

FILED

OCT 25 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Cause No. 31690-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CINDY BROWN, Petitioner/ Appellant

v.

LAWRENCE BROWN, Respondent

OPENING BRIEF OF APPELLANT

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I. Assignments of Error.

Error 1:

It was error for the court to conclude that the petition for post-secondary support is "without basis in fact or law."

Issue 1: If the mother had provided the factual basis and RCW 26.09.170 provided the legal basis, then was the request for post-secondary educational support without a basis in fact and law?

Error 2: It was error for the court to award \$750 in attorney fees sanctions against the mother for bringing a petition for post-secondary education support.

Issue 2: If the specific basis for sanctions is not met, are the sanctions an abuse of discretion?

Error 3: It was error for the judge to not revise the commissioner's ruling, because the commissioner's decision was based on errors.

Issue 3: When the commissioner was wrong on the ages of the children by two years and frequently used the wrong standard for his findings or refused to make any findings, then are his findings and conclusions an abuse of discretion because they are manifestly unreasonable, exercised on untenable grounds and exercised for untenable reasons?

Error 4: It was error for neither the commissioner nor the judge to rule on attorney fees requested to be paid under RCW 26.09.140 from the ex-husband to the ex-wife.

Issue 4: Should the attorney fees sanctions here substitute for analysis under RCW 26.09.140?

ii. **Statement of the Case.**

The mother filed a petition to modify child support on April 18, 2012, to include a request to order post-secondary educational expenses for both sons. CP 1, 3 and 5. The mother is an elementary school teacher in Louisiana. CP 14, lines 19 - 21. Her net pay for child support purposes was found to be \$2,741. CP 52. At the commencement of the petition, the father was a Lieutenant Colonel in the US Army, and was to be promoted to Colonel in 2013. CP 15 Ins 3 – 5 and CP 5 Ins 1 – 4. His net pay before being promoted to Colonel was \$10,799.95. CP 21 Ins 14 - 15 and CP 66 Ins 8-16. The father's percentage of the child support obligation was found to be 75.5% to the mother's 24.5%. CP at 52.

By the time the commissioner signed the child support orders in March 2012, Christian was 17 and Carson was 12 years old. See CP 91-93 and CP 88-89. The WSCSSW was wrong. See CP 52. The mother explained that her financial need pushed her to bring the post-secondary educational support petitions with the general child support modification action, acknowledging that it was a bit early for Carson, though understood it was timely for Christian, who was a junior in high school. CP at 15 - 16. The mother provided facts and information relevant to the post-secondary

education statute of RCW 26.19.090 for Christian in particular, but also some for Carson. See CP 17 - 20; CP 40 - 45; CP 94 - 102. It was further discussed in the Mother's memorandum of authorities filed April 30, 2013, at CP 77 - 80.

Due to her financial need, the mother also asked for attorney fees to be paid by her ex-husband. CP 19. The court did not address the financial need assessment of the mother in her request for attorney fees under RCW 26.09.140. See CP 57. Instead, the court ordered \$750 in attorney fees against the mother for bringing the petition to modify too soon. CP 57.

III. Argument.

A. Ordering Sanctions against the mother for requesting post-secondary educational support was an abuse of discretion.

An order of sanctions is reviewed for an abuse of discretion. *Loc Thien Truong v. Allstate Prop. & Cas. Ins. Co.*, 151 Wn.App. 195, 207, 211 P.3d 430 (2009). An abuse of discretion occurs where an order is "manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons." *Noble v. Safe Harbor Family Pres. Trust.*, 167 Wn.2d 11, 17, 216 P.3d 1007

(2009). An error of law constitutes an untenable reason. *Id.*; *Wn. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). Issues of law are reviewed de novo. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 556, 852 P.2d 295 (1993).

A trial court may impose sanctions according to court rules or under its own equitable authority upon a finding of “bad faith.” *State v. Gassman*, 175 Wn.2d 208, 210-11, 283 P.3d 1113 (2012).

Commissioner Rugal ordered sanctions because “The petition for post-secondary support is premature and without basis in fact or law.” CP 88 Ins 27 - 28. He does not cite CR 11, but CR 11 does contain similar language. CR 11 permits attorney fees sanctions against anyone who signs a document that is either not well grounded in fact or warranted by law. See CR 11. This appellate brief analyses the impropriety of ordering the sanctions under CR 11. If Respondent offers another possible basis, that will be analyzed on reply.

A petition must lack a factual or legal basis before CR 11 sanctions can be imposed. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992). The threshold for imposing CR 11 sanctions is high. *Skimming v. Boxer*, 119 Wn.App. 748, 754,

82 P.3d 707 (2004). “Because CR 11 sanctions have a potential chilling effect, the trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success. The fact that a complaint does not prevail on its merits is not enough.” *Loc Thien Truong*, 151 Wn.App. at 208.

In reversing CR 11 sanctions as an abuse of discretion, the *Dutch Village* court cited the long-standing principle that CR 11 sanctions should not “chill” representation. *Dutch Village Mall v. Pelletti*, 162 Wn.App. 531, 256 P.3d 1251 (2011)(citing *Loc Thien Truong v. Allstate Prop. & Cas. Ins. Co.*, 151 Wn.App. 195, 208, 211 P.3d 430 (2009)).

Recently, our Supreme Court has noted the same standard, refusing to impose CR 11 sanctions based only on a claim that a filing was not well grounded in fact or warranted by existing law under CR 11(a). CR 11 is not intended to chill an attorney’s enthusiasm or creativity to pursue legal theories. “[t]he purpose behind CR 11 is to deter *baseless* filings and to curb abuses of the judicial system,” but “the rule is not intended to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories.” *Condon v. Condon*, 177 Wn.2d 150, 166, 298 P.3d 86, 93 - 94 (2013).

Our 2013 Supreme Court still relied on the classic case for exploring sanctions in *Bryant v. Joseph Tree, Inc*, which lays out in detail a full discussion of CR 11 being used to curb abuses of the judicial system if it has no chance of success as follows: (emphasis added):

The petitioners first argue that the Court of Appeals erred in determining that a complaint may not be the subject of CR 11 sanctions without a finding that the complaint lacked a factual or legal basis. The petitioners maintain that CR 11 sanctions may be imposed against an attorney ^[2] regardless of whether or not the attorney's complaint has a factual and legal basis. The text of CR 11 does not explicitly require a finding that a pleading lack a factual or legal basis Before the court may impose CR 11 sanctions. We must therefore look to the purpose behind CR 11 to determine if such a finding is required.

The present CR 11 was modeled after and is substantially similar to the present Federal Rule of Civil Procedure 11 (Rule 11). See *Miller v. Badgley*, 51 Wash.App. 285, 299, 753 P.2d 530, review denied, 111 Wash.2d 1007 (1988). We may thus look to federal decisions interpreting Rule 11 for [219] guidance in construing CR 11. *In re Lasky*, 54 Wash.App. 841, 851, 776 P.2d 695 (1989); see also *American Discount Corp. v. Saratoga West, Inc.*, 81 Wash.2d 34, 37, 499 P.2d 869 (1972) (construing CR 24 in light of Fed.R.Civ.P. 24).

The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system. See *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, --- U.S. ---, ---, 111 S.Ct. 922, 934, 112 L.Ed.2d 1140 (1991). Both the federal rule and CR 11

were designed to reduce "delaying tactics, procedural harassment, and mounting legal costs." 3A L. Orland, Wash.Prac., Rules Practice § 5141 (3d ed. Supp.1991). CR 11 requires attorneys to "stop, think and investigate more carefully Before serving and filing papers." See Fed.R.Civ.P. 11 advisory committee note, 97 F.R.D. 165, 192 (1983). "[R]ule 11 has raised the consciousness of lawyers to the need for a careful prefiling investigation of the facts and inquiry into the law." Commentary, Rule 11 Revisited, 101 Harv.L.Rev. 1013, 1014 (1988).

However, the rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. Fed.R.Civ.P. 11 advisory committee note, 97 F.R.D. at 199. The Ninth Circuit has observed that:

Were vigorous advocacy to be chilled by the excessive use of sanctions, wrongs would go uncompensated. Attorneys, because of fear of sanctions, might turn down cases on behalf of individuals seeking to have the courts recognize new rights. They might also refuse to represent persons whose rights have been violated but whose claims are not likely to produce large damage awards. This is because attorneys would have to figure into their costs of doing business the risk of unjustified awards of sanctions.

Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1363-64 (9th Cir.1990). Our interpretation of CR 11 thus requires consideration of both CR 11's purpose of deterring baseless claims as well as the potential chilling effect CR 11 may have on those seeking to advance meritorious claims.

Complaints which are "grounded in fact" and "warranted by existing law or a good faith argument for the [220] extension, modification, or reversal of existing law" are not "baseless" claims, and are therefore not the proper subject of CR 11 sanctions.

The purpose behind the rule is to [829 P.2d 1105] deter baseless filings, not filings which may have merit. The Court of Appeals therefore correctly determined that a complaint must lack a factual or legal basis Before it can become the proper subject of CR 11 sanctions.

If a complaint lacks a factual or legal basis, the court cannot impose CR 11 sanctions unless it also finds that the attorney who signed and filed the complaint failed to conduct a reasonable inquiry into the factual and legal basis of the claim. See Townsend at 1362 (a filing may be subject to Rule 11 sanctions where it is both baseless and made without a reasonable and competent inquiry). The fact that a complaint does not prevail on its merits is by no means dispositive of the question of CR 11 sanctions. CR 11 is not a mechanism for providing attorney's fees to a prevailing party where such fees would otherwise be unavailable. *John Doe v. Spokane & Inland Empire Blood Bank*, 55 Wash.App. 106, 111, 780 P.2d 853 (1989).

The reasonableness of an attorney's inquiry is evaluated by an objective standard. Miller, 51 Wash.App. at 299-300, 753 P.2d 530. CR 11 imposes a standard of "reasonableness under the circumstances". Fed.R.Civ.P. 11 advisory committee note, 97 F.R.D. at 198; see also Miller at 301, 753 P.2d 530. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion or legal memorandum was submitted. See Fed.R.Civ.P. 11 advisory committee note, 97 F.R.D. at 199. The court should inquire whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified. *Spokane & Inland Empire Blood Bank*, 55 Wash.App. at 111, 780 P.2d 853 (quoting *Cabell v. Petty*, 810 F.2d 463, 466 (4th

Cir.1987)). In making this determination, the court may consider such factors as:

the time that was available to the signer, the extent of the attorney's reliance upon the client for factual support, whether [221] a signing attorney accepted a case from another member of the bar or forwarding attorney, the complexity of the factual and legal issues, and the need for discovery to develop factual circumstances underlying a claim.

Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 218-21, 829 P.2d 1099 (1992) *emphasis added*.

In the case at bar, it was not patently clear, not under the law, nor under the facts, that the petition had no chance of success.

B. The children were an appropriate age to ask for post-secondary educational support.

Washington law on post-secondary education does not have a specific age that is "too young" to ask for the support. It only has a too old age (23), and a preclusion if the child is not still dependent. "The court shall 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) "The court shall not order the payment of postsecondary educational expenses beyond the child's twenty-third birthday, except for exceptional circumstances,

such as mental, physical, or emotional disabilities.” See RCW 26.19.090 (5).

Without any other legal preclusions, the age of the child is merely one of the facts the court is to consider when exercising its discretion to order child support. See RCW 26.19.090 (2). What the court is not authorized to do under RCW 26.19.090, is to sanction an attorney or client for even asking for post-secondary educational support for a 16-17 year old or an almost 13 year old.

The commissioner wrongly found the children’s ages to be 15 and 11. CP 63, Ins 5 - 7. He erred in this material fact by two years, since the children are 17 and almost 13. CP 91 - 93. But, even if the children were 15 and 11, that should not warrant sanctions either.

The commissioner used the wrong ages of the children as the greatest reason to not order post-secondary child support. See Commissioner Rugal’s oral ruling at CP 63, Ins. 7, 15, 20; CP 64, Ins 2, 10, 13, 18 and 22; and CP 66 In 4.

Case law interpreting RCW 26.19.090 is sparse. There are no cases suggesting nor ruling that the children at bar are too young (whether 11, 13, 15 or 17). The case law does support a conclusion that post-secondary education orders for very young

children, e.g. 6 and 8 year olds, is too young and would be denied. There are two examples of children too young. The court noted for an 8 year old in, *In re Parentage of Goude*, 152 Wn.App. 784, 791, 219 P.3d 717 (Div. 3, 2009), that the first child support order was entered when the child was eight years old and at eight, as a matter of law, the ability to attend college was not well established. Quoting *In re Marriage of Kelly* the court noted, "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." The *In re Marriage of Kelly* court noted that it would have been improper to enter a post-secondary education support award when a child was 6 at the time of the divorce. *In re Marriage of Kelly*, 85 Wn.App. 785, 793, 934 P.2d 1218 (1997).

There are no found cases even suggesting it is improper to order post-secondary education support when children are between 11 through 17 years old. The obligation to pay child support is based on dependency, not on minority. *Sagner v. Sagner*, 159 Wn.App. 741, 748, 247 P.3d 444 (2011). On September 23, 2013, Division 1 upheld a postsecondary education support order for a 16

year old, who had not yet applied for college. That request was combined with a general modification of child support action and a post-secondary support action for an 18 year old sibling. See *In re Marriage of Morris*, 309 P 3d 767, 769 (2013).

Had Petitioner brought a request for post-secondary educational support when a child was no longer dependent on the parents, such would be a frivolous motion since it would directly violate a statute. But, to bring a petition for post-secondary education concurrent with a general modification to child support, when the child is a junior in high school, cannot be considered unnecessary or frivolous. The mother's request is both proactive (which should be encouraged), and in compliance with statutory and court order requirements.

C. An appropriate basis in fact and law was provided to the court for post-secondary educational support.

In his oral ruling, Commissioner Rugal ordered \$750 in sanctions because he felt "that this was an unnecessary motion that was brought." CP 67 Ins 12-14. In the final documents he ups the ante to "no basis in fact or law." CP 88 Ins 27-28. That legal conclusion flies in the face of his analysis of the RCW 26.19.090 criteria in his oral ruling. See CP 63-66. And, additionally, his

analysis and findings on most of the factors lie outside the range of the evidence or are based on the wrong standard, in any event.

At CP 63, Ins, 14 - 15 of his oral ruling of December 17, 2012, the commissioner finds the children to be 15 and 11 years old which is two years younger than they actually are. *See CP 91 - 93 and see CP 15 Ins 21 - 22 (referring to them as a 7th grader and a junior in high school).*

At CP 63, Ins 16-18 the commissioner acknowledges that the mother provided some data on the children's post-secondary education needs, but dismisses it as being too premature for an 11 year old and does not address it for the 17 year old. The mother discussed the needs in her 11/26/12 declaration. *See CP 15, In 5 - CP 18, In 14.*

At CP 63, Ins 22 - 25 the commissioner acknowledges that the parties' expectations are college bound children.

At CP 64 Ins 1-4 the commissioner acknowledges that the prospects for a 15 year old are "likely," but not "for sure." The mother provided evidence of the children's prospects in her opening declaration at CP 16, In 4 – CP 17, In. 3.

At CP 64 Ins 5 – 11, the commissioner acknowledges that evidence was presented for the desires of the older child, but

dismisses the younger child as not having the ability to desire a career. The mother had provided evidence of the children's desires for the older child Christian, at CP 17, Ins 4 - 6, and for the younger one, Carson, at CP 18 Ins 1 - 2.

At CP 64, Ins 12 -16 the commissioner dismisses the evidence that was presented on aptitudes, claiming it will all change as the (11 and 15 year old) get "slightly older." The mother provided college bound aptitude evidence for both children. See CP 16 In 2 - CP 17 In 2.

At CP 64, Ins 17 -19 the commissioner dismisses the evidence on abilities and disabilities, due to not being close enough in age to college (for the wrongly determined ages of 15 and 11). But the mother had provided such evidence at CP 16 In 4 - CP 17 In 2.

At CP 64 Ins 20 - 25, the commissioner again dismisses the evidence on where the children would go to college as the children were too young. The mother had provided evidence that they would be attending in state, Louisiana schools. See CP 16 Ins 2 - 3 and Ins 16 - 21.

At CP 65 Ins 2 - 9, the commissioner finds evidence in support of the parent's level of education, standard of living and

current resources. He declines to find for future resources as “not knowing exactly.” The mother had provided evidence on the future resources of the parties at CP 14 In 19 - CP 15 In13; and CP 43 Ins 15 - 18.

At CP 65 In 24 – CP 66 In 4 the commissioner concludes that nearly every fact in support of post-secondary education requires the court to make assumptions, especially for an 11 year old, which the court refused to do. But, the post-secondary ed. support was most seriously being requested for the junior in high school. See CP 15, Ins 20 - 22.

Although the court has the discretion to not award post-secondary educational support, it is an untenable basis to make all the findings based on the wrong ages of the children, and a material error when almost all of the other findings on the factors was colored by that error.

“A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.... A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on

untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *Katara v. Katara*, 125 Wn.App. 813, 822-823, 105 P.3d 44, 48 - 49 (2004) (citing *Littlefield*, 133 Wn 2d at 46 - 47, 940 P.2d 1362.

Here, when the commissioner based all of his analysis on the wrong ages of the child, his findings were untenable, as they were outside the range of acceptable choices.

Additionally, had the commissioner not been looking for something akin to clear and convincing, unequivocal proof of the facts necessary for post-secondary support, rather than a mere more-probably-than-not standard, the mother’s request may also have been successful. For example, the commissioner felt uncomfortable making “assumptions” about the future, See CP 66 Ins 1 – 7. But, those same factors within the post-secondary educational support statute to which he complains and where he refused to go, require judicial reasoned projections into future circumstances of the children and, even more complicated: of the parties’ previous expectations of the children’s future support. See RCW 26.09.170 (2) (requiring findings on the future resources of the parties; the child’s prospects; the child’s need for their future college education which will necessarily be between the future ages

of 18 and 22; and the nature of the college education sought (either by parents or children)). When the statute requires projections and expectations to be found as facts, the court denies a request for untenable reasons if he refuses to project where the statute requires him to project.

By Ms. Brown providing evidence on each of the post-secondary factors of RCW 26.19.090, it is not patently clear that Ms. Brown had no chance of success in her post-secondary educational request for her sons.

Had the commissioner not made errors of fact and law, and had the judge not upheld the commissioner's decision, Ms. Brown's request could have been successful.

Until reversal, the Spokane County judicial officer's use of sanctions to discourage legal theories to which they do not agree, certainly has a chilling effect on the practice of family law in Spokane County. Reversal is necessary.

D. While improperly ordering attorney fees sanctions to the mother, the court overlooked its responsibility to consider attorney fees under RCW 26.09.140.

Appellant had a need for financial assistance with attorney fees. This court should take judicial notice that she has even filed for bankruptcy, as she filed a notice of stay in the court of appeals. She had provided a financial declaration and financial information to the lower court. CP 28-33. The court found the difference in incomes was significant at approx. 75% to 25%. Financial declarations from the father had also been provided to the court. See CP 21 – 26. But, the request for attorney fees based on the mother's need and the father's ability to pay (CP 84) was ignored by the court. Instead, the mother was ordered to pay attorney fees sanctions of \$750 to the father. CP 67 and CP 90. CP 88. The mother asks that the court remand on this issue for the court to determine if attorney fees are awarded to the mother under a need and ability to pay analysis of RCW 26.09.140 is warranted.

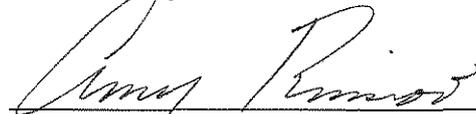
RAP 18.1 Attorney Fees.

The mother also requests attorney fees by this court for this appeal under the need and ability to pay analysis of RCW 26.09.140. The record, as noted above, shows her need and the husband's ability to pay. Appellant will submit her current financial statement at a time closer to oral argument.

Conclusion.

No reasonable basis exists for ordering the mother to pay \$750 in sanctions to the father because the mother's request was with both a legal and factual basis and not done in bad faith. The court should have considered and ruled on the attorney fees requested by the mother from the father under the need and ability to pay standard. Remand is necessary to vacate the order on sanctions, require that the trial court consider attorney fees to the mother, and revise the commissioner's findings with instructions.

Respectfully Submitted this 25th day of October, 2013



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