, then shortly after marriage opened a stone and tile import business. 8/1/2012 RP 413-14.

Mr. Rohde claims that because Ms. Rohde received a disproportionate share of the \$545,551 community estate, spousal maintenance was not needed. BOR at 21. The community split was 53/47. CP 253. Ms. Rohde was awarded separate property of \$10,252. Mr. Rohde was awarded separate property of \$150,179. CP 255.

Mr. Rohde also mentions that the one year of maintenance Ms. Rohde received pretrial was a significant benefit to her. Yet while Mr. Rohde earned \$220,000 that year, Ms. Rohde's total maintenance for that year was \$40,000, most of which went to mortgage, insurance, and car payments. CP 33.

Requiring Ms. Rohde to attend school full time, presumably at the University of Washington, obligates her to pay \$13,603 of her after-tax income for tuition and fees in 2013-14 (See Univ. of WA. cost chart at [http://opb.washington.edu/sites/default/files/opb/Tuition/2013-14\\_Annual\\_TF.pdf](http://opb.washington.edu/sites/default/files/opb/Tuition/2013-14_Annual_TF.pdf) – tuition and fees are \$12,397), plus \$1,206 for

books (see University of Washington cost chart at

<https://admit.washington.edu/Paying/Cost#freshmen-transfer>)

Viewing all the circumstances as a whole, the full-time education requirement leaves Ms. Rohde in an untenable financial position.

The aims of the maintenance statutes can only be achieved by requiring Ms. Rohde to maintain part-time education. This Court should reverse the maintenance condition and remand for inclusion of a part-time education condition.

4. THE TRIAL COURT ERRED BY FAILING TO INCLUDE MR. ROHDE'S ANNUAL BONUS IN ITS CALCULATION OF CHILD SUPPORT

Contrary to Mr. Rohde's suggestion, his bonus is not non-recurring. He earned \$215,525 including his bonus in 2010 and \$220,679 including his bonus in 2011. Exh. 96. Yet the trial court calculated child support based upon only his base income of \$185,000. CP 224, 8/10/2012 RP 718. Since Mr. Rohde received bonuses in 2010 and 2011, and since he is a highly paid software professional, the trial court's calculation of his base salary as \$185,000 lacked support in the record and was in direct violation of RCW 26.19.071.

Mr. Rohde's suggestion that this Court should consider facts about Mr. Rohde's later income which lie outside the record should be rejected. RAP 9.1(a) provides:

Generally. The "record on review" may consist of (1) a "report of proceedings", (2) "clerk's papers", (3) exhibits, and (4) a certified record of administrative adjudicative proceedings.

If Mr. Rohde wished to add additional facts to the record, he should have complied with RAP 9.11, which sets forth the procedure and criteria for consideration of additional facts after transmittal of the record to this Court. As he has not followed this procedure, this Court's review should be limited to the facts in the record.

The Court was aware that Mr. Rohde receives a predictable annual bonus, because the Court stated "I included as a comment that the father has a variable annual bonus up to \$20,000 per year because that needs to be part of the decision making." RP 718. RCW 26.19.071 is unambiguous that regular annual bonuses must be counted as gross income for child support purposes. Accordingly, this Court should remand and direct the trial court to re-calculate the child support with Mr. Rohde's bonus included.

5. THIS COURT SHOULD NOT DISTURB  
THE TRIAL COURT'S DECISION NOT  
TO IMPUTE INCOME TO MS. ROHDE  
WHILE SHE IS ATTENDING SCHOOL

The trial court declined to impute income to Ms. Rohde while she is in school. 8/10/2012 RP 718-19. Income is imputed when the parent is voluntarily unemployed or voluntarily underemployed. RCW 26.19.071(6). Determination of whether a

parent is voluntarily un-or-underemployed is a fact-specific analysis performed on a case-by-case basis by the trial court: "... based upon that parent's work history, education, health, and age, or any other relevant factors." Id. Here, the record supports that Ms. Rohde's attendance at school combined with her majority responsibility for the care of an autistic child form a sufficient basis upon which the trial court may exercise its discretion to decline to impute income.

Further, the record shows that Ms. Rohde has made efforts to find work since separation, and is not voluntarily unemployed:

Q: Okay. What sort of jobs were you looking for?

A: I looked a lot of, I was thinking to have a home daycare so I can care for Nate and other kids. My big effort was there. And I also know before this is all done I can't have a full time job and then to do the divorce. So the daycare nanny job just temporary. I also look at work at the gym where I take the children to. There is, the gym has temporary jobs. And I also look some bookkeeping job. And there is Chinese company. I looked there.

8/1/2012 RP 450.

Mr. Rohde argues that the trial court lacked authority to exercise discretion regarding imputation of income. BOR at 29. Yet the plain language of RCW 26.19.071 vests discretion in the trial court. See In re Marriage of Foley, 930 P.2d 929, 84 Wn. App. 839 (1997). While the trial court is bound to follow the guidelines of RCW 26.19.071, the record shows that it did so in

this case. This Court should not disturb the trial court's decision regarding imputation.

B. CONCLUSION

The trial court abused its discretion by conditioning further maintenance on Ms. Rohde's full-time enrollment in school; given her majority responsibility for the parties' young autistic son, this requirement is not reasonable. The maintenance condition issue is not moot, since the parties' post-trial CR2A agreement does not resolve it and meaningful relief can be granted.

The trial court admitted that Mr. Rohde receives an annual bonus as a highly paid software employee, and had no discretion to exclude it from calculation of child support; therefore it was an abuse of discretion for the court to fail to include it.

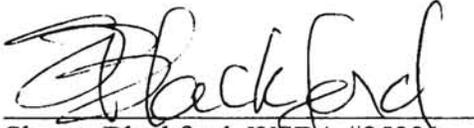
Ms. Rohde preserved the issue of Chinese New Year by including it in her proposed parenting plan, asking the parenting evaluator for it, and raising the issue during the evaluator's testimony.

Finally, the trial court had the discretion to decline to impute income to Ms. Rohde given her particular circumstances, thus this Court should not disturb that ruling.

For these reasons and for the reasons set forth in Ms.  
Rohde's Opening Brief of Appellant, this Court should reverse.

DATED this 17<sup>th</sup> day of July, 2013.

Respectfully submitted:

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

Sharon Blackford, WSBA #25331  
SHARON BLACKFORD PLLC  
Attorney for Appellant Shudan Zhu Rohde