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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Marriage of PAUL and ALICJA Z. HERRIOTT.	B255032
ALICJA Z. HERRIOTT, Appellant, v. PAUL BARRETT HERRIOTT, Respondent.	(Los Angeles County Super. Ct. No. BD415787)

APPEAL from orders of the Superior Court of Los Angeles County. Maren E. Nelson, Judge. Affirmed.

Alicja Z. Herriott, in pro. per., for Appellant.

Paul Berrett Herriott, in pro. per., for Respondent.

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This is appellant Alicja Z. Herriott's (wife) third appeal since her divorce from respondent Paul Barrett Herriott (husband) became final in April 2005.[1] The two prior appeals were consolidated (case Nos. B23420 and B233061). There, we reversed with directions to the trial court. Here, wife challenges the trial court's order that determining husband's obligation to pay child support terminated by operation of law (the November 2013 order).[2] Wife contends the trial court erred by (1) finding A.H. was not a full-time high school student, (2) failing to require a showing of change of circumstances necessary to terminate child support, and (3) modifying child support retroactive to a date prior to when the motion for termination was filed.[3] Husband counters: (1) the appeal should be dismissed because it stems from a nonappealable order and (2) wife should be sanctioned for a frivolous appeal. We affirm the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND

The facts concerning the divorce are set forth in our prior opinion. It is sufficient to note, after they were married in 1987, husband and wife had four children: R.H. (born in 1988), J.H. (born in 1989), P.H. (born in 1992) and A.H. (born in 1994). By the time Judgment of Dissolution was entered in November 2007 (the 2007 Judgment), only three of the four children were still minors. Consistent with a stipulation for allocated child support, the 2007 Judgment ordered husband to pay child support "until the first to occur

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[1] In May 2012, wife was declared a vexatious litigant. Her request to file a fourth appeal, case No. B242384, was denied in July 2012.

[2] See Family Code section 3901, subdivision (a) and section 4007, subdivision (a). All future undesignated statutory references are to the Family Code.

[3] Wife also contends husband is not entitled to credit for arrearages for earlier support payments and requests this court to credit her with $22,472.23 as a set off. But that issue was not litigated at the hearing on November 19, 2013, and the November 2013 order does not address it. Accordingly, we do not consider this contention. (See *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46 [notice of appeal that unambiguously designates a specific judgment or order is limited to that judgment or order].)

of the following circumstances: the child attains the age of eighteen (18) (except such support shall continue until the child graduates from high school or attains the age of nineteen (19), whichever occurs first, if the child is a full-time high school student who is not self-supporting) . . . ."

A. Post-Remand Proceedings in the Trial Court

Our prior opinion was filed in November 2012. About a month later, A.H. turned 18 years old. A.H. continued full-time as a high school student at Redondo Shore High School until June 2013. Soon thereafter, he moved to Minnesota to pursue a career in professional hockey. During that summer, the County Child Support Division (the agency), learned A.H. enrolled in summer school at Redondo Shore High School, but did not attend. Further, the agency discovered A.H. was not enrolled for the fall semester because he moved out of state.

As directed in our remand, the trial court conducted a hearing on child support/arrearages on August 23, 2013. The matter was continued several times. Meanwhile, the agency stopped collecting child support for A.H. because he was no longer a full-time high school student. On October 1, 2013, the agency alerted the trial court concerning A.H.'s educational status. Wife filed a declaration stating A.H. was attending high school in Minnesota. The trial court continued the matter to November 19, 2013, to permit briefing on whether an out-of-state, part-time, on-line student qualified for continued support after the age of 18.

Between then and November 19, wife twice sought court orders compelling husband to pay child support for A.H.; both requests were denied.[4] In each request, wife

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[4] First, on October 16, 2013, wife sought an emergency order for unpaid child support from September and October 2013. The trial court denied the request, finding no exigent circumstances and noting that the issue was set for hearing on November 19. Second, on November 5, 2013, wife filed an ex parte request for delinquent child support. The trial court denied the request because, among other reasons, it was the same issue already set to be heard on November 19.

submitted letters from the two schools she claimed A.H. was attending in Minnesota: Forest Lake Area High School and Trio Wolf Creek Distance Learning Charter School. According to the letter from the dean of Forest Lake Area High School, dated September 19, 2013, A.H. was a "*part-time student* (20 hours) a week . . . for the 2013-2014 school year." (Italics added.) According to the letter from the director of Trio Wolf Creek Distance Learning Charter School, dated September 30, 2013, A.H. was "enrolled as a *part time student* . . . . He is using the supplemental services law to take only some courses at Wolf Creek and still remains fully enrolled at Forest Lake High School." (Italics added.) In addition to opposing wife's request for continued support, husband sought section 271 sanctions against wife.[5]

A few days before the November 19 hearing, the agency filed a pleading seeking determination on whether husband's child support obligations had terminated as a matter of law. As articulated by the agency, the issue was whether, under section 3901, subdivision (a), "attending a part-time public on-line high school (25 hours) out of state, while residing apart from [both parents], constitutes full-time high school student status, thereby extending child support through December 2013, when the child reaches 19 years old?" The agency took no position. Wife maintained A.H. was a full-time high school student.

At the hearing, the trial court concluded there was no admissible evidence A.H. was a full-time high school student. The trial court further indicated the letters at most proved A.H. was only a part-time student. Wife sought a continuance to obtain a declaration in support of her position. Husband opposed. The trial court denied the request and ruled husband had "no further obligation to support [A.H.] . . . . No evidence is offered to support premise that [A.H.] is still attending high school. The support obligation terminated as of July 1, 2013." Additional hearing on the issue concerning

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5 Under section 271, subdivision (a), an award of attorney's fees and costs may be based on "the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction."

husband's under/overpayment was continued to December 16, 2013.[6] Wife filed a timely appeal.

B. The August 2014 Settlement Agreement[7]

On August 5, 2014, husband and wife executed a settlement agreement on husband's over/underpayment of child support. They agreed that husband would pay wife $54,055.27 under a payment plan. Husband also agreed to waive court-ordered sanctions payable by wife to husband. The agreement expressly excluded this appeal.

DISCUSSION

A. The November 2013 Order is Appealable

Husband contends the appeal should be dismissed because the November 2013 order "was not intended to be the appealable order." Husband acknowledges we previously denied husband's separate motion to dismiss. Nevertheless, he renews the same argument: the unsigned minute order was an intermediate order, and wife should have appealed from the order entered on June 17, 2014, which included the parties' stipulation as to support arrears. For the same reason we denied the motion, we find this contention lacks merit.

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[6] Attached as Exhibit A to husband's Respondent's Brief is a document entitled "Order After Hearing" which states that it is the order entered following the continued hearing on December 16, 2013; the document has a file stamp date of June 17, 2014, two months after wife filed her designation of record in March 2014. This document is not included in the Clerk's Transcript, nor is it the subject of a request for judicial notice. It is therefore not properly before the court and we do not consider it. (Cal. Rules of Court, rule 8.120, subd. (a)(1).)

[7] In support of his motion to dismiss, husband requested that we take judicial notice of the record in the prior appeal as well as other court documents, including the August 2014 settlement agreement. Although we denied the motion to dismiss, we did not rule on the request for judicial notice. We hereby grant that request. (Evid. Code, § 452, subd. (d)(1) [court records], 453 [mandatory judicial notice], 459, subd. (a)(2) [judicial notice by the appellate court].)

An order terminating child support is an appealable order made after judgment. (Fam. Code, § 3554; Code Civ. Proc., § 904.1, subds. (a)(2) [order after judgment] & (10) [order made appealable by provisions of the Family Code].) Although the November 2013 order did not terminate child support, it is nevertheless an appealable order because it finally determined that child support terminated on July 1, 2013. (See *In re Marriage of Brinkman* (2003) 111 Cal.App.4th 1281, 1286-1287.)

B. Sufficiency of the Evidence that A.H. was Not a Full-Time High School Student

Wife contends the trial court's finding A.H. was not a full-time high school student was contrary to the evidence.[8] She argues the letters from the dean of Forest Lake Area High School and the director of Trio Wolf Creek Distance Learning Charter School establish A.H. was a full-time high school student. We disagree.

Whether a child is a full-time high school student within the meaning of section 3901 is a question of fact. Accordingly, we review the trial court's determination for substantial evidence. (See *Edwards v. Edwards* (2008) 162 Cal.App.4th 136, 141 [factual findings underlying support modification order reviewed for substantial evidence]; see also *In re Marriage of Hubner* (2001) 94 Cal.App.4th 175, 188 (*Hubner*) [discussing the sufficiency of the evidence that child was full-time high school student].) Under that standard, we view the evidence in the light most favorable to the party who prevailed in the trial court. (See *In re Marriage of Schopfer* (2010) 186 Cal.App.4th 524, 529.)

Hubner is instructive. One of the issues concerned whether attending classes at a host high school in Japan constituted full-time high school status. In a declaration, the assistant principal of the child's host high school averred "the courses [the child] took at his host high school in Japan would benefit him in the college application process, would

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8 It is undisputed that under section 4007, subdivision (a), once A.H. turned 18 years old, husband's obligation to pay child support terminated as a matter of law if A.H. ceased being a full-time high school student.

become part of his school transcript, and would count toward his graduation from high school." (*Hubner, supra,* 94 Cal.App.4th at p. 188.) The *Hubner* court found this evidence sufficient to establish that the child was a full-time high school student.

In contrast to *Hubner*, the only evidence A.H. was a full-time high school student in Minnesota was wife's own representation based on the two letters. Unlike the declaration from the principal of the child's school in *Hubner*, the two letters from the Minnesota schools submitted by mother were hearsay and met none of the exceptions for admissibility. (Evid. Code, § 1200, subd. (a) [an out-of-court statement offered to prove the truth of the matter asserted is inadmissible hearsay].) Even assuming those letters were admissible, both stated that A.H. was a *part-time* student. As such, those letters supported the trial court's finding that A.H. was *not a full-time* high school student.

Nor do we find any abuse of discretion in the trial court's denial of wife's request for a continuance to obtain additional evidence. "Continuances are granted only on an affirmative showing of good cause requiring a continuance. (Cal. Rules of Court, rule 3.1332; [citation].) Reviewing courts must uphold a trial court's choice not to grant a continuance unless the court abused its discretion in so doing. [Citation.]" (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 823.) Here, the content of the letters was already known. Both letters stated A.H. was a part-time student. Obtaining a declaration would change nothing. Under these circumstances, wife failed to show good cause for the requested continuance and the denial of her request was not an abuse of discretion.

C. Changed Circumstances

Wife contends it was error to terminate child support because husband did not show "changed circumstances" required to obtain an order modifying child support. We disagree.

Section 3601, subdivision (a) states, "An order for child support entered pursuant to this chapter continues in effect until the order (1) is terminated by the court or (2) terminates by operation of law pursuant to Sections 3900, 3901, 4007, and 4013." In

enacting the statute, the California Legislature set forth two alternative means a child support order may terminate. In one, the trial court acts and terminates the child support order. In another, a predetermined event or contingency set forth in the statute occurs (such as marriage, emancipation, or death etc.) and terminates the child support by operation of law. This reading is bolstered by Section 4007, subdivision (a), which states in relevant part, "the obligation of the person ordered to pay support terminates on the happening of the contingency." This distinction is not without significance.

Generally, a supporting parent cannot unilaterally stop paying child support when the child turns 18 years old. (*Spivey v. Furtado* (1966) 242 Cal.App.2d 259, 263.) Rather, the parent must obtain a court order terminating his or her child support obligation. As with any other modification, to warrant a court order modifying or terminating child support, the supporting parent must introduce admissible evidence of changed circumstances. (*In re Marriage of Leonard* (2004) 119 Cal.App.4th 546, 556.) In such cases, it is within the trial court's discretion to determine whether the facts warrant modification of the child support order. (*Ibid*.)

By contrast, no change of circumstance showing is necessary when child support terminates as a matter of law under section 4007, subdivision (a), which specifically references section 3901, subdivision (a). Rather, the existing child support order terminates upon the happening of the contingent event identified in the original order.

In this case, the child support order terminated by operation of law pursuant to section 3901, subdivision (a) when A.H. turned 18 and ceased to attend high school full-time. As noted in Section B, *ante*, the trial court's determination A.H. was not a full-time student was supported by substantial evidence. As such, no change of circumstance showing was necessary.

D. Retroactivity

Wife contends the trial court erred in terminating child support effective June 30, 2013, since it precedes the agency's filing date. She argues section 3651, subdivision (c)(1) prevents retroactivity. We disagree.

Sections 3651 and 3653 expressly apply to *orders* modifying or terminating child support orders. Generally, such orders are the result of a motion by a party to modify support. As shown earlier, here, the child support order terminated by operation of law. Thus, husband was not required to obtain a modification order under sections 3651 and 3653.

Lehrer v. Lehrer (1976) 63 Cal.App.3d 276 (*Lehrer*) offers guidance. In *Lehrer*, the husband was initially ordered to pay child support " 'continuing until each child marries, attains her majority, or by further order of the Court.' " (*Id*. at p. 278.) He stopped paying after the couple's minor daughter moved to Mexico with a boyfriend.[9] This triggered two related issues - whether the child support was terminated by the daughter's actions, and if so, whether retroactive termination was appropriate. The husband argued he was no longer obligated to pay support because the daughter was emancipated. Wife countered husband should have obtained a modification order and the support order could not be modified retroactively to a date prior to the date any such motion was filed. The trial court found (1) the daughter was emancipated as of October 1972, and (2) the husband was not obligated to pay child support after the date the motion was filed. The trial court, however, denied the husband's motion to quash payments accruing before that date because of the rule against retroactivity. (*Id*. at pp. 278-279.) The appellate court affirmed, reasoning that emancipation was not one of the contingencies specified in the child support order (marriage, reaching the age of majority or further court order). Since the child support order did not terminate by operation of law, husband was required to seek a modification based on changed circumstances. (*Id*. at p. 279.)

Lehrer stated, "Husband cites no authority for the proposition that in the absence of a prior order for such contingency his obligation to support his child automatically terminates upon her 'emancipation' by leaving home and becoming self-supporting." (*Id*.

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9 The daughter in *Lehrer* was 18 years old, but at that time the age of majority was 21 years of age.

at p. 280.) Properly construed, *Lehrer* stands for the rule that a parent cannot unilaterally terminate a child support order where none of the contingent events identified in the order have occurred.

Distilled from *Lehrer* is the following corollary: when the obligation to pay child support terminates by operation of law, the rule against retroactivity does not apply.[10] Here, the trial court determined a contingent event terminating child support occurred - that under Section 3901, subdivision (a), A.H. was 18 years old and not attending high school full-time.

This reading is consistent with the wording of section 3651, subdivision (c)(1) which states, "Except as provided in paragraph (2) and subdivision (b), a support order may not be modified or terminated as to an amount that accrued before the date of the filing of the notice of motion or order to show cause to modify or terminate." Since the support payment terminated upon the occurrence of the contingent event prior to the filing by the agency, no amount could have accrued from that date (when A.H. stopped attending high school full-time). As such, the rule against retroactivity did not apply.

E. The Appeal is Not Frivoulous

Husband requests sanctions against wife, payable to the court, for a frivolous appeal. Whether an appeal is frivolous is determined under a subjective as well as an objective standard. "The subjective standard looks to the motives of the appellant and his or her counsel. . . ." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649.) "The objective standard looks at the merits of the appeal from a reasonable person's perspective. 'The problem involved in determining whether the appeal is or is not frivolous is not whether [the attorney] acted in the honest belief he had grounds for

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10 The risk a supporting parent runs in unilaterally deciding to stop paying child support based on his or her belief that the contingent event has occurred is illustrated by *In re Marriage of Hubner* (2004) 124 Cal.App.4th 1082, which held a supporting parent liable for accrued interest on unpaid support payments after the appellate court decided the contingent event did *not* occur.

appeal, but whether any reasonable person would agree that the point is totally and completely devoid of merit, and, therefore, frivolous.' [Citations.]" (*Ibid*.)

Viewed under either standard, wife's appeal is not frivolous. It appears wife fervently believed in her position. Objectively, the various issues raised in this appeal were not devoid of all reasonable merit.

Husband's request for sanctions for a frivolous appeal is denied.

DISPOSITION

The November 19 order is affirmed. Each party shall bear their own costs on appeal.

OHTA, J.*

WE CONCUR:

FLIER, ACTING P. J.

GRIMES, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.