

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 REPLY BRIEF

Victor Ghigleri, Pro se
3534 E. Roosevelt Ave.
Tacoma, WA 98404
(253) 307-3720
vghigleri@gmail.com

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I. INTRODUCTION

In the “Statement of the Case” portion of the Respondent’s brief, as well as the main body of legal arguments, there are several misstatements of the facts of the case which I would like to address. Also, two pages were spent in attacking my character. Besides not being germane to the issues at hand, these are untrue allegations of which Ms. Ghigleri is ultimately the only source and for most of which there is contradictory evidence. As to the misstatements of facts relevant to the issues at hand, I will address the most important below before replying to her legal arguments.

II. FACTUAL INACCURACIES

Net Income

The respondent made statements on pages 5 and 32 of her brief relating to my net income as set by the 2015 and 2017 orders. In 2015 my net income was set at \$6,362 which was \$250 higher than actual because I didn’t end up getting all the child tax deductions which the \$6,362 net income was based on. CP 18, 22. The net income set at the January 4th, 2017 order was \$6,012, which was correct for 2016. CP 105. I would like to point out that

contrary to what Ms. Ghigleri alleges on page 32, my net income is slowly dropping over time because my tax deductions have gone down faster than my pay has gone up. My net income for 2017 is \$5,873. My monthly income tax burden was \$250 in 2015, \$367 in 2016, and \$750 in 2017. CP 41, 118.

Living Costs

The Respondent questioned the monthly expenses listed in my financial declaration (CP 46) on pgs 7 & 14, specifically my housing costs of \$1,550 and transportation costs of \$280. CP 49. The breakdown for housing costs are as follows; \$1,132 Mortgage + \$219 TPU (monthly Budget Billing plan) + \$146 PSE (average last 6 months) + \$33 internet + \$11 Netflix = \$1,541 The transportation costs are as listed in my financial declaration. CP 49. I do have the personal use of a company truck, but with restrictions which require that I also own a vehicle. The costs listed are very reasonable, although the maintenance and gas are a little high at \$100 because my daily driver is a 1967 International pickup that gets about 10 mpg and has close to 200,000 miles on it. The \$30 is what I typically spend to send the kids back on the ferry after visitation. I do own some older vehicles, as she mentioned, but if you add the purchase price of every one of them together, they come up to less than half the cost of the \$20,000 4wd diesel Ford Excursion that we

bought for her to drive. Hardly evidence of the “extravagant tastes” she mentions on page 16.

My house in East Tacoma is worth just under \$200,000 and is almost paid off, but I will need to borrow money this fall to make some badly needed repairs such as replacing the leaking 30 year old roof and replacing the 1950’s era gas furnace. I will also still have insurance and property tax costs going forward, so of course paying off my mortgage won’t “free up \$1,100 per month” as Ms. Ghigleri alleges on page 32.

Ms. Ghigleri also states on page 32 that I was able to pay \$3,297 per month in support and maintenance during the 11 month period of temporary orders. It should be noted that \$500 of that amount was maintenance which I could not pay out of my earnings. The Court left me enough of the family savings on final orders to pay the \$5,500 arrears; she was awarded almost all the rest of the liquid assets of the marriage. CP 3. If you subtract my total monthly living expenses of \$3,278 from my actual net income of \$6,095 at the time, you get \$2,817. CP 46. \$2,817 was 46 percent of my net income and what I had left to pay support and alimony, and about \$500 less than my obligation. The situation today is about the same with my net income being a bit lower. I can just scrape by on \$3,200 per month living expenses, but that’s with no budget items for monthly savings or house repair. If my support

obligations go over 45 percent of my income, I have to borrow the money and make the payments out of the 45 percent.

Status of Idaho Property

On page 13 of Ms. Ghigleri's brief she mentions my property in Idaho as part of the justification for her accusation that I have not been forthright about my financial circumstances. The 80 acres I own in Idaho is part of a 160 acre cattle ranch that has been in the family since 1962. It has been run as a family business since the early 1980's in partnership with my father, my sister, and myself. Originally, we each owned 40 acres, but I inherited my brother's 40 acres upon his death. My father's 40 acres contains the ranch house, barn, and outbuildings. Since my father owns the majority of the value in the business, he manages the whole ranch, including paying all property taxes. My finances are completely separate from the ranch and I neither make nor receive any payments to the ranch.

As is common with many small farms, it doesn't generate much income, which is why the property value (\$42,000) and taxes are so low. CP2. Since my father is in his 80's, he leases out the land to a rancher who pays him about enough to cover the property taxes. Close to half of my

acreage is very steep wooded mountainside that was last logged in the 1990's. The rest of it is pasture land that is not good enough ground to raise alfalfa for winter feeding. The better land on the rest of the ranch is used to grow the winter feed while my land supplies most of the summer grazing. If I was forced to sell my part of the ranch, the whole business would be crippled for this reason. The only way to raise a significant amount of money from my part of the ranch would be to sell it. When calculating eligibility for student financial aid, the federal government does not expect farm families to have to sell their farms to finance their children's college education and neither should the State of Washington.

Postsecondary Support for B.G., A.G. and J.G. Paid by Ms. Ghigleri

The respondent makes the unsupported claim on page 11 of her brief that she deposited \$75 per month in B.G.'s bank account while in several places she implies that B.G. has not received any support from me. My information is that her deposits to B.G. only averaged \$25 per month and only while he was in high school as he started working soon after graduation. I would like to point out that I have provided him with food and lodging continuously through the summer of 2017 and gave him a car in 2015 as well.

On page 11, Ms. Ghigleri claims to have paid tuition for J.G. I believe this springs from the mistaken belief that she seems to have that the child support I pay to her counts as support coming from her when she uses it for the children's postsecondary needs. Thus, when she states on page 13 that my share of the tuition cost for the 2016-17 school year at PLU is \$4,534 after some "voluntary assistance" from her, she is incorrect. I paid \$2,700 in child support for J.G. to Ms. Ghigleri in the last 6 months of 2016 after J.G. graduated from high school. CP 38. For 5 of those months J.G. was living at and attending PLU. The money Ms. Ghigleri claims to have given J.G. for tuition came from the \$2,700 I paid, not from Ms. Ghigleri.

For A.G., I believe Ms. Ghigleri's unsupported claims to have paid tuition and other school expenses have to be viewed with some suspicion. During A.G.'s first year of postsecondary education, I paid support for her to Ms. Ghigleri under temporary orders. The record shows that almost all of A.G.'s educational need for the 2016-17 school year was taken care of by financial aid and it is fair to assume her financial picture was similar for her freshman year as well. Therefore, it seems likely that anything she received from Ms. Ghigleri that year actually came out of the payments I made. Furthermore, I have not seen any proof that Ms. Ghigleri has made any substantial payments to A.G. in subsequent years.

Ms. Ghigleri's Income Compared to the Appellant's Income

The respondent makes the assertion several times in her brief that I can afford to pay all the support that has been ordered. On page 10 of her brief, she states that the record shows her income had increased to \$1,716 per month by the January 4th hearing. I could not find anything in her submittals that showed much over \$1,300 per month for 2016. I found her submittals a bit hard to follow as did the Court. VRP1 at 17. In any case, Ms. Ghigleri does have a substantial amount of money coming into her bank account every month what with the \$1,300 she earns and the \$2,250 she receives in child support. That's over \$3,500 per month coming in for her to spend. CP 109. She does not have a mortgage or rent to pay, so she has quite a bit of disposable income. If she had to pay rent and utilities, she would spend at least \$1,500 per month for an apartment, so her effective net income could be considered to be about \$5,000 per month, which is only \$900 less than my net income. Since I only get to keep about half of my net income to cover my expenses, she ends up having considerably more disposable income than I do.

With my net income under \$6,000 and monthly living costs of \$3,200, I have less than \$2,700 to pay the (\$2,250 child support + \$300 for A.G. + \$500 for J.G. = \$3,050) support which I am obliged to pay under the current

orders. So I fall several hundred dollars short every month, which I am forced to borrow.

III. MS. GHIGLERI'S LEGAL ARGUMENTS

Postsecondary Support for A.G.

The respondent makes the legal argument that A.G.'s support was not properly before the court and that even if it was, A.G. was still dependant on her parents and had educational need.

The record clearly shows that I did request that A.G.'s support be modified in my response to Ms. Ghigleri's petition. CP 34. The record also shows that the court did hear testimony as to A.G.'s costs for schooling from both parties. VRP1 at 26-27, 55, 72-74 and VRP2 at 5-6, 8. The court also looked at A.G.'s financial aid award letter which was submitted by Ms. Ghigleri as well as at A.G.'s declaration. CP 85, 91. This was appropriate because there was a definite change of circumstances with the amount of children in college increasing from one to three as well as A.G. changing schools and also in view of the Court's rational for the original postsecondary award in 2015.

At the 2015 trial, postsecondary support was set for A.G. at \$300 per month because that was the amount left under the statutory 45 percent cap after child support and because the Court considered it “not very much”. CP 21. There was no evidence presented or discussion of A.G.’s financial aid or educational need at the trial other than that she was attending WSU. This information should have been presented at trial, so the award was a bit of a shortcut on the part of the Court. In view of the fact that the 45 percent limit was not exceeded and that A.G. was attending a state school it is understandable considering the many issues that the court needed to decide at trial. I realize now based on A.G.’s current financial aid information that I was probably paying more than her needs dictated. However, I paid this amount with no objection for the next year and a half because the total amount of support did not force me to jeopardize my ability to support my other children’s future needs by going deeper into debt every month.

At the January 4th 2017 hearing, the Court did hear testimony from Ms. Ghigleri as to A.G.’s educational need;

“THE COURT: So what’s the bottom line owed for her?

MS. GHIGLERI: Well, so – honestly, Your Honor, I think she’s doing okay at this point.

THE COURT: Okay, um, so reserve contribution from—

MS. GHIGLERI: Um, she’s going to struggle without any help, but she’s two years from graduating.

THE COURT: Okay” VRP1 at 26- 27.

The reason Ms. Ghigleri gave this testimony was that she knew that A.G.’s financial aid award letter showed that almost all her costs were covered and that her earnings during the school year would be much more than enough to cover her unmet costs. CP 91. On the other hand, J.G.’s award letter showed that she had substantial unmet costs to attend PLU which exceeded her ability to cover them with her earnings. I presume that in light of these facts on the record that Ms. Ghigleri wanted to make sure that our limited postsecondary support resources would go to meet J.G.’s need. Apparently disregarding Ms. Ghigleri’s earlier testimony, the Court later set the amount of support for A.G. at \$300 per month, commenting that “I’m a little surprised that’s even going to get her there.” VRP1 at 53. He made that comment probably because it was only later, towards the end of the last of five sessions of the hearing that the Court looked at A.G.’s financial aid award letter which hadn’t been submitted in time to be included in the working papers. VRP1 at 26, 72.

Ms. Ghigleri raised the objection in her brief that I did not claim that A.G. was not dependent at either hearing in January, so I couldn’t raise it as a new issue on appeal. This is a matter of semantics. My argument at both hearings was that A.G. did not have educational need because the record showed that she was more than able to cover the amount of her costs left after

financial aid by working part time just as B.G. does. That is another way of saying she is not dependent on her parents. As for A.G.'s declaration that she needed the \$300 to pay rent, she earned over \$3,000 net income in the last half of 2016 and if she made that much in the first half of 2017, she would have more than enough to cover the \$5,000 shown as her gross need on her financial aid award letter. CP 91. This is especially true since her actual off campus living costs were significantly less than the \$10,000 room and board cost for living on campus shown on her financial aid award.

At the January 27th hearing for revision, I again explained that the record showed that A.G. had no educational need as follows;

“MR. GHIGLERI: And what I found is that, you know, as far as the need of the students, you know, Ben was not awarded anything because he didn't have any need. He is working 20 hours a week. He is living with me, and I'm providing his room and board. And I don't know, I don't think that Amanda has, you know, according to her declaration, she has \$5,000 worth of need. You know, she is going to a state school. She has \$5,000 worth of need and there is just this other \$4,000 scholarship that seems to be in addition to that, so that might be like \$1,000. I asked her for information on -- Joy has the award letter -- exactly what financial aid was awarded. I didn't get that from Amanda, but in any case, even if she works just half the time, she is going to net \$10,000 working half the time for the year, and she will more than cover all of her expenses. So it seems to me the only person that really has a need is Joy.” VRP2 at 5-6.

The Court commented about J.G. in its subsequent decision, but made no reference to this testimony or the issues of fact and law that were raised.

VRP2 at 10-13. The Court thus ignored the facts of the case as they related to A.G.'s need at both hearings. This amounts to the manifest error of complete disregard of the facts of the case.

Postsecondary Support Award for J.G.

Ms. Ghigleri claims that my arguments relating to the net cost to the parents for J.G. to attend PLU versus a state school are not supported by the record and that it is not more expensive to attend PLU than it is to attend a state school. I was basing those arguments on J.G.'s and A.G.'s financial aid award letters which are certainly part of the record. CP 73, 91. In her brief Ms. Ghigleri states that I am obliged to pay 80% of J.G.'s net need, and that for the 2016-17 school year this amount is \$4,500. Simple math brings us to the conclusion that Ms. Ghigleri figures J.G.'s total net need for 2016-17 at \$5,625. A.G.'s net need is shown by her financial aid award letter as being \$1,536. CP 91. Net need was defined at the January 4th hearing as the costs shown by the school (room & board, tuition, books, fees) less personal and transportation costs. So using Ms. Ghigleri's own figures, J.G.'s net need at PLU is almost four times A.G.'s net need at WWU. Therefore it is reasonable to conclude that if J.G. went to a state school, her net need, the amount her

parents are required to pay under the current orders, would be 25 percent of what it is at PLU.

The postsecondary award for J.G. was to be prorated over the calendar year starting with the effective date of the order, which is January 4th, 2017. CP 112. (the 2016 date in the orders is obviously a scrivener's error as J.G. was still in high school at that time) The amount owed for the 2016-17 school year under the orders was thus for the second half of the school year only. Therefore, Ms. Ghigleri's calculations of postsecondary support I owed for J.G. are not correct because they are for the entire school year and they ignore the \$2,700 in child support that I paid for J.G. while she was at PLU in the fall of 2016. Looking forward, the correct monthly amount I owe is certainly not \$377 per month for the 2017-18 school year as she claims. It is substantially higher. For the 2017-18 school year, just my portion of the PLU obligation is more than \$5,625, but that was not part of the record at the time of the January hearings.

I would like to point out that no specific findings were made justifying this higher cost to attend a private school as the law requires "at the very least" under *Shellenberger*. The *Shellenberger* Court stated the general principal that;

"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 underlying rational basis for this position is that there is not necessarily an “educational need” to attend a more expensive private school instead of a state school and that the State’s legitimate interest in having an educated citizenry can be satisfied by an education taken at a state subsidized institution.

Ms. Ghigleri also claims that the fact that J.G. can obtain a degree in her chosen field at a state institution is not supported by the record. It is a matter of common public knowledge that theater arts are taught at most state universities, including at WWU for example.

45 Percent Statutory Limit on Support

Ms. Ghigleri claims that the Court made specific findings that there was educational need to exceed the 45 percent cap and “that this is a larger family”. She gave no citation to the record for either assertion. I can find no place in either the January 4th hearing or the January 27th hearing where the

Court made specific reference to either educational need or a large family as justification to exceed the 45 percent cap in this case. I wouldn't expect to find such a justification in the first hearing since the Commissioner believed that it didn't apply to postsecondary support awards. VRP1 at 43.

As Ms. Ghigleri noted, the Court did find good cause to exceed the 45 percent limit at the January 27th hearing. Specifically what that cause was remains a mystery because the court never said what that "good cause" might be. VRP 2 at 10-13. Further, the statutory language found in RCW 26.19.065(1) is "good cause shown". Webster's definition of the word shown is "to cause or permit to be seen". If we were to speculate that the good cause which the Court had in mind was educational need, for example, the Court made no attempt to "show" that, a) J.G. had an educational need to attend a private school or, b) that A.G. had educational need. As mentioned earlier, the court did not make specific findings as to the cost and availability of a college education in J.G.'s chosen field at publicly funded institutions as required by *Shellenberger*. Nor did the Court make any mention of A.G.'s need or if the amount awarded to her was justified by educational need or in any other way. This was despite hearing testimony which was supported by the record that A.G. did not have need. Indeed, the Court didn't specifically mention A.G. in its decision. VRP2 at 10-13. Good cause to exceed the 45 percent cap was not shown in this case.

Further, no consideration was given for the future educational needs of the youngest five children in the family, whose future opportunity to receive support from their father was definitely affected when the Court exceeded the 45 percent cap. Some consideration of the future postsecondary needs of the younger children in this case should be made in order to balance their needs with the current needs of the oldest daughters.

Operating within the existing federal student aid system that all families work with, there are just enough resources available to meet the legitimate needs of all the children. That is because the federal system considers the resources of both parents as well as family size. It does not treat intact families in a substantially different manner than broken families. The Court clearly recognizes the desirability of working within the federal student aid system, as evidenced by its use of the “net need” concept in determining how much cost the parents should pay. Unfortunately, the orders as they are currently written give economic benefits to the two oldest children that they would not have had except for the interference of the Court and which go beyond the level they would normally have based on legitimate need. These special benefits come at the expense of the younger children.

It should also be noted that the support table columns for five children were used in this case instead of the columns for the seven children for which

support is actually being paid as required per *In re Marriage of Cota*, 177 Wn. App. 527, 312 P.3d 695 (2013). CP 109. This oversight, along with the fact that Ms. Ghigleri's income was not imputed at the new minimum wage rate effective as of 2017, contributed over \$200 to the exceedance of the 45 percent cap as well. CP 105. Since these errors affect a fundamental constitutional right of the other children to equal protection, it would be appropriate to consider these facts on appeal although they were not raised at trial.

IV. CONCLUSION

None of the Respondents arguments alter the facts of this case or invalidate the basic legal arguments that I have put forward. A.G. was not shown to have educational need. No specific findings were made to justify the higher cost to the parents for J.G. to attend a private school. Good cause was not shown to exceed the statutory cap of 45 percent of net income.

The immediate effect of the Court's decision was that I began to fall into debt by several hundred dollars per month. Of course as I borrow more money over time, more of my earnings will go to interest payments instead of postsecondary support and so the amount I fall short every month in paying

my obligations will grow, forcing me to borrow more money and pay more interest in an ever increasing debt snowball.

This need not happen if the common sense dictates of the law are followed in this case. Because there is such a large family, the federal student aid system has made available financial aid to both J.G. and A.G. sufficient for their educational needs to be met at a state school with help from their parents that is within the parent's means. As the number of minor children decreases over time, the amount of financial aid that is awarded will decrease over time such that the younger children will probably need more help from their parents than the older two girls do. If the parents are still paying off large loans taken out for A.G. and J.G. to pay for costs that were not for their legitimate educational need, a grave injustice will have been perpetrated on the younger children. This injustice would not be a result of the divorce, but rather from the failure of the Courts to properly apply existing law in this case, thus creating disadvantage where none need exist in a contradiction of both legislative intent and the basic mission of the courts as set forth in *Childers*;

“In allowing for divorce, the State undertakes to protect its victims.”

Childers v. Childers, 89 Wn. 2d 592, 575 P.2d 201 (1978)

The result would be a manifest error affecting the constitutional right that all the children, including the youngest five, have to some measure of equal protection under the law.

Respectfully submitted this 30th day of August, 2017.



Victor Ghigleri, Pro se
3534 E. Roosevelt Ave.
Tacoma, WA 98404
(253)307-3720

VICTOR GHIGLERI - FILING PRO SE

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Sender Name: Victor Ghigleri - Email: vghigleri@gmail.com
Address:
3534 E. Roosevelt Ave.
TACOMA, WA, 98404
Phone: (253) 307-3720 EXT 253

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