SUPREME COURT OF FLORIDA

LINDA L. WATTENBARGER,

Petitioner,

-vs- CASE NO.: 95,228

J. FRANK WATTENBARGER,

Respondent.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL

FIRST DISTRICT

PETITIONER'S INITIAL MERITS BRIEF

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CERTIFICATION OF TYPE STYLE AND SIZE

I hereby certify that 14 point proportionally spaced Times New Roman type has been utilized in this brief.

COURSE OF PROCEEDINGS

Petitioner, the former wife, filed a "Petition to Modify/Clarify Judgment" on or about May 16, 1997. This petition sought an extension of child support for one of the parties' minor children "beyond the child's eighteenth birthday so long as that child remains in high school, not to exceed the child's nineteenth birthday." The petition also sought clarification of how support was to be calculated once no support was due for the older of the two children.

Respondent, the former husband, answered and counter-petitioned on or about June 9, 1997. On or about September 9, 1997 the former wife moved to have Florida Statute §743.07(2) declared unconstitutional as a denial of equal protection.

The former wife's petition, the former husband's counter-petition and the former wife's motion attacking Florida Statute §743.07(2) came on for hearing on September 15, 1997. The hearing was taken by a certified court reporter but was not transcribed by the former husband in his appeal to the First District Court of Appeal.

An Order Modifying Final Judgment was entered by the trial court on October 23, 1997. *App. A*. Thereafter, the former wife had to file a Motion to Enforce and Clarify on November 12, 1997. No hearing was held on this motion and it was dealt with by the court on an exchange of correspondence. Thereafter, on or about

November 24, 1997 the former husband filed his Notice of Appeal but did not tender payment of the appellate fee.

On or about December 15, 1997 the former husband filed a Motion to Stay Execution of Judgment in the trial court. The former wife filed her Response to Motion to Stay Execution of Judgment on January 22, 1998. Hearing was held on the motion on February 19, 1998. The motion was denied at the conclusion of the hearing and a written order of denial rendered on March 13, 1998.

The former husband eventually perfected his appeal to the District Court and on February 4, 1999 the appellate court rendered its decision reversing the trial court's order of October 23, 1997. The former wife filed a timely Motion for Rehearing which was denied by the court on March 11, 1999. Mandate issued on March 29, 1999.

The former wife timely filed her Notice to Invoke Discretionary Jurisdiction. This court accepted jurisdiction and dispensed with oral argument by order entered August 24, 1999.

STATEMENT OF FACTS

The marriage of the parties ended by dissolution on October 3, 1990. The parties had two minor children, Scott, born May 21, 1979 and Kevin, born February 25, 1982. The mother (petitioner herein) was awarded primary residential responsibility for the minor children. The father was directed to pay child support for both children. The Final Judgment did not specify a date for termination of child support.

As a result of a joint decision of the parties during the time that they were married, Scott was retained for a year in kindergarten. Although Scott subsequently progressed appropriately throughout his subsequent schooling, this early kindergarten retention meant that Scott would not receive his high school diploma prior to his 18th birthday on May 21, 1997. Therefore, the mother timely petitioned the court to order that child support for Scott be continued until Scott turned 19 or graduated from high school. The mother also moved to have Florida Statute §743.07(2) declared unconstitutional as a denial of equal protection to Scott and similarly situated children and parents.[1]

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[1]The trial court's ultimate ruling made it unnecessary to rule on the constitutional challenge to the statute.

On October 23, 1997 the trial court entered its order finding that "[t]he testimony before the court is that Scott Wattenbarger will be entitled to a diploma by the date of his 19th birthday." *App. A.* Having made this factual finding, the court then ordered that support continue for Scott and imposed certain provisions apparently intended to assure that Scott continued to progress towards graduation.

SUMMARY OF THE ARGUMENT

The meaning of the term "graduation" as it is used in Florida Statutes §743.07(2) is ambiguous as recognized by the differing judicial interpretations as well as standard dictionary definitions. Therefore, the term must be judicially construed in pari materia with related statutes dealing with child support. The statute should be liberally construed to effect the intent of the statute to provide child support in cases where the child is over the age of 18 but will satisfy all of the requirements of a high school diploma prior to age 19.

ARGUMENT

THE TERM "GRADUATION" AS USED IN FLORIDA STATUTE §743.07(2) IS AMBIGUOUS AND SHOULD BE CONSTRUED LIBERALLY IN LIGHT OF ITS AMELIORATIVE PURPOSE.

The issue before the court is relatively straight forward: What, if any, statutory construction should be applied to Florida Statute 743.07(2). The statute provides in relevant part as follows:

> This section shall not prohibit any court of competent jurisdiction from requiring support for a dependent person beyond the age of 18 years when such dependency is because . . . the person is dependent in fact,[2] is between the ages of 18 and 19, and is still in high school, performing in good faith *with a reasonable expectation of graduation before the age of 19*. (Emphasis added)

It is the italicized language of the statute that brings this case before the court. More specifically, what the legislature intended by the word "graduation." No definition of the word appears in Florida Statutes, nor in Florida case law.

In the instant case, the trial court found as a matter of fact that Scott

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[2]Dependency in fact was not a contested in the appeal below. The absence of a hearing transcript precluded appellate review of the trial court's factual findings and they are presumed correct. *Clayton v Clayton,* 442 So.2d 310 (Fla. 1st DCA 1984); *Kirchinger v Kirchinger,* 546 So.2d 86 (Fla. 2nd DCA 1989).

Wattenbarger would be entitled to his high school diploma *prior* to his 19th birthday on May 21, 1997.[3] However, the date for Scott's graduation ceremony was June 2, 1997. Eleven days after his 19th birthday. The trial court adopted the definition of "graduation" found in AmJur2d, Colleges §28, to-wit: graduation means the satisfactory completion of courses required to obtain a diploma. Finding that under this definition the facts supported a finding that Scott met the requirements of §743.07(2), the court ordered continued child support.[4] *App. A.*

On review, the First District Court of Appeal applied what it called the "plain language" of the statute and found that Scott was ineligible for support since his graduation was after his 19th birthday. The District Court did not state the "plain language" definition of the term "graduation." However, it is clear from a reading of the opinion that the First District construed the term to mean the formal commencement ceremony. The court refused to recognize any legal significance in the fact that Scott would irrevocably earn his right to a high school diploma prior to his 19th birthday. *Wattenbarger v Wattenbarger,* 728 So.2d 277 (Fla. 1st DCA 1999).

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[3]Review of the sufficiency of the evidence supporting the trial court's finding was precluded by the former husband's choice to proceed on appeal without producing the transcript of the hearing in the trial court.

[4]The dollar amount of support stated in the court's order is the total support for both children of the parties.

Conversely, the Fourth District Court of Appeal, on almost identical facts, reached exactly the opposite conclusion. In *Boot v. Sapp,* 714 So. 2d 579 (Fla. 4th DCA 1998) the twin children at issue were to turn nineteen in late May 1999 and their graduation ceremony was to be "just days after [their] birthday." The trial court denied the requested continuation of support. The Fourth District chose to construe the term "graduation" liberally to include students who would meet the requirements of graduation prior to their 19th birthday even though formal graduation ceremonies would take place after that date. In so doing the Fourth District construed the statute in the light of the "spirit and intent of the law as it relates to child support . . . and . . . to mitigate potential harm to children." *Boot* at 579. The Fourth District reversed the trial court and remanded for further proceedings in light of the more liberal interpretation to be given to the term "graduation."

The two court opinions expressly and directly conflict with each other. Does the First District's "plain language" analysis control or is the statute subject to the liberal construction given it by the Fourth District?

It is axiomatic that this court will not resort to statutory construction where the meaning of a statute is plain and unambiguous. *Smith v Crawford,* 645 So.2d 513, 522 (Fla. 1994). Thus the first issue is whether there is an ambiguity in the statute. More specifically, whether the word "graduation" is ambiguous in that it ". . . is capable of

being understood in two or more possible senses or ways." *Webster's Third New International Dictionary (unabridged)* 1993. In light of the different usages of the word graduation by the two trial judges and six appellate judges in these two cases, it would seem self-evident that the term is ambiguous since clearly "reasonable persons can find different meanings in the same language" *Black's Law Dictionary* 79 (6th ed. 1990), and the word is capable of being understood in two or more senses or ways. Indeed, *Webster's Third New International Dictionary* recognizes that the word has multiple meanings, including "the act of completing a phase of one's formal education, ***or*** the ceremony of conferring a degree or diploma." (Emphasis added) The Oxford English Dictionary, Second Edition (1989) similarly defines the word graduation. Clearly therefore, the word graduation as used in this statute requires judicial construction.[5]

In construing a statute, this court has held that full effect must be given to all statutory provisions and construe related statutory provisions in harmony with each other. *Forsythe v. Longboat Key Beach Erosion Control District,* 604 So.2d 452 (1992). As this court said in *Forsythe*, " . . . if from a view of the whole law, or from

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[5]This court appears to have recognized the imprecision of the word graduation. In specifying the requirements for admission to the Florida Bar, this court requires "graduation" from an accredited law school or "completion of the requirements of graduation." *Florida Board of Bar Examiners re Amendment to Rules of the Supreme Court of Florida Relating to Admissions to the Bar,* 603 So.2d (Fla. 1992).

other laws in pari materia the evident intent is different from the literal import of the terms employed to express it in a particular part of the law, that intent should prevail, for that, in fact is the will of the legislature." *Id.* at 454, citing *Van Pelt v. Hilliard*, 78 So. 693, 694-695 (Fla. 1918); *accord, Smith, supra* at 522. For this reason the petitioner urges this court to adopt the Fourth District's approach and construe the term graduation consistent with the spirit and purpose of Chapter 61, Florida Statutes. More specifically, to construe § 743.07(2) liberally in the "best interest of the child."

Further, such an interpretation is consistent with the provisions of Florida's Compulsory School Attendance law, Chapter 232, Florida Statutes. The education statutes, while not defining the term graduation, do provide for the requirements for graduation (*See, F.S. §232.246*) and provide that students meeting those requirements are entitled to a diploma. *F.S. §232.246(9)*. Attendance at a graduation ceremony is not a legislative requirement. These statutes make clear the legislature's perspective that a child who has met the requirements of a high school diploma has, ipso facto, met the requirements of graduation - irrespective of whether a child ever actually attends a graduation ceremony.

The irony of the First District's plain language interpretation is that it would permit continuing child support for a child attending school and a graduation ceremony to the 19th birthday, even though that child has not met the legal requirements for

graduation and rather than receive a high school diploma will merely receive a Certificate of Completion. *F.S. 232.246(9)*. Equally incongruous results would attach where a child completes the final high school requirements in mid-school year (usually December) and goes directly to college but has the 19th birthday prior to graduation ceremonies at the end of the school year (usually early June). Finally, the First District's constrained interpretation may well encourage similarly situated parents to make educational choices for their children based on the date of graduation ceremonies, pitting the best financial interest of the parents against the best educational interest of the child.

CONCLUSION

The term "graduation" as used in Florida Statute 743.07(2) is ambiguous. This court should construe the statute consistent with other provisions of Florida Law and find that a liberal construction of the term is called for as found by Fourth District Court of Appeal. The decision of the First District Court of Appeal should be reversed and the judgment of the trial court affirmed.

Respectfully submitted,

____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been provided this date to Scott T. Orsini, Esq., counsel for respondent, at his address of record.

DATED: September 20, 1999

____
GEORGE W. BLOW III

APPENDIX

A. Order of the trial court entered October 23, 1997

B. *Wattenbarger v Wattenbarger,*
728 So.2d 277 (Fla. 1st DCA 1999)

C. *Boot v. Sapp,* 714 So.2d 579 (Fla. 4th DCA 1998)

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR BAY COUNTY

J. Frank Wattenbarger,

Petitioner,

v. Case Number: 90-1485-CA-J

Linda L. Wattenbarger,

Respondent.

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Order Modifying Final Judgment

The former wife moves for an order requiring the former husband to pay support for their oldest son, Scott, who turned eighteen (18) years of age on May 21, 1997. Because the parties elected to have their son repeat kindergarten, he did not graduate with his entry class. He is "on track" to graduate at the conclusion of the Spring 98 term.

The legal issue before the Court surrounds the term "graduation". The Petitioner contends that Scott's right to graduate will "vest" prior to his 19th birthday thus meeting the requirements of §743.07, *Florida Statutes*. Conversely, the Respondent argues that graduation is June 2, 1998, and the date of the ceremony is beyond Scott's 19th birthday by eleven (11) days.

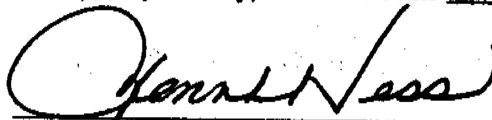
"Graduation" means the satisfactory completion of the courses required to obtain a diploma. See 15 AmJur 2d, Colleges §28. The testimony before the Court is that Scott Wattenbarger will be entitled to a diploma by the date of his 19th birthday. It is therefore

Adjudged that J. Frank Wattenbarger remains responsible for the support of Scott Wattenbarger at the rate of $651.58 monthly through May 1998 provided:

1. Scott Wattenbarger remains enrolled at Bay High School;
2. Scott Wattenbarger complies with the attendance policy of the Bay County School System;
3. Scott Wattenbarger maintains a full course load of academic, classroom courses, which witnesses defined as a minimum of three credits;
4. Scott Wattenbarger maintains a grade point average of 2.5 or better in the courses taken; and
5. J. Frank Wattenbarger is provided a monthly written report of Scott Wattenbarger's grades. It is further

Adjudged that each party shall bear his or her own attorney fees and costs.

Done and ordered in chambers at Panama City, Bay County, Florida on this 23rd day of October, 1997.



Honorable Glenn L. Hess
Circuit Judge

cc: George W. Blow, III, Esq.
Attorney of Former Wife

Scott T. Orsini, Esq.
Attorney for Former Husband

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

J. FRANK WATTENBARGER,

Appellant,

v.

LINDA L. WATTENBARGER,

Appellee.

CASE NO. 97-4706

_______________________________/

Opinion filed February 4, 1999.

An appeal from an order of the Circuit Court for Bay County. Glenn L. Hess, Judge.

Scott T. Orsini of Orsini & Rose, St. Petersburg, for Appellant.

George W. Blow III, Tallahassee, for Appellee.

PER CURIAM.

The parties to the present action are former husband and wife whose marriage was ended by dissolution on October 3, 1990. The appellee/former wife was awarded primary residential responsibility for the minor children, and the appellant/former husband was directed to pay child support for both children. The Final Judgment did not specify a termination date for child support.

On May 19, 1997, the former wife filed a Petition to Modify/Clarify Judgment, seeking an extension of child support for one of the minor children, Scott, beyond his eighteenth birthday.

The petition was based on the fact that Scott would still have another year of high school to complete after turning eighteen on May 21, 1997.[1] His anticipated high school graduation date was June 2, 1998, eleven days after his nineteenth birthday.

The trial court entered an Order Modifying the Final Judgment on October 23, 1997. In the order, the trial court found that Scott "will be entitled to a diploma by the date of his 19th birthday," and, on that basis, ordered the former husband to continue paying child support for Scott through May of 1998.

The former husband appeals, arguing that, under section 743.07(2), Florida Statutes (1995), and the cases interpreting the statute, a court may only order a former spouse to continue paying child support beyond the child's eighteenth birthday if the child has a reasonable expectation of graduating high school before the age of nineteen. Since the child in the present case was not set to graduate until after his nineteenth birthday, the former husband argues that it was error for the trial court to order him to continue paying child support for Scott beyond his eighteenth birthday. We agree.

Section 743.07(2) provides that a trial court may require child support for a dependent beyond the age of 18 years:

> when such dependency is because of a mental or physical incapacity which began prior to such person reaching majority <u>or if the person is dependent in fact, is between the ages of 18 and 19, and is still in high</u>

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[1]Scott had been held back for a year in kindergarten, which was the cause of his late graduation.

school, performing in good faith with a reasonable expectation of graduation before the age of 19.

The former wife does not allege that Scott suffers from any mental or physical incapacity; therefore, the former husband could only be required to pay child support for Scott beyond the age of eighteen if he met the listed criteria in the portion of the statute underlined above. Because Scott's nineteenth birthday was on May 21, 1998, and his high school graduation date was June 2, 1998, he did not have a reasonable expectation of graduation before the age of 19. Therefore, he did not meet the criteria for continued support beyond age eighteen listed in the statute. See Walworth v. Klauder, 615 So.2d 219 (Fla. 5th DCA 1993); Moyer v. Moyer, 636 So.2d 125 (Fla. 4th DCA 1994); Drake v. Drake, 686 So.2d 753 (Fla. 1st DCA 1997).

In Walworth, the Fifth District explained,

> Children who have early-in-the-year birthdays and who will turn nineteen before a June graduation, are entitled to no support during their eighteenth year, even though they are in need, in school, and "on track." Children . . . who were held back a year or two, but who are on course to graduate late, are similarly disadvantaged. Under the terms of [section 743.07(2)] they are not entitled to support after their eighteenth birthday.

Walworth, 516 So.2d at 221.

In the present case, the trial court based its ruling on its use of the definition of "graduation" in 15 AmJur 2d, Colleges section 28, and on its conclusion that Scott's right to graduate would vest before his nineteenth birthday. There is no support in the case law for the concept of the vesting of the right to graduate high school, or for the application of such a concept in

the interpretation of section 743.07(2). Moreover, as the former husband points out, the section of American Jurisprudence 2d on which the trial judge relied concerns colleges, not secondary public schools. There was thus no proper basis for the trial court's ruling.

Although no transcript of the hearing was filed, a transcript is not necessary to determine that the trial court erred as a matter of law in the present case. See Hines v. State, 549 So.2d 1094 (Fla. 1st DCA 1989). The language of the order reflects an incorrect application of the plain language of section 743.07(2) and one inconsistent with precedent.

Therefore, we reverse and remand for entry of a support order providing for the termination of support when Scott "reaches age 18, marries, becomes self-supporting or dies, whichever first occurs." See Drake, 686 So.2d at 755; Hunter v. Hunter, 626 So.2d 1069, 1070 (Fla. 1st DCA 1993).

Reversed and remanded.

BENTON, VAN NORTWICK and PADOVANO, JJ., CONCUR.

Laura BOOT, Appellant,
v.
John SAPP, Appellee.

No. 97-3667.

District Court of Appeal of Florida,
Fourth District.

July 1, 1998.

Divorced mother petitioned for modification of child support for 18-year-old twin sons. The Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, Jorge Labarga, J., denied mother's petition and she appealed. The District Court of Appeals held that term "graduation," under statute governing child support for dependent children between the ages of 18 and 19, should be construed liberally.

Reversed and remanded.

PARENT AND CHILD 3.1(12)
285k3.1(12)
Term "graduation," under statute authorizing award of child support for dependent children between ages of 18 and 19 who are still in high school and who have a reasonable expectation of graduation before the age of nineteen, should be construed liberally, especially under circumstances where children are dependent and in need of child support during their last year of high school; to deny support for entire year of school would not be within spirit or intent of law as it relates to child support. West's F.S.A. §§ 61.001 et seq., 743.07(2).
***579** Ann Porath, Wellington, for appellant.

Timothy W. Gaskill of DeSantis, Gaskill, Smith & Shenkman, P.A., North Palm Beach, for appellee.

PER CURIAM.

Laura Boot, former wife, appeals an order denying a petition for modification of child support pursuant to section 743.07(2), Florida Statutes. This section provides that the trial court may require child support for dependent children between the ages of eighteen and nineteen who are still in high school and who have a reasonable expectation of graduation before the age of nineteen.

The twin sons of the parties are presently in eleventh grade and will turn nineteen in late May of 1999. The date for graduation ceremonies for 1998 is June 2, just days after the twins' birthday; the date for the graduation ceremonies for 1999 is unknown.

The term "graduation" is not clearly defined in statute or case law. Graduation may mean the act of completing a phase of one's formal education, or the ceremony of conferring a degree or diploma. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 985 (3d ed.1986). A high school student may complete all requirements of an educational program a few days, or even several weeks, before the date that student participates in graduation ceremonies. According to the former wife, the twins will complete twelfth grade and their high school ***580** studies some two weeks prior to graduation ceremonies.

It appears the trial court believed that the date of the graduation ceremonies limited the court's discretion. We construe the term "graduation" in section 743.07(2), Florida Statutes, liberally, especially under the circumstances where the children are dependent and in need of child support during their last year of high school; to deny support for the entire year would not be within the spirit or intent of the law as it relates to child support. Chapters 61 and 743 of the Florida Statutes should be read together as related to child support and should be liberally construed to mitigate potential harm to children.

Because the term "graduation" may be defined in different ways, we reverse and remand to the trial court to reconsider the final judgment in light of this opinion, recognizing that the decision is left to the discretion of the trial court.

REVERSED and REMANDED.

GLICKSTEIN and GROSS, JJ., and GOLDENBERG, RENEE, Associate Judge, concur.

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