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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN LUIS OBISPO

10 Pamela Glen,)	No. FL 03 1219
11 Petitioner,)	MEMORANDUM OF POINTS AND
12 vs.)	AUTHORITIES
13 Jeffrey Glen,)	
14 Respondent.)	DATE: 2/7/13
)	TIME: 8:30 a.m.
)	DEPT: 7
)	Assigned: Com. Gayle Peron
)	

17 For her memorandum of points and authorities in support of her request for support of the
18 parties' adult child, Jessica Glen (hereinafter referred to only as "Jessica"), and for attorney fees,
19 Petitioner submits the following:

20 I. INTRODUCTION:

21 1. Petitioner has requested that Respondent, father of the adult child, Jessica,
22 be ordered to provide support for Jessica, beyond the age of 18 and her completion of high
23 school, pursuant to Family Code Section 3910.

24 Respondent contends that Jessica does not meet the criteria to receive support past the
25 age of majority under Family Code Section 3910.

26 2. Petitioner has also requested an award of attorney fees for having to bring
27 this motion on the following theories:
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29

1 a. Breach of the terms of the Marital Settlement Agreement (MSA)
2 related to payment of the childrens' college expenses and the provision in the MSA for attorney
3 fees to be awarded to the prevailing party in the event of a breach of the MSA terms and court
4 intervention;

5 b. Pursuant to the Statutory Authority granted under the common law
6 theories in an action for support of an adult child;

7 c. Pursuant to the Statutory Authority granted under Family Code
8 Section 271.

9 II. ARGUMENT:

10 1. Jessica Glen is entitled to the support of her parents under Family Code Section
11 3910.

12 Unlike the general duty of support, parents' statutory duty to support their needy
13 children, who are unable to provide for themselves by work, persists even if child...reaches age
14 of majority – *Bryant v. Swoap* (1975) 48 Cal.App.3d 431, 121 Cal.Rptr. 867; Family Code
15 Section 3910 [formerly Civil Code Section 206]

16 Jessica suffers from Pervasive Developmental Disorder, Generalized Anxiety and Major
17 Depressive Disorder pursuant to a diagnosis by Sara Leon, LMFT employed by the San Luis
18 Obispo County Department of Mental Health, Jessica's primary treating mental health
19 professional. Ms. Leon has been subpoenaed to testify at the hearing on this matter and to bring
20 her records with her to the hearing for the court's review.

21 Jessica is in the process of applying for SSI benefits but no determination has yet been
22 made by the Social Security administration.

23 Jessica has been also been evaluated by the California Department of Rehabilitation
24 (hereinafter referred to as the "DOR") to determine her eligibility for services related to
25 education and employment now and in the future.

26 //

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1 On November 14, 2012 the DOR certified Jessica as being eligible for services and a
2 person who could benefit from the DOR's assistance¹. Specifically, the DOR found that Jessica
3 suffers from a "physical or mental impairment which constitutes or results in a substantial
4 impediment to employment...". A copy of the "Notice of Eligibility and Priority for Services" is
5 submitted as an Exhibit to the Declaration of Pamela Glen submitted herewith.

6
7 Family Code Section 3910 states:

8
9 "(a) The father and mother have an equal responsibility to
10 maintain, to the extent of their ability, a child of whatever age who
11 is incapacitated from earning a living and without sufficient
12 means."

13
14 Family Code Section 3910

15 The obligation under Family Code Section 3910 is a two prong test. First, the court must
16 determine that the "child" is "incapacitated from earning a living" and second the court must find
17 that the "child" is "without sufficient means".

18 a. Jessica meets the first test of being "incapacitated from earning a living".

19 The language "incapacitated from earning a living and without sufficient means" has
20 been held to require that the child demonstrate an inability to be self supporting because of a
21 mental or physical disability or proof of inability to find work because of factors beyond the
22 child's control. In Re Jesse V. (1989) 214 Cal.App.3d 1619, 1623-1624, 263 Cal.Rptr. 369

23 Adult indigent children may include the developmentally disabled In Re Marriage of
24 Drake (1997) 53 Cal.App.4th 1139 and the emotionally disabled Chun v. Chun (1987) 190
25 Cal.App.3d 589, 235 Cal.Rptr. 553

26 ¹ The DOR derives its authority from and operates under the California Code of
27 Regulations. The determination of eligibility is based on the provisions
28 found in 9 C.C.R. Section 7062. The determination of eligibility is made
29 specifically "without regard to the type of expected employment outcome". 9
C.C.R. 7060(c)(2)(B)(2) In other words, a condition of eligibility is not
that the person will be able to become self supporting, only that they can
benefit to some degree from the services.

1 Petitioner asserts that the DOR determination of eligibility and Ms. Leon’s testimony
2 qualify Jessica as falling within the ambit of Family Code Section 3910.

3 The court may note a distinction in the language “substantial impediment to working”
4 used by the DOR and the language “incapacitated from earning a living” found in the Family
5 Code. Petitioner submits that the two phrases hold the same meaning in the present context.

6 Family Code Section 3910 was the replacement statute for former Civil Code Section 206
7 when the Family Code was enacted in 1992 (effective 1994). Civil Code Section 206 was
8 repealed effective 1994.

9 A review of the legislative history of Family Code Section 3910 and former Civil Code
10 Section 206 reveals that until it was repealed, Section 206 read:

11 “It is the duty of the father, the mother and the children of any
12 person in need who is unable to maintain himself by work, to
13 maintain such person to the extent of their ability.”

14 Welfare Reform Act of 1971; Statutes of California and Digests of
15 Measures (1971) Vol. 1, Chapter 578, Section 3, pg. 1137
16 [published by the Legislative Counsel, Compiled by George H.
17 Murphy]

18 That language remained unchanged until the enactment of the Family Code in 1992. At
19 the time the Family Code was enacted the language of the first sentence of former Civil Code
20 Section 206 was changed. The phrase, “unable to maintain himself by work” was replaced with
21 “incapacitated from earning a living”. West Publishing’s (WESTLAW) annotated codes,
22 Section 3910 of the Family Code, states under the Law Revision Commission Comments:

23 “Subdivision (a) of Section 3910 restates without substantive
24 change the first sentence of former Civil Code Section 206 and
25 former Civil Code Sections 241(d) and 242 to the extent those
26 sections applied to the duty to maintain an incapacitated adult
27 child.”²

28 ² Sections 241 and 242 of the former Civil Code dealt with guardianship law
29 and are not applicable to the present case.

The Family Code terminology, “incapacitated from earning a living” is substantially the same in meaning as the former language, “unable to maintain himself by work” and no higher or different burden of proof was imposed by the change in the language.

The incapacity need not serve as a complete bar to any employment. Instead, it must only impede the “child” from fully supporting themselves. [Where adult child is incapable of *self support*, parental duty may continue or arise – Levy v. Levy (1966) 245 Cal.App.2d 341, 53 Cal.Rptr. 790 (emphasis added); Parent is obligated to care for and maintain an adult child who is incapable of *supporting* himself – In Re Dudley (1966) 239 Cal.app.2d 401, 48 Cal.Rptr. 790 (emphasis added)]

An adult child is “incapacitated from earning a living” within the meaning of Section 3910 if he or she demonstrates “an inability to be self-supporting because of a mental or physical disability or proof of inability to find work because of factors beyond the child's control.” (Jones v. Jones (1986) 179 Cal.App.3d 1011, 1014-1015; see In Re Marriage of Drake (1997) 53 Cal.App.4th 1139 [son a chronic paranoid schizophrenic]; Chun v. Chun (1987) 190 Cal.App.3d 589, 235 Cal.Rptr. 553 [daughter an emotionally disabled adult with the maturity of a 12-year-old])

Even if Jessica is able at some future point to support herself, the “inability to maintain herself by work” under former Civil Code Section 206 need not be based on a permanent condition and she is entitled to support so long as she remains unable to support herself due to her condition. Rebensdorf v. Rebensdorf (1985) 169 Cal.App.3d 138, 215, Cal.Rptr. 76

The DOR found that Jessica presently suffers from a “physical or mental impairment which constitutes or results in a substantial impediment to employment...”.

Petitioner submits that the DOR agency finding is dispositive of Jessica’s incapacity from earning a living. Alternatively, Ms. Leon’s testimony will support the finding by the court that Jessica meets the “incapacitated from earning a living” statutory criteria set forth in Family Code Section 3910.

1 b. Jessica meets the second test under Family Code Section 3910 of being
2 “without sufficient means”.

3 The phrase “without sufficient means” in Family Code Section 3910 has been equated to
4 “person in need” as the language appeared in former Civil Code Section 206.

5 The statutory duty to support an adult child does not arise only when the child would
6 otherwise be turned into the street, and the duty is legislatively designed to protect the public
7 from the burden of supporting a person who has a parent able to support him or her. Thus, the
8 question of "sufficient means" should be resolved in terms of the likelihood a child will become
9 a public charge. *In Re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 62 Cal.Rptr.2d 466

10 The statutory purpose is to prevent needy disabled adult children from becoming public
11 charges. (*Drake, supra*, at p. 1154.) In this context, the term “ ‘without sufficient means’ “ relates
12 to the “likelihood a child will become a public charge” and the parents' duty to support does not
13 arise *only* when the child would otherwise be “ ‘turned into the street.” *Chun v. Chun* (1987)
14 190 Cal.App.3d 589, 235 Cal.Rptr. 553 [see also *Swoap v. Superior Court* (1973) 10 Cal.3d 490,
15 502-503, 111 Cal.Rptr. 136, 516 P.2d 840 – Purpose of section 206 is to protect the public from
16 the burden of supporting a person who has a parent or child able to support him or her.]

17 In *Chun* the mother and the child both testified that mother had been and would continue
18 to, support the child, regardless of whether father was ordered to, or voluntarily supported the
19 child. However, it was only the support of the mother which insulated the child from becoming
20 a public charge. (*Chun supra* at 556).

21 The court of appeal in *Chun* (at fn.4) held that “absurd results” could be foreseen if the
22 court were to deny the child the support of her father just because the child’s mother was
23 providing support. To do so would create a situation where the child would have to first disavow
24 the support of her mother before she could ask for the support of her father.

25 The *Chun* court ultimately held that one may be receiving support from one source, but
26 still be a person “in need” for the purposes of Civil Code Section 206 [now Family Code Section
27 3910].

1 The Chun court also noted that the parental obligation to a disabled adult child is closely
2 akin to a joint and several obligation in nature.

3 c. Amount of support – Guideline Formula Preserves the concept of Joint
4 and Several Liability of Parents to Support an Adult Indigent Child.

5 The statutory duty to support an adult child imposes on both parents a duty of support
6 closely akin to a joint and several obligation, in proportion to their respective abilities to provide
7 support. The parents are not jointly liable for the support of their adult child in the sense that
8 each is required to render the same support; rather, the statute requires each parent to provide
9 only such support as each can afford to pay. Chun v. Chun (1987) 190 Cal.App.3d 589, 235
10 Cal.Rptr. 553

11 In Chun the court held that a trial court must take into account the expenses of the adult
12 child and set support proportionally between the parents based on their ability to pay.

13 However, this ruling was questioned in Drake in which the court considered as an issue
14 of first impression, whether the child support guidelines apply to any child owed a duty of
15 support, including a disabled adult child. In Re Marriage of Drake (*supra*) (1997) 53
16 Cal.App.4th 1139, 1155-1157. 1161, 62 Cal.Rptr.2d 466

17 The Drake court held that to the extent the guideline embodies assumptions that are true
18 of minor children, but not of adult disabled children, the guideline permits a trial court to adapt
19 or depart from the basic child support formula in accordance with the special circumstances of
20 the adult disabled child or the child's parents. (Drake, supra, at 1155-1158) This rule still holds
21 true and the court should start with a guideline child support calculation.

22 In addition, because an adult disabled child may have additional needs beyond those of a
23 well child, a parent may be ordered to provide additional care for such a child beyond normal
24 necessities. Woolams v. Woolams (1952) 115 Cal.App.2d 1, 251 P.2d 392

25 Here, Jessica does have unique needs which, with any other child, might be considered
26 “extra-curricular activities”, such as her horseback riding and social skills group therapy.
27 However, those activities are part of Jessica's needs imposed as a direct result of her disability
28 and should be ordered as add-ons to the basic child support formula results.

2. The court should award attorney fees on the following basis:

a. Breach of and/or court action initiated to enforce the marital settlement agreement.

The marital settlement agreement incorporated into the judgment in this matter provides at page 12, paragraph 25(B):

“In the event that either of the parties shall be required to bring any action or proceeding to enforce any provision contained in this agreement, or to enforce any judgment or order made by a court in connection with this agreement, or the dissolution of the parties, the [p]arty [sic] prevailing in such action or proceeding will be entitled to receive from the other such reasonable attorney’s fees and other reasonable necessary costs in respect thereto as shall be fixed by the court.” [emphasis and brackets added]

The marital settlement agreement at page 4, paragraph 10 states:

“**Higher Education:** The parties agree to each pay one-half of college tuition costs for the children.”

When the instant Request for Order was filed on August 1, 2012, Respondent was in breach of his obligation to pay one-half of Jessica’s tuition for college. This was the initial reason for the filing. Assuming the court finds in Petitioner’s favor, Petitioner is entitled to attorney fees pursuant to the contract (MSA).

b. Award of attorney fees to prevailing party in action for support of adult indigent child and/or in action to modify, terminate or set aside support order.

California case law recognizes the right to an attorney fee award in favor of the party who prevails in seeking Section 3910 support. *Paxton v. Paxton* (1907) 150 Cal. 667, 672, 89 P. 1083, 1085; . *Chun v. Chun* (1987) 190 Cal.App.3d 589, 598, 235 Cal.Rptr. 553, 559

Although these cases speak in terms of an independent action brought by or on behalf of an adult indigent child, nothing in the Family Code precludes an award of attorney fees under other theories of law and Petitioner, if she prevails, requests an award of attorney fees under this theory.

1 Family Code Section 3652 also provides for an award of attorney fees to the prevailing
2 party in an action to modify, terminate or set aside a support order and Petitioner makes a request
3 for attorney fees under Section 3652.

4 c. Family Code Section 271 Sanctions.

5 During the course of this most recent litigation in this case Respondent has acted
6 to intentionally delay these proceedings and has frustrated any possibility of settlement.
7 Respondent essentially lured Petitioner and her counsel into first drafting a detailed stipulation
8 on all issues before the court in this proceeding by claiming he was in agreement. Then, piece by
9 piece, Respondent refused to agree to different portions of the agreement. At each stage,
10 revisions were made to accommodate Respondent's concerns. At least 6 different versions of the
11 stipulation were drafted by Petitioner's attorney and staff and Petitioner herself made additional
12 revisions in an attempt to appease Respondent and consummate the stipulation. In the end,
13 Respondent refused to sign any of them unless Petitioner 1) dismissed the pending motion
14 entirely; 2) agreed not to seek any wage assignment for enforcement of any orders; and, 3)
15 incorporated provisions giving complete control of the decision making process as to various
16 aspects of the stipulation entirely to Respondent. If Petitioner were to agree to everything
17 Respondent wanted (which she very nearly did), it would have divested the court of its inherent
18 authority regarding enforcement of support orders and would have divested Petitioner of her
19 legal custody rights. Such a stipulation would have violated public policy. Respondent was
20 clearly not acting in good faith when he led Petitioner and her counsel to believe that an
21 agreement would be forthcoming if the requested changes were made. As such, Petitioner
22 requests sanctions under Section 271.

23 Where "[A] settlement offer that is so onerous that it will not seriously be considered by
24 the opposing party, is not designed to promote settlement, but to antagonize or to gain an unfair
25 advantage" it may itself warrant Section 271 sanctions as "flout[ing] the policy in favor of
26 settlement." *Marriage of Abrams* (2003) 105 Cal.App.4th 979, 992, 130 Cal.Rptr.2d 16, 24
27 [brackets added]

28 III. CONCLUSION:
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1 The purpose of the statute and the legislative intent was summed up best in
2 Woolams v. Woolams (1952) 115 Cal.App.2d 1, 251 P.2d 392 where the court stated that the
3 “purpose of the statute, requiring a parent to support an adult child unable to support themselves,
4 is to protect the public from the burden of supporting the person who has a parent able to support
5 them”.

6 The secondary purpose of the statute imposing a duty of support on parents whose needy
7 children are unable to provide for themselves by work is to enforce a moral obligation of
8 support. Bryant v. Swoap (1975) 48 Cal.App.3d 431, 121 Cal.Rptr. 867

9 Petitioner submits that Jessica’s diagnosed condition and the determination of eligibility
10 by the Department of Rehabilitation demonstrate that she is not capable at this time of supporting
11 herself through employment alone. She needs additional financial assistance to survive.

12 Jessica has no other means of support apart from her parents. Without the help of her
13 parents she would almost certainly become a public charge. The mere fact that Petitioner is
14 providing support for Jessica does not relieve Respondent of his obligation to share in that cost
15 pursuant to his ability to provide such support. Neither would Jessica’s qualification for SSI
16 relieve Respondent (or Petitioner) of their joint and several obligation to provide support for
17 Jessica based on her needs and their ability to provide support.

18 Petitioner submits that based upon the foregoing, and the supporting evidence, the court
19 should find that Jessica meets the criteria to receive support beyond the age of majority. Jessica
20 is incapable of supporting herself and has no other means as required by the statute.

21 Turning then to the amount of support to be provided, the court is required to utilize the
22 statewide uniform guideline formula, making adjustments as appropriate under the
23 circumstances.

24 Lastly, Petitioner submits that Respondent should be ordered to pay attorney fees based
25 upon his breach of the martial settlement agreement, as well as on the statutory and common law
26 theories advanced herein.

27 Dated:

Respectfully Submitted,

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ANGEL R. CABRERA
ATTORNEY FOR PETITIONER
PAMELA GLEN

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