

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 42334-1-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

GARY A. TOLLEFSEN,
Appellant,

v.

VALERIE D. TOLLEFSEN,
Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

This is a child support case. The underlying child support order was entered when the subject child of the parties was just eleven years of age. In addition to a higher than standard calculation transfer payment, post-secondary educational support was addressed--not reserved, and the transfer payment was to continue in addition to post-secondary educational support. There was, however, a typical termination provision where child support would end when the child turned 18 or graduated from high school, whichever occurred later. The post-secondary educational support provision overrode the termination language if the child attended college.

The minor child struggled throughout high school. She attempted an occasional college class without success. She turned 18 in August, 2009, and dropped out of high school by November, 2009. When the obligor father learned this information in April, 2010, he promptly filed a motion to at least suspend his support obligation. The mother filed a motion to continue post-majority support a month later, alleging that the child had mental disabilities. The trial court repeatedly ordered the father to continue to pay child support pending trial.

By August, 2010, the child obtained her GED certificate. The child then presented no indication that she would be attending college. The father had already paid support for that month, which was the month the child would turn 19 years of age. The father was not seeking any reimbursement of amounts paid to date, so offered that his motion appeared moot under the totality of the known circumstances.

However, the court again ordered that the father should continue to pay post-majority child support, for at least 30 days after the child's nineteenth birthday. Within that 30 day window, the child signed up for online classes at Phoenix University, without any input from or prior notice to the father. The father objected on several grounds, and immediately requested review of the post-secondary educational situation. At no time did the mother or child file any motion regarding post-secondary educational support. Yet another order was entered requiring the father to continue to pay post-majority support pending trial.

Trial finally occurred in May, 2011. While testimony was offered that the child had mental health diagnoses, and prescriptions for those issues, her counselor also opined that the child was doing well and her illnesses should not interfere with her ability to attend college full-time. Testimony was also offered indicating the child wanted nothing to do with her father except when she wanted money from him. The trial judge

ordered post-majority support to continue indefinitely. The post-secondary educational support provisions were modified to require the father to pay one-half of the costs should the child enroll in a state institution. The trial judge acknowledged in his oral decision that the court had made mistakes every time it did not terminate the father's support obligation, which should have properly ended when the child had dropped out of high school in November, 2009.

The father appeals, arguing that he should bear no legal obligation for child support of any sort after November, 2009. The father does not seek reimbursement or refund of any amounts he had paid to the date of trial—May 27, 2011.

II. ASSIGNMENTS OF ERROR

1. The trial court erred, on five separate occasions—May 10, 2010, August 12, 2010, October 18, 2010, May 27, 2011, and June 3, 2011--by entering orders that expressly or effectively required Gary Tollefsen to continue to pay post-majority support because (a) Lila Tollefsen had already met the conditions for termination of child support by reaching the age of majority and dropping out of high school and (b) no motion to extend post-majority support was timely filed.
2. The trial court erred in granting Valerie Tollefsen's motion to extend post-majority support because (a) the motion was not timely filed, and (b) based on the expert testimony, there was no showing of 'compelling circumstances.'
3. The trial court erred in entering any order for post-secondary educational support where (a) the underlying child support order termination language was satisfied, (b) the original order for post-secondary educational support was entered when the child was eleven years of age and was therefore *void ab initio*, (c) there was a motion to review all aspects of the prior post-secondary educational support provisions, including the choice of college, by the obligor parent, and (d) there was no motion whatsoever from the obligee or on behalf of the child for new post-secondary educational support orders.

ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Does child support obligation automatically and with finality end when the termination clause provisions of the child support order are satisfied?
2. Do voluntary continued payments of child support by the obligor, who lacks knowledge that the termination clause provisions of the child support order are satisfied, constitute anything other than a reimbursable overpayment?
3. Where the termination clause provisions of the child support order are satisfied, and a motion for continued post-majority support is not filed for several months thereafter, does the court have any jurisdiction to consider such motion?
4. Where a child support order is entered when a subject child is just eleven years of age, and that order sets forth specific provisions for post-secondary education support, is that aspect of the order enforceable?
5. Where the termination clause provisions of the child support order are satisfied, and the subject child has neither applied to nor been accepted at any post-secondary institution for approximately ten months thereafter, and no motion has been filed by the obligor or on behalf of the child for post-secondary educational support, does the court have any jurisdiction to award post-secondary educational support?

III. STATEMENT OF THE CASE

Appellant Gary Tollefsen (“Gary”) and Respondent Valerie Tollefsen (“Valerie”) were divorced on February 5, 2003. An Order of Child Support was entered on that same date. CP 1. The parties have two children, Nathaniel, then age 20, and Lila, then age 11. CP 2.

Pursuant to the Order of Child Support, Gary was to pay a transfer payment of “\$1,000.00 per month in child support for Lila until she reaches age 18 or graduates from high school, whichever comes last.” CP 3. This amount was an upward deviation from a standard calculation of \$882.32 for one child. CP 4; CP 8-12. Separate provision was made for the support of Nathaniel, which recognized his suspected disabilities. CP 3. No disabilities or mental illnesses of Lila were known or suspected at the time. Lila’s mental health issues were first raised to her doctor in 2006. RP 73, l. 12-25, p. 74, l. 1-13.

The 2003 support order also addressed post-secondary educational support for both children as follows:

In the event that the children pursue a post-secondary education then, in addition to support provided for in paragraph 3.5 Obligor parent shall pay the tuition, book expenses and student fees, if any, for both children. If a child opts to take a “break,” and not continue his/her post-secondary education for a reason other than illness then

the father is not responsible to resume his payments for tuition, book expenses and student fees.

CP 5.

The 2003 Order of Child Support was never modified.

By 2007 or 2008 Gary was aware that Lila was having difficulty in high school. RP 25, l. 8-14. In August, 2009, Lila turned 18 years of age. By November, 2009, by her own admission, Lila had dropped out of high school. RP 132, l. 10-12. Lila did attempt random and sporadic classes at Grays Harbor College without success. RP 115, l.19-25—RP 116, l. 1-5.

In March or April, 2010, Gary and Lila met for lunch. RP 20, l. 5-6; RP 105, l. 1-7. On April 19, 2010, Gary filed a Motion to Suspend Child Support. CP 13-14. When the motion was argued on May 10, 2010, the court expressly ordered that Gary continue to pay child support pending a testimonial hearing on the motion. CP 15.

Also, on May 10, 2011, Valerie filed a Petition/Motion for Child Support to Continue. CP 16-17. That motion sought to continue the post-majority, non-post-secondary support until Lila was 23 years of age, based on alleged non-specific health concerns.

Lila “waited a few months” after dropping out of high school before she started working toward her GED certificate. RP 132, l. 13-15. Sometime after the filing of Gary’s motion in April Lila began working

toward her GED. RP 149, l. 5-16. Lila completed her GED in July, 2010, CP 25, l. 9-14. The GED was only completed after a delay of some indeterminate period of weeks or months of no action by Lila, when she took the final necessary test. RP 112, l. 4-5; 5/27/11 RP 148, l. 19-25-- RP 149, l. 1-9.

The completion of the GED certificate was disclosed to Gary just a couple of days before the August 12, 2010 scheduled testimonial hearing on Gary's Motion to Suspend Child Support. CP 25, l. 9-14; CP 69-71. Since Lila was then nearly 19 years of age, had completed her GED, had no disclosed college plans or evidence of application or acceptance at any college, and Gary was not seeking to be reimbursed for any child support he had paid thus far, the parties entered an order agreeing Gary's motion was moot. CP 18-19. Gary was ordered to continue to pay post-majority support for, at least, thirty days after Lila's nineteenth birthday. CP 18-19.

Lila scrambled to enroll in a post-secondary institution after being lectured by the court on August 12. RP 146, l. 19-25—RP 147, l. 1-24. Lila chose the University of Phoenix ("Phoenix") online school, without making any effort to involve Gary in the decision-making process, RP 148, l. 11-13; RP 28, l. 3-5. Lila previously led Gary to believe she was considering only Grays Harbor College. RP 28, l. 13-15. Lila did not seriously research any state school online programs. RP 148, l. 5-10; RP

116, l. 6-23. Gary was first provided information about Phoenix in late August. CP 66-71. Gary was only informed of Lila's actual enrollment at Phoenix in September, CP 60-64, when he was asked to pay an exorbitant tuition bill. CP 61.

Gary objected to Phoenix, based its high costs, and for several other reasons, in a Motion and Affidavit re: Post Secondary Support filed on September 9, 2010. CP 33-37. Gary sought review of his post-secondary support obligation, as well as Lila and Valerie's unilateral choice of Phoenix. When the motion was argued on October 18, 2010, Gary was ordered to continue to pay post-majority support pending another testimonial hearing, which was initially to be by December 31, 2010. CP 100; RP 11, l. 6-11. Unfortunately, the hearing was delayed until May 27, 2011. RP 12, l. 15-20.

The May 27, 2011 trial therefore encompassed Valerie's request to extend post-majority support to age 23 based on claimed mental health disability, as well as Gary's request to review the post-secondary support obligation generally and as to choice of schools.

At trial, it was not disputed that Lila had past mental health issues. Dr. Teveliet, Lila's physician, testified that Lila is diagnosed as having bipolar disorder and anxiety issues. RP 72, l. 8-9. Lila is prescribed medications for those issues through her psychiatrist. RP 72, l. 10-13; RP

77, l. 1-16. Drinking alcohol or using recreational drugs interfere with the effectiveness of those medications. RP 78, l. 5-7. Lila has consumed alcohol and methadone, without a prescription, while on her psychiatric drugs. RP 78, l. 8-20; RP 112, l. 15-21; RP 127, l. 13—RP 128, l. 12.

Lila's current counselor, Robert Holt, testified that he had not reviewed any of Lila's prior mental health records, RP 88, l. 4-18, and that he had only seen Lila six times since October, 2010. RP 87, l. 17-25—RP 88, l. 1-3. At the time of trial, Mr. Holt believed that Lila was doing well. RP 88, l. 2-3; RP 90, l. 8-11. Mr. Holt was also of the opinion that Lila's mental health issues should not interfere with her ability to attend college with a full course load. RP 89, l. 17-22; RP 90, l. 12-15. No evidence was presented indicating Lila's dropping out of high school, or two separate delays in obtaining a GED were in any way attributable to her alleged mental illnesses. Lila's psychiatrist did not testify.

The testimony at trial also revealed that there is virtually no relationship between Gary and Lila. It has been a number of years ago since Lila last had a visitation with Gary. RP 20, l. 7-10. Shortly after the April 2010 motion, Lila telephoned Gary, and screamed inappropriate remarks. RP 21, l. 1-7. When Gary underwent brain surgery and a two month recovery beginning in October, 2010, he heard not one word from Lila. RP 20, l. 11-22. Aside from the April lunch and a note at Christmas,

2010, Gary only heard from Lila when she wanted funds for a college class. RP 50, l. 7-25. Lila conceded that she considers her step-father as her father, RP 125, l. 10-12, and that she does not even want to keep Gary's surname. RP 126, l. 4-9. While Lila claimed to never initiate contact with Gary for monetary purposes, she admitted to asking Gary for college funds repeatedly, and did not identify any contact other than the Christmas note that was not asking for money. RP 126, l. 13-25. Lila admitted that she wants Gary to pay the entire cost for Phoenix, and that she was not willing to seek assistance from Social Security Disability or anyone else. RP 127, l. 1-5.

At the conclusion of testimony, Judge Gordon Godfrey acknowledged that it had been a mistake to repeatedly order Gary to pay post-majority child support because the entire support obligation should have terminated when Lila, at age 18, dropped out of high school in November, 2009. RP 161, l. 11—RP 162, l. 7. Nevertheless, Judge Godfrey went on to order that the \$1000 per month post-majority support continue until further court order. RP 164, l. 19-20. Judge Godfrey also modified the post-secondary support terms to require Gary to pay one half of the cost should Lila enroll in a state school. RP 165, l. 1-9. Gary did seek reconsideration of the post-majority support ruling, CP 175, but that motion was summarily denied. CP 117.

Gary has appealed the multiple orders requiring a continued payment of post-majority child support. Valerie has filed a cross-appeal, presumably regarding the modification of the post-secondary support provisions.

IV. SUMMARY OF ARGUMENT

A child support obligation ends with finality and certainty when the termination clause provisions of a child support order are satisfied, unless a proper petition has earlier been filed requesting to modify or continue that obligation.

Voluntary continued payments of child support by an obligor parent who lacks knowledge that the termination clause provisions of the child support order are satisfied are merely overpayments that are reimbursable to the obligor.

A court lacks jurisdiction to consider a request to order continued post-majority support when the termination clause provisions of a child support order are satisfied several months before the request is filed.

Post-secondary educational support provisions of a child support order entered when the subject child was just eleven years of age are not enforceable.

A court lacks jurisdiction to order post-secondary educational support when previously ordered terms are not enforceable, the underlying child support order termination clause provisions have been satisfied prior to any request for post-secondary educational support being filed, and nearly a year has passed since the termination of the underlying child

support obligation and the subject child has neither applied to nor been accepted at any post-secondary institution.

VI. ARGUMENT

The child support order herein was entered on February 5, 2003, when the subject child, Lila, was just eleven years of age. Paragraph 3.5 of the order required the appellant, Gary Tollefsen, to pay a transfer payment for Lila as follows:

The obligor parent shall pay \$1,000.00 per month in child support for Lila until she reaches 18 or graduates from high school, whichever comes last. If Lila elects to pursue a post-secondary education, child support for her will continue until she turns 23 years old.

Paragraph 3.13 defining termination of support conditions simply referred back to Paragraph 3.5.

Lila turned 18 years of age in August 2009. By November 2009, by her own admission at trial, she had dropped out of high school. Lila also testified at trial that it was several more months before she began seeking a GED certificate, and it took her several additional months to complete the GED testing.

Lila met with Gary in April 2010, and Gary then learned that Lila was no longer attending high school. Gary promptly filed to suspend, if not terminate, his child support obligation, believing that the provisions of Paragraph 3.5 would not require him to continue to pay at that time.

A person is emancipated as a matter of law upon reaching the age of majority, which is 18 years of age. RCW 26.28.010. “Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of the child are terminated by emancipation of the child. . . .” RCW 26.09.170(3). Here, the written order of child support did provide for support to continue until graduation from high school, if later than age 18.

Respondent Valerie Tollefsen and the child, Lila, have argued that the termination language of the support obligation is ambiguous because the unrelated post-secondary educational support language of Paragraph 3.14 of the support order contained reference to “breaks” from post-secondary education. Gary asserts this provision is irrelevant because Lila was not then in college.

Where an order is ambiguous, or possibly susceptible to more than one reasonable interpretation, the reviewing court should apply general rules of construction applicable to contracts, statutes, and other writings. Marriage of Gimlet, 95 Wn. App. 699 at 704-705 (1981). The interpretation of the order is a question of law, not fact. Ibid.

The alternative requirements that the child not be 18 years of age, or graduated from high school, whichever occurs later, constitute the conditions under which support would continue to be owing.

A “condition” is defined as “a future and uncertain event on which the existence or extent of an obligation of a liability depends; an uncertain act or event that triggers or negates a duty to render a promised performance.” Black’s Law Dictionary, (Seventh Edition), page 288. More specifically, a “condition precedent” is defined as “an act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises. If the condition does not occur and is not excused, the promised performance need not be rendered. The most common condition contemplated by this phrase is the immediate or unconditional duty of performance by a promissory.” Black’s Law Dictionary, page 289. Also, an “implied condition” is defined as “a condition that is not expressly mentioned, but is imputed by law from the nature of the transaction or the conduct of the parties to have been tacitly understood between them as a part of the agreement.” Black’s Law Dictionary, page 289.

Here, the conditions for the underlying child support obligation to continue hinge on the subject child either not yet being 18 years of age, or not yet having graduated from high school, whichever event occurs later. The implied condition are that the child is in fact attending high school full time, and making reasonable progress. When Lila turned 18 and then dropped out of high school, she failed to meet the conditions for continued

receipt of child support. Pursuant to RCW 26.09.170, the child support obligation was terminated as soon as Lila dropped out of high school after having reached her eighteenth birthday.

Thus, Gary's legal obligation to pay child support for Lila legally terminated in November 2009, even though he was then unaware that Lila had breached her conditions for continued support. The provisions for termination for support had been satisfied.

While the allegations of fact Gary raised in his April 2010 to suspend his support payments might have been slightly different from the testimony elicited from Lila and her mother at trial, Gary's motion should nevertheless have been granted on initial argument on May 10, 2010.

It is significant that Valerie's motion to continue to post-majority support was not filed until May 10, 2010, even if it was dated in April 2010, either of which was well after Gary's legal obligation to pay ended in November 2009. Petitions to establish post-majority support must be filed before the existing support obligation otherwise terminates. In re Marriage of Gillespie, 77 Wn. App. 342 (1995); Balch v. Balch, 75 Wn. App. 776 (1994); In re Marriage of Crossland, 49 Wn. App. 874 (1987). While a court ordinarily would have jurisdiction to award post-majority support (jurisdiction over the parties and subject matter), it does not have authority to do so if the support obligation has previously terminated. In

re Marriage of Major, 71 Wn. App. 531 (1993); In re Marriage of Campbell, 22 Wn. App. 560 (1978); Childers v. Childers, 89 Wn. 2d 592 (1978); RCW 26.09.170.

The fact that Gary continued to pay an amount equal to his child support obligation from November 2009 through April 2010, at a time when he was unaware that the termination clause provisions of the child support order were already satisfied, neither extends jurisdiction nor constitutes anything other than a mere overpayment, which is subject to judgment and reimbursement. Marriage of Stern, 68 Wn. App. 922 (1993). Similarly, the fact that the trial court erroneously required Gary to continue paying the underlying child support amount before eventually determining that his obligation should have terminated in November 2009, neither extends jurisdiction nor constitutes anything other than an overpayment which is subject to judgment and reimbursement.

A petition for post-secondary educational support must also be filed before the existing child support obligation terminates. Here, neither Valerie, nor anyone acting on Lila's behalf, filed a motion to modify, determine, or reaffirm provisions for post-secondary educational support. Instead, Valerie simply relies on the provisions set forth in the original 2003 Order of Child Support, under Paragraph 3.14 as follows:

In the event that the children pursue a post-secondary education then, in addition to support provided for in paragraph 3.5, Obligor parent shall pay the tuition, book expenses and student fees, if any, for both children. If a child opts to take a “break,” and not continue his/her post secondary education for a reason other than illness then the father is not responsible to resume his payments for tuition, book expenses and student fees.

This order of child support was entered when Lila was just eleven years of age. Case law indicates, that as a matter of public policy, that an eleven year old child is not proper fodder for consideration of post-secondary educational support provisions. See, e.g., Marriage of Studebaker, 36 Wn. App. 815 (1984). Neither is a ninth-grader, who would typically be 14 or 15 years of age. Marriage of Anderson, 49 Wn. App. 867 (1987). As such, an order of child support which purports to make specific provisions for post-secondary educational support for a eleven year old is *void ab initio*, which is defined as “null from the beginning, as from the first moment when a contract is entered into. A contract is *void ab initio* if it seriously offends law or public policy, in contrast to a contract that is merely voidable at the election of one party to the contract.” Black’s Law Dictionary, page 1568. Further,

When considering whether to order support for post-secondary educational expenses, the court shall determine whether the child is in

fact dependent and is relying upon the parents for the reasonable necessities of life. The court shall exercise its discretion when determining whether and for how long to award postsecondary educational support based upon consideration of factors that include but are not limited to the following: Age of the child; the child's needs; the expectations of the parties for their children when the parent 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. Also to be considered are the amount and type of support that the child would have been afforded if the parents had stayed together.

RCW 29.19.090(2)

Some of these factors, notably the child's prospects, desires, aptitudes, abilities or disabilities and the nature of post-secondary education sought are generally relatively unknown, and therefore cannot be properly considered, until the child is very late in his or her high school years. For this reason, post-secondary educational support provisions of the child support order are generally reserved unless the child is already well into his or her high school years. The need for post-secondary educational support is typically presented by the custodial parent, acting on behalf the child; filing a motion or petition to modify for post-secondary educational purposes. That would have been the proper

recourse to follow here, particularly in the face of the argument repeatedly raised that the father's support obligation should have properly and legally terminated completely as of November 2009. The mother did not timely follow such procedure in any fashion, and in fact had felt it necessary to file only her petition to continue post-majority support as of May 2010.

VI. CONCLUSION

Gary Tollefsen's child support obligations for Lila, be they general child support, post-majority child support, or post-secondary educational support, all legally and with finality and certainty ended when Lila, at age 18, dropped out of high school, in November 2009.

No petitions were properly and timely on the table for any sort of extension, for any purpose whatsoever, so authority to enter new orders or modify already existing orders no longer existed. The fact that Gary Tollefsen was not aware for a few months thereafter that Lila had breached the conditions necessary to continue to receive any support in no way operates to extend jurisdiction or the authority of the court to impose any support obligation. The several orders herein requiring Gary Tollefsen to continue to pay child support post-majority are therefore legally erroneous and should be set aside.

The end result is that Gary Tollefsen has paid \$1,000.00 per month in child support overpayments from December 2009 to this date. Gary is not seeking reimbursement of those overpayments through the month of trial, May 2011. This means that Lila and her mother have received a windfall of at least \$18,000.00 in overpayments.

Since no timely petitions were filed to extend post-majority child support to either impose, ratify, or modify post-secondary educational

support, all orders imposing any such obligation after November 2009 are improper and should be set aside.

Respectfully submitted this 1 day of December, 2011

Micheau Law

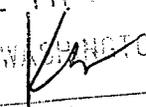
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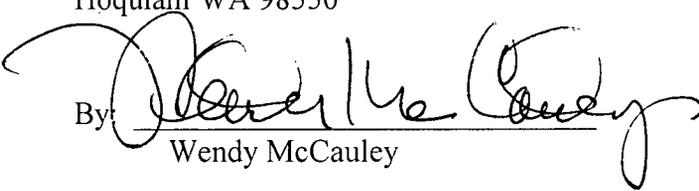
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CERTIFICATE OF SERVICE

I certify that on the 1st day of December, 2011, I caused a true and correct copy of this Brief of Appellant to be served on the following by U.S. Mail:

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