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DIVISION II

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STATE OF WASHINGTON

BY  _____
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No. 49948-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN THE MATTER OF

Victor Ghigleri,

Appellant,

v.

Margaret Ghigleri,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The issues before the court are; (1) is the eldest daughter dependent on her parents, (2) should the parents be ordered to pay the costs for their second oldest daughter to attend an expensive private university and, (3) whether the amount of postsecondary support awarded favors one of the dependent children while sacrificing the immediate best interests as well as the long term educational needs of the other dependent children in the case.

II. ASSIGNMENTS OF ERRORS and ISSUES PERTAINING TO ASSIGNMENTS OF ERRORS

Under Washington Law, was it error for the court to award postsecondary support to the eldest daughter A.G., when the facts of the case indicate that she is not dependent and has no actual need?

Under Washington Law, was it error for the court to award postsecondary support to the second eldest daughter J.G., at a level that will monopolize approximately 80% of the earnings that the father will be able to dedicate to postsecondary support for the next 8-10 years? Was it error not to consider the cost for J.G. to attend a state supported institution that has the

same course of study that she is pursuing at a much more expensive private institution?

Under Washington Law, was it error for the court not to apply the statutory 45 percent income limit on child support obligation to postsecondary support awards?

III. STATEMENT OF THE CASE

The Parties, Victor Ghigleri and Margaret Ghigleri, have eight children who range from eight to twenty-one years of age. As of the time of the January hearings, the living arrangements for the eight children are as follows. The five youngest live with their mother at her stepfather's house on Vashon Island. A.G. lives in Bellingham where she has been attending her junior year at Western Washington University. Just before the hearing on January 4th, she began attending online classes and working full time. Verbatim Report of Proceedings, 1/4/2017 (VRP1) at 26. The oldest son B.G., attends Pierce Community College in Puyallup and works half time while living at his father's house in Tacoma. VRP1 at 5, 31-32. J.G. lives on campus at Pacific Lutheran University in Tacoma where she is in her freshman year studying theater arts. VRP1 at 5, 28.

In June of 2016, Margaret filed a motion to modify support in which she requested that postsecondary support be awarded to B.G. and J.G., who

graduated from high school that month, as well as AG, who was already receiving support. VRP1 at 4-5. On October 5th, a hearing was held on Victor's motion to address the support issues as well as issues relating to signing of the QDRO's. CP 52. The hearing was continued to November 2nd and then to December 1st because there was not enough information for the court to make a decision about postsecondary support. CP 59, 66. The December 1st hearing was continued to January 4th for the same reason. CP 67-68. The court entered a modified order of support at the hearing on January 4th based on a net income for Victor of \$6,012 and an imputed income for Margaret of \$1,522. CP 118. Child support for the minor children was modified to \$2,249 and postsecondary support was awarded to J.G. for up to \$10,000 per year with 80 percent to be paid by Victor and 20 percent to be paid by Margaret. CP 112. A.G. was awarded \$300 per month to be paid by Victor and B.G. was not awarded anything. CP 112. A motion for revision was denied at a hearing held on January 27th. CP 102.

Victor's financial declaration showed that his monthly expenses were \$3,278 plus child support and postsecondary support. CP 46, 19, 21. He is responsible for all costs associated with running his household including caring for his minor children for the 20 percent of the time they reside with him. CP 2. Margaret shares living costs with her stepfather who has an income of about \$70,000 per year and has claimed two of the children as tax

deductions in past years as head of household. CP 95 and Margaret's Sealed Financial Source Documents Filed 12/30/16 at page 2. Margaret's total monthly living expenses are shown as \$3,158 in her financial declaration. CP 96.

IV. ARGUMENT

Standard of Review

The standard of review when reviewing a trial court's order on modification of child support is abuse of discretion. *Childers v. Childers*, 89 Wn. 2d 592, 575 P.2d 201 (1978). A trial court abuses that discretion when its decision is based on untenable grounds or reasons. *In re Marriage of Cota*, 177 Wn. App. at 536, 312 P.3d 695 (2013). Further, the trial court's findings of fact must be supported by substantial evidence. *Schumacher*, 100 Wn. App. 211, 997 P.2d 399 (citing *In re Marriage of Peterson*, 80 Wn. App. 148, 153, 906 P.2d 1009 (1995)).

Support For Eldest Daughter A.G.

The facts of the case show that A.G.'s gross educational need for the 2016-2017 school year is \$5,031 with a net need of \$1,536 once personal and transportation costs are subtracted. CP 91. The record also shows that she was employed part time in 2016 and started working full time in early January

2017 while planning to take online courses to complete her degree. VRP1 at 26. Margaret testified at the January 4th hearing that A.G. has been essentially living and supporting herself, “on her own and doing her own income tax” and that she is “doing okay at this point.” After hearing this testimony, the Court decided to reserve as to A.G.’s postsecondary support. VRP1 at 26, 27.

Later in the hearing, the Court heard testimony about B.G.’s costs to attend Pierce Community College and that he worked 20 hours per week. VRP1 at 31, 32. B.G. was not awarded support because he was found to have no need. VRP1 at 51. We can assume that finding was because, although his out of pocket cost to attend school was four or five thousand dollars, this was offset by the fact that he works 20 hours a week which is more than enough to cover his costs. A.G. has an out of pocket cost to attend school which is less than B.G.s’ cost. She earned more than her net need of \$1,536 just in the second half of 2016 and the father also paid her \$1,800 in postsecondary support during that period. Why does she have need while B.G. does not?

This is especially puzzling in light of the fact that she is currently employed full time earning at least the minimum wage (\$1,900 per month). That prompts the second question; is A.G. " relying upon the parents for the reasonable necessities of life." per RCW 26.19.090(2)? Considering that she has not been claimed by her parents as a dependent for several years, the

amount of her financial aid award, and that she is employed full time, there is no tenable reason why she could be considered a dependent or that there can be a finding of need.

As a matter of fact, a review of the record from the January 4th hearing shows that after hearing testimony and reviewing the record, the Court did indeed find that A.G. had no need. VRP1 at 27. It should be noted that the parties came before the Court five times during the January 4th hearing between 9:00 a.m. and 2:00 p.m. The testimony regarding A.G.'s need was heard in the first session and it was not until one of the sessions later in the day that the Court awarded A.G. the \$300 per month. VRP1 at 50. By this time, after many other issues had been presented and testified about in this case, the father had forgotten about the testimony early in the day when the Court had reserved on A.G.'s postsecondary support. It is hardly surprising that after hearing several other cases in addition to hearing the many subsequent issues in this case, that this earlier testimony seems to have slipped the Court's mind as well. Indeed, the Commissioner commented in a later session that, "I'm a little surprised that's even going to get her there. That's \$3,600 a year to go to college.", clearly indicating that the earlier testimony and the facts of the case were not foremost in his mind. VRP1 at 53. The result was an award to A.G. that is untenable because it is not supported by the facts of this case or by statutory law.

Support For Second Eldest Daughter J.G.

There are several legal problems with the postsecondary award to J.G. of up to \$10,000 per year, 80 percent to be paid by the Father. First, it was made to cover need at an expensive private institution for a course of study (theater) which is offered at several public institutions. CP 71,73. Second, it ignores the interest that the five minor children of the marriage have in support from their father, both while they are minors and when they in turn pursue postsecondary education.

As to the question of private versus publicly funded universities, case law clearly states that:

“we conclude that the trial court must, at the very least, make specific findings as to the cost and availability of college education in the child's chosen field at publicly funded institutions before ordering an objecting parent to support a more expensive private college education. A trial court should not require objecting parents of modest means to pay for private college where the child can obtain a degree in his or her chosen field at a publicly subsidized institution.” *In re Marriage of Shellenberger*, 80 Wn. App 71, 906 P.2d 968 (1995)

The facts of this case show that J.G.'s costs to attend Pacific Lutheran University after financial aid are \$8,826 versus \$5,031 for A.G. at Western Washington University. Net need, the amount after personal expenses and transportation costs are subtracted from the cost of attendance, and which the

parents are responsible for under the current orders, is \$6,123 and \$1,536 respectively. CP 73, 91. In other words, it is about four times more expensive for the parents at the private institution as at the public institution. This is for students from the same family, with similar academic records and for the same academic year, so it's an excellent comparison of relative costs. More complete information shows that the ratio is actually sixteen to one.

Theater majors are offered in at least the following four public universities in the state of Washington; Western Washington University, Eastern Washington University, Central Washington University and the University of Washington. These are all fine institutions which the parents already pay taxes to subsidize. A degree in theater at an expensive private college is at best a luxury, not a need, especially when the family has so many other children with needs to be considered as well. A trial court should not require objecting parents of modest means to pay for private college where the child can obtain a degree in his or her chosen field at a publicly subsidized institution.

The best interests of the other children are virtually ignored by this award. The court suggested that the father take out federal student plus loans (10 year term) to cover the yearly amount required to pay the postsecondary award. VRP at 75. This would require borrowing \$11,600 per year for which

the monthly payment would be \$140 at 7.5 percent interest. After three years of this the father will have borrowed \$34,800 and his debt service will amount to \$420 per month for the next eight years.

Since the father is almost fifty years old and at the peak of his earning potential, his income is likely to remain about the same, but his net income will drop as the younger children age out of eligibility for tax credits and deductions. This will happen as his child support payments decrease at a usually slower pace. A look at his financial declaration will show that he has about \$400 dollars a month left after deducting child support and paying his well documented, very reasonable living costs. CP 46, 109, 118. He will have some level of mortgage on his house for many years in the future because there are some long past due repairs, such as a new roof and furnace, which need to be made. The net effect is that he will be unable to borrow substantially more than the \$34,000 because he won't be able to service more debt.

Over the subsequent ten years he will make payments of about \$50,000 including interest. The loans will be paid off by 2030 when he is 62 years of age. The recipients of the \$50,000 will be J.G. at 49 percent, various banks at 30 percent, A.G. at 15 percent and whomever the next child is to attend college, at seven percent.

As we have shown, by 2020 the father will have virtually exhausted his ability to take on additional debt. Over the next at least six years, all of the earning potential he can dedicate to postsecondary support will go to servicing the existing debt, almost 80 percent of which will be for the benefit of J.G.'s pursuit of the luxury that is a theater degree at an expensive private university. At this point, further demands placed on the father will result in him having to sell the family home, which is the only asset he has which is worth enough to pay for the college expenses of the other children. We can assume this would not happen since it would amount to a patent abuse of discretion per *Shellenburger*;

“a post-secondary education support obligation that would force the obligor parent into bankruptcy, or force that parent to liquidate the family home because he or she cannot make both the support payment and the mortgage payment will, in most cases we can presently envision, amount to a patent abuse of discretion. This is especially true where the parent also supports a minor child, and the post-secondary support obligation prevents the parent from meeting that obligation to the minor child. *In re Marriage of Shellenberger*, 80 Wn. App 71, 906 P.2d 968 (1995)

The end result is that there would be no more earning power available for postsecondary support, which leaves the rest of the children with virtually no help from their father during that six year period at least, and very little

after that. This is a situation that is manifestly arbitrary, unreasonable, inequitable, and unjust.

In *Childers v. Childers*, 89 Wn. 2d 592, 575 P.2d 201 (1978) the Washington Supreme Court reasoned that the purpose of the courts being granted the long standing special powers they have had over parents and children of broken homes is to assure that the children's disadvantages are minimized. These orders do the opposite. They create disadvantage for the majority of the children that would not have existed but for the divorce. There is no rational basis to dedicate such a large percentage of the father's ability to assist his children with a higher education to just one of his children at the expense of the other children.

On the other hand, if justice is served for all the children in the family, and if the clear instructions of case law are followed, the situation looks much better. Since the record clearly shows that A.G. has no established need at this time, all of the father's funds available for postsecondary support could go to J.G. for several years. That would be enough to cover her net need at a public institution as the record clearly shows. CP 91. Instead of 30 percent of the father's postsecondary available earning power over the next ten years going to enrich banks, it could go to help the other children in the family when

they attend postsecondary schooling, as it rightly should. This is a much more just, reasonable, and equitable arrangement than the current orders.

RCW 26.19.090(2) requires that the court consider the amount and type of support that the child would have been afforded if the parents had stayed together. No reasonable parent would favor one of their children with a luxury education at the expense of arbitrarily depriving the families' other children of help in their college aspirations.

Statutory Limit on Amount of Support

Finally, the total award of postsecondary support exceeds the statutory limit on child support obligation owed of 45 percent of net income except for good cause shown per RCW 26.19.065(1). The Webster's definition of the word shown is "to cause or permit to be seen". There was no good cause shown in this case to exceed the 45 percent limit; indeed, as we have shown, the facts of this case show a good cause not to exceed the limit. The only justification given came during the hearing on January 27th on the Motion to Revise. The Court declared that "Every child should be able to chase their dreams..."). Verbal Record of Proceedings, 1/27/2017 (VRP2) at 13. Certainly, we all have a right to the pursuit of happiness, but not at the

expense of the rights, or dreams, of others. There is no indication that any of the minor children's future interest in postsecondary support was considered at this hearing.

A careful review of the record shows that the 45 percent limit was exceeded without good cause shown due to an obvious error by the court. Towards the end of the first session during the hearing on January 4th, the court declared that, "We don't get into the 45 percent cap in postsecondary awards." VRP1 at 43. This statement is obviously at odds with case law as decided in *Marriage of Cota*;

"we hold that postsecondary educational support is part of a parent's "child support obligation" for the purposes of the 45 percent limitation in RCW 26. 19. 065(1). The trial court violated RCW 26. 19. 065(1) when it set Anthony's child support obligation, including postsecondary educational support, at an amount greater than 45 percent of his net monthly income." *In re Marriage of Cota*, 177 Wn. App. 527, 542, 312 P.3d 695 (2013)

It is hardly surprising that the Court made no effort to evaluate the facts of the case for good cause to exceed the statutory limit when it did not believe that limit applied to postsecondary support.

V. CONCLUSION

The trial court failed to enter the necessary findings in support of its order or to properly consider several of the relevant factors. This leaves us to wonder on what basis the award was made.

Did the court find A.G. had need? If so, on what basis? As we saw earlier, the court found that B.G. did not have need. Further, the record shows that the court heard testimony from the mother to the effect that A.G. was employed full time and was self supporting with most of her school costs covered by financial aid. This is confirmed by the facts of the case. After hearing this testimony the Court decided not to award postsecondary support to A.G. at that time. Much later in the day, the court did award her \$300 per month, but without any basis for a finding of need. This was an obvious error.

Did the court find that J.G.'s choice to attend a much more expensive private school instead of a state school was justified? On what basis? In this case, we have clearly shown how this award denies the rest of the children in the family the opportunity to receive the support from their father that they otherwise would certainly have had at some level. This strikes at the very heart of the justification that the state claims for intervening in the postsecondary financial affairs of broken families: to minimize the children's disadvantages as a result of the divorce.

Finally, the Court clearly erred in its' belief that the statutory limit of 45 percent does not apply to postsecondary support awards as can be seen by a review of *Marriage of Cota* and many other decisions of the Appellate Court.

Ultimately, the Court ran into a fundamental problem when trying to make a reasonable provision for postsecondary support for the older children in this case. It tried to apply the standard two child family solution to a large family with eight children. As the Court remarked at the 2015 dissolution trial, "This has been a very unique case, I cannot recall any other case with 8 children except in dependency court." CP 1.

The child support tables are set up so that child support is paid from monthly earnings because child support is a long term (up to 18 year) proposition. Postsecondary support on the other hand, generally only lasts four years. This makes it possible to spread the cost of a 4 year degree over a longer period through the use of credit. No one sees credit as a potential long term solution to child support because the costs go on for so long a time. Similarly, for a family of eight children, postsecondary costs can go on continuously for close to two decades. In this situation, pay as you go postsecondary support is the only way to feasibly maintain the flexibility to react fairly and reasonably to all the many possible permutations of

circumstance that will occur with so many students over so long a period of time.

The court should recognize that A.G. is no longer dependent on her parents for the necessities of life and thus any contributions towards her schooling by her parents should be voluntary. Further, J.G.'s award should be limited to the amount of her net need at a public institution with a course of study in her chosen field, such as Western Washington University. At the very least, the court should recognize the rights of the other children in this case and reduce the father's total support obligation to 45 percent of his net monthly income to comply with RCW 26.19.065(1).

Respectfully submitted this 12th day of April, 2017.



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PROOF OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that, on the date stated below, I did the following:

On the 12th day of April, 2017, I mailed by certified U.S. Mail, postage prepaid a true copy of the Appellants Opening Brief in the above-entitled matter to Margaret Ghigleri at the following address: 20111 Singer Rd. S.W., Vashon, WA 98070

Dated: 4/12/2017

V. Ghigleri
Signature

Victor Ghigleri
Print or Type Name

Seattle, WA
Place signed