

No. 49948-7-II

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

In re:

VICTOR GHIGLERI, Appellant,

and

MARGARET-ANN GHIGLERI, Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR PIERCE COUNTY

The Honorable Michael E. Schwartz, Judge

BRIEF OF RESPONDENT

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I. **STATEMENT OF THE CASE**

This appeal arises from a Petition for Modification of the parties' 2015 Final Order of Child Support issued after trial in their Legal Separation matter. The following briefly describes the history of their separation as well as the Modification proceedings presently at issue.

The parties were married on August 7, 1993, and separated initially in 2012 when Ms. Ghigleri left the home with their eight children. CP 141. Despite attempts at reconciliation, they then filed for separation on February 21, 2014, when the underlying case began. CP 141-42. They have eight children together, whose ages ranged from 5 to 18 at the time the Legal Separation matter began, and all of whom remained dependent on the parties throughout their parents' separation. CP 17-32. Just before Mr. Ghigleri filed for legal separation on 2/21/14, the parties learned that their oldest daughter, AG, had been accepted to Washington State University for the Fall of 2014. CP 125. She was commended for her achievements and even selected to receive a "University Achievement Award" due to her academic success thus far. CP 125.

Concerns about Mr. Ghigleri's focus on money were raised early in their separation matter. Mary Weis was appointed Guardian Ad Litem (hereinafter "GAL") for the children, and she issued a report on August 27, 2014. CP 139-65. She noted that

both parties reported coming from large families and both agreed to have a large family together. CP 142-43, 146. Ms. Ghigleri remained at home with the children, caring for them and homeschooling them, while Mr. Ghigleri worked long hours to provide financial support. CP 142-43. As the children grew older, however, Mr. Ghigleri became “obsessive and tyrannical,” yelling at the children, angry whenever there was the slightest mess, and focused completely on money. CP 143. Despite this worry, even when Ms. Ghigleri cut back her spending to just the barest necessities, Mr. Ghigleri continued to spend frivolously for himself and refused to cut back on his own spending. CP 143. When counseling failed to resolve these issues, and Mr. Ghigleri’s controlling nature began escalating to the point where Ms. Ghigleri became afraid of further restrictions to finances, so she left with the children while Mr. Ghigleri was away on a trip and filed for separation. CP 143-44.

During her investigation, the GAL determined that Ms. Ghigleri was an excellent mother and had no concerns about placing the children in her primary care. CP 157. Regarding Mr. Ghigleri, the GAL was concerned about the fact that he often put his own needs before the kids’ needs. CP 158. She was particularly concerned about incidents wherein he told the children Ms. Ghigleri did not “love” him, implying to them that the separation

was her fault, and that he was giving 80% of his money to their mother such that he could no longer afford to pay for his house. CP 158. The GAL was also concerned that he woke the children up after bedtime to finish a chore to his exacting standards, that he insisted the children stop doing homework on the computer so he could play a game, that he gave Ms. Ghigleri only a very limited amount of money to pay for the kids' necessities (food, clothing) while paying for extravagant food, discretionary spending, and hobby supplies (such as antique car restoration) for himself. CP 158. The GAL was even concerned that Mr. Ghigleri would essentially expect one of the girls to be his housekeeper if she came to live with him. CP 151-52, 158.

At the time of the separation, Mr. Ghigleri worked as a professional engineer, licensed in two states, and was earning approximately \$7,500 per month. CP 127-30, 167. The parties' home in Tacoma, where Mr. Ghigleri resided and where he has continued to reside ever since, had only \$29,799.10 left to be paid on the mortgage with only a little over two years of payments remaining. CP 131, 166-67.

After the court entered Temporary Orders placing requiring Mr. Ghigleri to pay \$500 per month spousal maintenance and \$2,797 child support, Mr. Ghigleri filed a Motion for Revision

challenging the maintenance and child support he was required to pay. CP 168-71. His requests to lower his support were denied.

On April 15, 2015, after trial, the parties received Judge James R. Orlando's written decision. CP 1-4. Judge Orlando decided that Mr. Ghigleri's gross monthly income was \$7,372 and "[c]hild support should be determined using his income less the medical and his retirement deduction. It should be calculated for the seven children and he should pay \$300 per month for Amanda's post-secondary expense at WSU." CP 4. Regarding Ms. Ghigleri, Judge Orlando decided:

Income for Ms. Ghigleri should be calculated using minimum wage taken to full-time. It is not appropriate to impute by census table as she has not been employed full-time since the birth of Amanda 19 years ago. Her entry level work will probably start at minimum wage until she returns to school or advances in her employment.

CP 4. On July 10, 2015, the parties' final orders were signed by the court, including their Decree of Legal Separation (which was later converted to a divorce), Findings of Fact, Final Parenting Plan, and Final Order of Child Support with attached worksheets. CP 5-32. Generally, the Decree awarded Mr. Ghigleri the marital residence in Tacoma (with only \$22,000 owing on the mortgage) as well as property in Idaho and multiple classic and collectible cars, vehicles, boats, and motorcycles as well as the remaining share of his

retirement and financial accounts after Ms. Ghigleri received her portion. CP 2, 5-6.

Regarding support, Mr. Ghigleri's gross monthly income was determined to be \$7,322, and after he received deductions for FICA of \$544 and voluntary retirement contributions of \$416, his actual net monthly income was \$6,362.00. CP 27. Ms. Ghigleri's income was imputed at \$1,613 gross, and after FICA deductions of \$91, her imputed net monthly income was \$1,522. CP 27. Mr. Ghigleri was also given a credit of \$170 for monthly health insurance premiums he paid as well as a credit per the *Arvey* split-custody calculation since the oldest son continued to reside with him per the Final Parenting Plan (so the son could stay at the same high school). CP 28, 31. Based on these figures, the monthly child support transfer payment was set at \$2,402.75 instead of the Standard Calculation, which would have required Mr. Ghigleri to pay \$3,001.00 per month. CP 19-20.

As part of this decision, the Court included a requirement that Mr. Ghigleri pay "\$300 per month to WSU for Amanda while she is in school (including summer months if she is enrolled for the fall). Proof of payment shall be obtained from WSU on a quarterly basis." CP 21. Regarding the remaining children, post-secondary support was reserved. CP 21. Otherwise, the parties shared "day care that is work related" and uninsured medical expenses with Mr.

Ghigleri paying 80.8% and Ms. Ghigleri paying 19.2%. CP 21-22, 25.

Ten days after entry of this order, Mr. Ghigleri filed a Motion for Relief from Judgment requesting that the court modify the children's tax exemptions awarded to Ms. Ghigleri. CP 196-98. The court denied his request, and Mr. Ghigleri did not file an appeal or otherwise challenge the decision. Other than this Motion, neither party otherwise sought reconsideration or appeal of these orders.

Thereafter, the parties' Legal Separation was converted to a divorce on February 5, 2016.

On June 13, 2016, Ms. Ghigleri filed a Petition for Modification of support for the following reasons: 1) more than a year had passed since entry of the previous order, 2) one of the children changed age brackets by turning 12, and 3) two of the children were graduating high school that month and would need postsecondary support. CP 199-203. No request was made to change support for A.G. but for a request that payments be made to Western Washington University directly. CP 201.

In response, Mr. Ghigleri disagreed on one hand that the modification should be allowed, although he did request on the other hand that his own proposed modifications occur, namely to "[c]hange [A.G.]'s post-secondary support award and make one to to [sic] [B.G.] per my response to section 8 above [denying that

post-secondary support should be modified].” CP 33-34. He did not file his own Petition or Counterpetition with these requests. CP 33-34. Instead, he attached proposed Child Support Worksheets wherein he increased his tax deductions, increased his health insurance costs, and decreased his monthly transfer payment by about \$500 even though his income had increased. CP 41-43. In his accompanying Financial Declaration, he argued that his income had been calculated incorrectly by the trial court based on his 2015 income. CP 48. He also provided a pay stub showing his gross monthly income was \$7,445.41 (which was higher than that used at trial). CP Attachment 1 (Sealed Financial Source Documents, dated 6/24/16). His claimed expenses included only one debt for \$1,200 owed to his previous attorney (who filed a Lien against him in court, CP 187-95, which was later resolved by stipulation to pay \$2,000, CP Attachment 1 (Sealed Financial Source Documents, dated 6/24/16). CP 46-51. He listed no other debts, CP 50, and did not itemize his monthly expenses, instead setting forth general, total amounts only (for example, that he spends \$1,550 per month on housing and utility expenses without listing any particular amounts for particular expenses), CP 49. Nevertheless, his own stated income was higher than that listed at trial, and his expenses such as they were accounted for much less than half of his income. CP 46.

In support of his contradictory request that the court deny modification of the order but also simultaneously decrease his child support, Mr. Ghigleri argued against the Order of Child Support entered at trial, claiming that he has “already been paying more than would be expected from the Worksheets. This is because the Worksheet that was adopted by the court imputed income to me that was higher than my actual income” CP 204. He further claimed that the total amount of postsecondary support for all children “should be no more than \$300 in total.” CP 205. In support, he claimed that some internet website had calculated the “Expected Family Contribution” if the family had stayed together, which he claims “would have been just over \$100 per month for each of the three children attending college.” CP 205. He also claimed that ordering him to pay more than \$300 per month for three children in college would put his support obligation “over the 45% limit and impose an extreme financial hardship on myself, my son [B.G.] who lives with me, and the other children when they come to spend their time with their father.” CP 205. He then requested that the court order no future support changes for two years. CP 207.

At the same time that Mr. Ghigleri argued support should not be changed, he scheduled a hearing to discuss the modification on

October 5, 2016, even though he argued that any changes should be put off until after December of 2016. CP 204.

Ms. Ghigleri also provided her financial information, including her Financial Declaration, which showed her gross monthly income of \$1,465, debts totaling \$9,733, and monthly expenses of \$3,258. CP 53-58.

Regarding postsecondary support, she explained that B.G. was 19 years old, had graduated high school, and was attending college, so postsecondary support was appropriate for him. CP 212. As to J.G., she had not yet turned 18, but was attending Pacific Lutheran University and needed support. CP 212. A.G., whose postsecondary support was established at trial, continued to be enrolled full time at Western Washington University, and Ms. Ghigleri noted that support should continue as ordered at trial, but for the change in making payments directly to Western. CP 212. Ms. Ghigleri also noted that Mr. Ghigleri had not filed his own Petition to Modify child support for any of his requested changes. CP 211.

Regarding the 45% cap, Ms. Ghigleri pointed out that the statute allows for an exception, and the fact that the parties have so many children should be considered an exception. CP 213.

It is reasonable to expect that parents who have 8 children will spend a higher percentage of their income on their children than a family of typical size. Additional financial responsibilities are incurred with

each child that you bring into a family. There is less disposable income. Each parent's post-secondary support obligation should be calculated using current proportionate income figures.

CP 213.

After the hearing that Mr. Ghigleri scheduled was continued, as the court noted that it was not properly before the court and the court needed more information, the parties' hearings on various matters (not just support issues) were continued a few times until January 4, 2017. CP 59-60, 66, 67-68. Neither party was deemed "at fault" for the continuances, and both parties were requested to provide additional information. CP 59-60, 66, 67-68. Neither party was represented by an attorney during those proceedings. CP 59-60, 66, 67-68.

As additional information, Ms. Ghigleri provided J.G.'s resumé and financial information as well as A.G.'s scholarship award information. CP 69-92.

Ms. Ghigleri also provided updated income information, as her income had increased to \$1,716 per month. CP 61-65. In support, she provided her bank statements showing her income deposits as well as her tax returns. CP Attachments 2 and 3 (Sealed Financial Source Documents, dated 12/30/16). All three postsecondary children provided statements to the court about their own financial situations. CP 69-92, 99-101.

Ms. Ghigleri also explained her own contributions of support to the children, including \$75 per month to B.G.'s checking account for his expenses, purchases for B.G. of clothing and school supplies, a cell phone for B.G., support as needed for A.G. and J.G. to pay their tuition and living expenses, and school class, lab, supply, activity, and ASB fees for all children as well as their extracurricular fees, camp fees, transportation expenses, and any other expenses that arose. CP 61-65.

On January 4, 2017, the court granted the modification and signed a new Final Order of Child Support. CP 272-90. Mr. Ghigleri's income was set at \$7,436, CP 286, as he originally proposed in his own child support worksheets, CP 41. His request to include income tax deductions was granted (despite earlier claims that he paid no taxes due to the number of child tax exemptions allocated to him), and his requested deduction amount was also included in the final Child Support Worksheets. CP 286. His request to increase the child support premium credit he received was also granted as he proposed. CP 42-43, 287. Ms. Ghigleri's income was determined to be about the same, although her request for a deduction for voluntary retirement contributions was denied. CP 286 (showing no deduction for voluntary retirement contributions). As a result of these changes, Mr. Ghigleri's percentage of support and expenses decreased from

80.8% to 79.8%. CP 27. His monthly support payment per the standard calculation for the five minor children was decreased from \$2,402.75 to \$2,249 (factoring in that two children had started college and that there was no longer an Arvey split as the child who resided with Mr. Ghigleri was one of the children who started college). CP 275. Neither parent requested a deviation from the standard calculation. CP 276.

Regarding postsecondary support, the court ordered that A.G.'s \$300 per month postsecondary payments as ordered at trial would continue. CP 280. For J.G., the court ordered that her costs would be split between the parents, 80% to Mr. Ghigleri and 20% to Ms. Ghigleri, with the proviso that "[p]arent's costs/payments can not [sic] exceed a combined \$10,000 for any academic year for [J.G.]." CP 280. Postsecondary support for the remaining children was reserved. CP 280.

On January 12, 2017, Mr. Ghigleri filed a Motion for Revision of the Order of Child Support, claiming that \$967 per month in postsecondary support "exceeds the petitioner's ability to pay." CP 291-94. He also claimed that it "exceeds the statutory [sic] guideline of 45% of the petitioner's net income (\$2,705 per line 18 of the approved worksheet) by \$511 per month. CP 292. He then asserted that the postsecondary award was "an abuse of judicial

discretion” because he “never envisioned that we would incur these kinds of costs to educate our 8 children.” CP 292.

In response, Ms. Ghigleri noted that the \$10,000 figure, which Mr. Ghigleri used when arguing that his support exceeded the 45% limit, was only a ceiling to what the parties were required to pay - not the actual amount to be paid. CP 295. She explained that J.G. had, through the receipt of grants, scholarships, employment, and her own student loans, been able to pay \$49,000 of the \$54,669 tuition on her own (with some voluntary assistance from Ms. Ghigleri). CP 295-96. This left only \$5,668 to be apportioned between the parents, which put Mr. Ghigleri’s share at \$4,534 spread out over the year (about \$377 per month). CP 295-96. Further, she noted that Mr. Ghigleri was lumping all children’s support together at once, whereas they would start graduating from college soon as others began graduating from high school, which meant that support for the minor children would decrease as they graduated high school, and postsecondary support for the older children would stop as they graduated college. CP 296. As an example, she noted that A.G. was already a junior in college and would graduate soon. CP 296.

Further, Ms. Ghigleri also noted that Mr. Ghigleri was not being forthright about his financial circumstances, including the following facts: A) his debt expenses were minimal, as the house

mortgage would be paid off in full as of November 2017, B) he owns 80-acres of meadow and harvestable forest land in Idaho worth over \$300,000 (possibly closer to \$400,000), C) he retained almost all of the parties' home furnishings, meaning he did not need to "start over" after the divorce, D) although he claimed \$280 in monthly vehicle expenses, his car is employer provided and funded, E) although he claimed \$450 in non-itemized monthly utility expenses, his monthly cell phone and plan are employer provided and funded, and F) he has many, many collectible and antique items (at issue during the marriage when he wanted to spend money on his own hobbies, not the family's expenses) that he could use to supplement his income. CP 296-97. Therefore, Mr. Ghigleri could afford the additional \$377 he had been required to pay, not only because of these factors, but also because his overall child support had decreased. CP 295-97. At trial, he was ordered to pay a combined \$2,702.75 for seven minor children and one in college, and after the modification, that figure only increased to \$2,926 for five minor children and three postsecondary children - a difference of \$223.25. CP 295-96.

On January 27, 2017, Mr. Ghigleri's Motion for Revision was denied by the Honorable Judge Michael E. Schwartz, "based on the evidence reviewed by the court, and the statutory factors in RCW 26.19.065 and RCW 26.19.090. CP 102. Regarding Mr. Ghigleri's

argument that support exceeded the 45% cap, Judge Schwartz held:

Mr. Ghigleri points to RCW 26.19.065 as the limitation on what a court can order a parent's child support obligation to be, and that subsection 1 indicates that it may not exceed 45 percent of net income, except for good cause shown. That's not mandatory on the part of the Court. That language "may" is discretionary.

In fact, in subsection B the statute says before determining whether to apply the 45 percent limitation, the court must consider whether it would be unjust to apply the limitation after considering the best interest of the child and circumstances of each parent. Such circumstances include, but are not limited to, leaving insufficient funds in the custodial parent's household to meet the basic needs of the child. Comparative hardship to the affected household. Assets or liabilities, and any involuntary limits on either parents' earning capacity, including incarceration, disabilities or incapacity.

RP (1/27/17 Hearing) 10-11. After discussing these factors, Judge Schwartz noted that these children all appear to be self-starters who are working exceptionally hard, that although they are working, they are not self reliant, and that there was a need for help paying for their educations. RP (1/27/17 Hearing) 12. Based on this, he held that:

Given the factors that I've considered here, based on the evidence, I find that there is good cause to exceed that 45 percent in this particular circumstance.

RP (1/27/17 Hearing) 12. Judge Schwartz further noted that J.G. had "substantially reduced" her own schooling costs by "taking on a

job, getting partial scholarships, getting a grant.” RP (1/27/17 Hearing).

Mr. Ghigleri then filed this appeal on February 2, 2017, attaching the Order of Child Support, dated January 4, 2017. CP 103-122.

II. ARGUMENT

Mr. Ghigleri has a long history of trying to minimize all support paid for his eight children in order to save funds for his own extravagant tastes, but the law is clear that children should be supported, and the trial court did not abuse its discretion in establishing support for those children. For that and the following reasons, his appeal should be denied, and Ms. Ghigleri’s fees and costs should be reimbursed.

A. Standard of Review

A trial court’s modification of an order of child support is reviewed for an abuse of discretion. *In re Parentage of Goude*, 152 Wn. App. 784, 790, 219 P.3d 717 (2009) (citing *Schumacher v. Watson*, 100 Wn. App. 208, 211, 997 P.2d 399 (2000)). “Discretion is abused where it is exercised on untenable grounds or for untenable reasons.” *In re Marriage of Tang*, 57 Wn. App. 648, 653, 789 P.2d 118 (1990). A trial court’s findings must be supported by substantial evidence. *Schumacher*, 100 Wn. App. at 211. “Substantial evidence” is evidence sufficient to “persuade a fair-minded person of the declared premise.” *In re Parentage of*

Goude, 152 Wn. App. at 790 (citing *In re Marriage of Hall*, 103 Wn.2d 236, 246, 692 P.2d 175 (1984)). In sum, a trial court abuses its discretion when “no reasonable person would take the position adopted by the trial court.” *Singleton v. Frost*, 108 Wn.2d 723, 730, 742 P.2d 1224 (1987). Regarding postsecondary support specifically, trial courts have broad discretion to order support for postsecondary education. *Childers v. Childers*, 89 Wn.2d 592, 601, 575 P.2d 201 (1978).

B. CONTINUING POSTSECONDARY SUPPORT FOR A.G. AS ORDERED AT TRIAL WAS PROPER

Mr. Ghigleri asserts that ordering postsecondary support for A.G. was error because, he alleges, A) she is not dependent on the parties for support, and B) the court found their son, B.G., was not dependent under similar circumstances to A.G. What he fails to address at the outset of this argument, however, is 1) that modification of A.G.’s support was not before the lower court since neither party filed a Petition or Motion to request that modification, and 2) Mr. Ghigleri failed to preserve this argument for appeal. Further, even if A.G.’s support was before the trial court, the support provided for A.G. was appropriate because 3) she remains dependent on the parties and is thus eligible for support, and 4) the Court determined B.G. did not need support because Mr. Ghigleri himself argued that B.G. did not need support - not because of any circumstances relating to A.G.

1. Support for A.G. was not subject to modification in the underlying action.

Unlike the parties' other children, postsecondary support for A.G. was addressed at the parties' trial in 2015, and as part of the court's decision, Mr. Ghigleri was required to pay \$300 per month for A.G. postsecondary education (a minor amount considering the potential costs to parents for a college education). He did not seek reconsideration or appellate review of this decision, and in fact, he argued against modifying the order in his Response to Petition, wherein he indicated that he "disagreed" with the requests to "modify the monthly child support amount" and to "modify post-secondary educational support." As part of this same Response, he later indicated that he wanted to "[c]hange [A.G.'s] post-secondary support award" - not because she was not dependent, but because he wanted to divide the \$300 previously awarded to her amongst all three post-secondary children. However, he never filed his own Petition to modify the order in that regard.

RCW 26.09.010(4) states "[t]he initial pleading in all proceedings under this chapter shall be denominated by a petition. A responsive pleading shall be denominated a response." Regarding modifications of child support orders, specifically, RCW 26.09.175 requires that the modification "commence with the filing of a petition and worksheets." As part of this request, a party is required to demonstrate the requisite change of circumstances as

set forth in RCW 26.09.170 in support of the modification. When the prior Order of Child Support is the result of a contested court proceeding, the party requesting that it be changed “must prove a substantial change of circumstances to warrant modification.”

Pippins v. Jankelson, 110 Wn.2d 475, 481, 754 P.2d 105 (1988).

Mr. Ghigleri did not file a Petition in support of his requested Modification, and since Ms. Ghigleri’s Petition did not request that A.G.’s support be modified, no Petition or Motion was before the court to allow her support to be changed.

In fact, Mr. Ghigleri was specifically told this at the hearing on the modification, as he stated for the first time regarding support for A.G., without providing any other information, “So she’s getting money even though she doesn’t have a need for it.” RP (1/4/17 Hearing) 55. Ms. Ghigleri responded that she does have a need, and Mr. Ghigleri said “Could we -- could we change that?” The Commissioner responded by saying, “[T]here’s no motion in front of me to do that. I’m not changing that part of it. . . . It stays as you guys have been -- if it’s in a court order, it stays as is.” RP (1/4/17 Hearing) 56. Therefore, the trial court lacked authority to change support for A.G., and as a result, it was appropriate for the modified Order of Child Support to state that support for A.G. would continue as originally ordered.

2. Mr. Ghigleri did not preserve the issue of support for A.G. on appeal, as he did not raise it as an issue to be addressed in court, and in fact, agreed in court that she should receive support.

Further, Mr. Ghigleri did not preserve this issue for appeal, and claimed errors not raised in the trial court will not be considered on appeal. RAP 2.5(a); *Brandt v. Impero*, 1 Wn. App. 678, 463 P.2d 197 (1969); *In re Marriage of Knutson*, 114 Wn. App. 866, 60 P.3d 681 (2003).

For example, in *Marriage of Knutson*, the Court of Appeals refused to consider a party's collateral estoppel argument that was not raised in the proceedings below. *In re Marriage of Knutson*, 114 Wn. App. at 871. Similarly, in *Marriage of Williams*, a husband argued before trial that the wife's failure to hand over documents constituted intransigence, but because he did not actually make that argument at trial, he was precluded by the Court of Appeals from raising the argument on appeal. *In re Marriage of Williams*, 84 Wn. App. 263, 272-73, 927 P.2d 679 (1996).

In the instant case, Mr. Ghigleri argued before the final hearing that he could not afford to pay postsecondary support for A.G. and that her support should be re-apportioned so it is *pro rata* amongst the children, but he failed to raise any argument about her status as a dependent child until after the modification hearing. In his Response to the Petition, he asserted that her award should "change," but not that she was no longer eligible for support for

some reason. CP 34. In his Declaration on 9/8/16, he argued that support should continue “as it has been,” but that postsecondary awards should be apportioned “66% to [A.G.] and 34% to [B.G].” CP 207. He made no statements about denying support to A.G. or about her eligibility for support to the court and did not raise it as an issue to be addressed.

Further, at the hearing, in response to the Commissioner’s inquiry about the “bottom line” of what was being paid to/for the children, RP (1/4/17 Hearing) 22, Ms. Ghigleri explained the current education situation for each of the post-secondary age children, including A.G., indicating that she is a junior at Western and that she would struggle without any help, RP (1/4/17 Hearing) 26-27. Mr. Ghigleri did not assert in response any objection to continued support for A.G.

Later in the hearing, Mr. Ghigleri asked about the amount he was going to pay going forward, stating “I know there’s an order for me to pay [A.G.] \$300 a month now. So does that -- does that change that order, what we’re doing here today? Or is it - I mean, and I have no idea how much I’m support to pay” RP (1/4/17 Hearing) 50. In response, the Commissioner stated, “[A.G.’s] still \$300 a month.” RP (1/4/17 Hearing) 50. Mr. Ghigleri then continued to discuss support for B.G. and J.G. with the

Commissioner, but did not object to support for A.G. RP (1/4/17 Hearing) 50-56.

In sum, there was no motion or petition before the court to change support for A.G., but despite that, Mr. Ghigleri at no time raised the issue that she was no longer dependent or eligible for postsecondary support. In fact, his actions and arguments throughout the case demonstrate that he wanted support to remain the same and/or be apportioned differently, but only out of his concern for his total support, not because he thought she was ineligible for support. As a result, Ms. Ghigleri was deprived of the opportunity to respond fully to the argument and provide any additional evidence about A.G.'s dependence.

3. Even if support for A.G. is properly before the Court, she remains dependent and eligible for continued support, and the order was appropriate in light of the parties' finances and the child's educational need.

With that said, the uncontroverted evidence presented did demonstrate that A.G. remained dependent on her parents for support such that postsecondary support is appropriate. RCW 26.18.020 defines a "dependent child" as "any child for whom a support order has been established or for whom a duty of support is owed." Further, a dependent child is "one who looks to another for support and maintenance, one who is in fact dependent, one who relies on another for the reasonable necessities of life." *Id.* at 598. Age is but one part of this consideration, as other factors include

“the child’s needs, prospects, desires, aptitudes, abilities, and disabilities, and the parents’ level of education, standard of living, and current and future resources.” *Id.* Ultimately, dependency “is a question of fact to be determined from all surrounding circumstances,” or more specifically, “all relevant factors.” *Id.*; RCW 26.09.100. Even if a child is employed while attending school, that factor does not mean a child is no longer dependent, as the question is whether the child is “capable of earning an income sufficient to meet her ‘reasonable necessities of life.’” *In re Marriage of Cota*, 177 Wn. App. 527, 538, 312 P.3d 695 (2013). Even when a child files her own tax returns due to her own employment but still “looked to another for support,” she is still dependent. *In re Marriage of Goude*, 152 Wn. App. 784, 791, 219 P.3d 717 (2009).

In the instant case, A.G. filed a declaration with the court indicating that she is a full-time student at Western Washington University pursuing a joint degree in Elementary Education and Early Childhood Education. CP 85. Although her full-time status made it difficult for her to work, she was able to work as an assistant preschool teacher part-time to earn about \$400 per month. CP 85. She further declared that she relies upon the income received from Mr. Ghigleri in order to pay for her groceries

and bills, and without regular, timely payments from her father, she would not be able to pay her bills. CP 85-86.

These facts should be sufficient to determine that A.G. is in fact dependent on her parents, not only because \$400 per month is insufficient for any person to meet their own reasonable necessities of life, but because she still looks to Mr. Ghigleri and the \$300 she receives for support in paying basic bills and groceries.

4. Support for B.G. was not denied because the court found he was not “dependent” or because of a comparison between B.G. and A.G., but because Mr. Ghigleri himself testified that B.G. had no present need for support and was paying all expenses himself.

Mr. Ghigleri’s comparison between A.G. and B.G. as demonstrating error in the court’s decision is inapposite, as it is a false comparison based on misstated facts as they occurred before the trial court. First, it was Ms. Ghigleri’s position that B.G. was dependent on the parties and should receive postsecondary support, and part of her Petition for Modification was to request support for B.G. She never argued or agreed that B.G. was not dependent.

Second, it was Mr. Ghigleri who argued to the court that B.G. did not need support because B.G. had already been paying all of his own personal and educational expenses. Specifically, Mr. Ghigleri testified that B.G.’s income is \$16 per hour, that he does not need support, and that B.G. covers his own essentials,

including gas, food, entertainment, insurance, and car repairs. RP (1/4/17 Hearing) 32. When the parties were asked about B.G.'s educational need, Mr. Ghigleri stated that B.G. "pays for all of his school." RP (1/4/17 Hearing) 35. The Commissioner specifically asked, "So he's taking care of all of it," to which Mr. Ghigleri replied, "Yeah." RP (1/4/17 Hearing) 35.

Then, instead of objecting to support for A.G. or some claim about her lack of dependence/need as well, Mr. Ghigleri turned the focus of the discussion to his request to pay only \$100 per child each month for college education, and when the Commissioner deemed that an unreasonable expectation for supporting three children in college, Mr. Ghigleri stated, "take my house and my kids' house, that's fine." RP (1/4/17 Hearing) 35. Later, when the parties discussed the draft order with the Commissioner, the Commissioner again indicated "you say [B.G.] takes care of all of his" and "he doesn't have the need at this point," to which Mr. Ghigleri agreed and made no mention of challenging his need or challenging support for A.G. RP (1/4/17 Hearing) 51. Therefore, it was Mr. Ghigleri who induced the court not to enter an award of postsecondary support for B.G. by arguing that B.G. had no need for it, even though it was Ms. Ghigleri who argued that B.G. should receive support. It is contradictory for Mr. Ghigleri now to argue

that the trial court erred because it simply agreed with him based on information he provided.

Further, A.G.'s financial circumstances and B.G.'s financial circumstances are different as set forth in the record. A.G. was determined to have need for support and still relied on the funds she received from Mr. Ghigleri each month to pay her basic bills. That she was only earning \$400 per month from employment made it unsurprising that she would need help with bills. However, B.G.'s circumstances as argued by Mr. Ghigleri indicated he earned more from employment and was able to pay his own expenses without assistance from Mr. Ghigleri. Therefore, it is inappropriate to say both children are not dependent simply due to employment, not only because employment is just one factor of dependency per *Marriage of Cota*, but also because their incomes and expenses cause them to have different levels of need.

Lastly, Mr. Ghigleri argues that the issue of A.G.'s support was reserved. That is not demonstrated by the record as set forth above. It does appear there was discussion early during the hearing of reserving the amount which A.G. should be responsible to contribute towards her own education, although there was no discussion about what "reserve" meant to or with the *pro se* parties, and thereafter, it was determined that support for A.G. should appropriately continue per existing court order. RP (1/4/17

Hearing) 27. Nevertheless, that occurred as the parties' argued, but the Commissioner's decision was clear as explained above that A.G.'s support would not change and there was no basis for it to change. Even if the Commissioner's commentary could be considered a "decision," at best it is an oral decision that differs from the written decision, and "parts of the oral decision cannot be assigned as error because the court's final determination is expressed in its findings, conclusion and judgment. The court's oral decision is subject to change by the [court] at any time prior to the entry of the judgment." *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 857, 376 P.2d 528 (1962).

In conclusion, support for A.G. was not properly before the trial court for modification, and Mr. Ghigleri's objection to her eligibility for support is not properly before this Court. Nevertheless, the uncontroverted evidence provided demonstrates that she remains a dependent child who is eligible for postsecondary support under RCW 26.19.090, and continuing support for her was appropriate not only per *res judicata*, but also per her dependence, the parties' financial circumstances, and her need.

C. POSTSECONDARY SUPPORT FOR J.G. WAS PROPER

Mr. Ghigleri makes many claims regarding support for J.G., many of which are based on new allegations and new facts not located anywhere in the record. RAP 10.3 limits the recitation of

facts on appeal to facts that can be located in the record, stating “[r]eference to the record must be included for each factual statement.” RAP 9.1 also provides, in relevant part, that the “record on review” is limited to the “report of proceedings,” which is the oral record of underlying proceedings, the “clerk’s papers,” which are “pleadings, orders, and other papers filed with the clerk of the trial court,” and exhibits from trial. RAP 9.11 further states that a party can supplement facts under limited circumstances as directed by the Court of Appeals, in which case the trial court would take the additional evidence.

In the instant case, most of Mr. Ghigleri’s argument about support for J.G. contains new, unsupported information not located in the record, and he provides no citations to the record for his claims that J.G.’s school is five times more expensive than other schools, that her course of study is offered publicly elsewhere, or that loans are not available to him to pay support. This information was not raised before the trial court, is not supported by any documentation other than self-serving, unsworn comments in his brief, and he has not asked this Court for permission to supplement the record on review. Therefore, this Court should decline to consider that information per *Southcenter View Condo. Owners’ Ass’n v. Condo. Builders, Inc.*, 47 Wn. App. 767, 770, 736 P.2d

1075 (1986) (citing *Am. Universal Ins. Co. v. Ranson*, 59 Wn.2d 811, 816, 370 P.2d 867 (1962)).

Moreover, even if Mr. Ghigleri's arguments about J.G. are considered, they do not refute the fact that support for J.G. was proper as set forth in the order.

First, Mr. Ghigleri claims that J.G. attends a private school five times more expensive than a public school. What he fails to note, however, is the fact that J.G. already decreased the cost of her own schooling from \$54,669 per year to \$5,669 through the receipt of grants, scholarships, employment, and her own student loans. Per the court's order and in light of the facts, Mr. Ghigleri is only responsible for \$4,534 of this cost, which is \$377 per month. Therefore, even though she attends a private university, J.G.'s educational need is already comparable to a public university. This is demonstrated by the fact that A.G. attends a public university - Western Washington University - and her support is \$300 per month, which is only slightly less than J.G.'s costs at \$377 per month.

Second, the fact that the trial court capped postsecondary support for J.G. at \$10,000 per year (combined for both parents) defeats Mr. Ghigleri's argument that J.G. attends a school five times more expensive than a public school. Facts aside, this is based on logic alone: if J.G.'s private school at \$54,669 per year is

“five times more expensive than public school” per Mr. Ghigleri, then public school should be one-fifth of the cost of private school, or about \$10,933.80 per year. The trial court capped both parents’ combined support for J.G. at \$10,000 per year, which means that the trial court already capped support at a level *less than* what Mr. Ghigleri claims should be paid for a public education. On top of this, the order requires the parties to share that \$10,000 capped amount *pro rata* per the Order of Child Support, which means Mr. Ghigleri is only responsible, at most, for \$8,000 per year for J.G.’s support. By Mr. Ghigleri’s own argument, this is less than the cost of public school.

Further, using the actual support numbers for J.G., Mr. Ghigleri’s cost per month is \$377, which is not five times more expensive than A.G.’s \$300 cost per month at a public school.

In sum, J.G. may be attending a private university, but through her own extraordinary efforts, she has relieved her parents of 89.6% of the cost, and even by Mr. Ghigleri’s own figures, he is paying less than what would be paid for the average public school. Therefore, Mr. Ghigleri has not been required to pay the costs of a private school and he is not actually paying the costs of a private school. His support has been capped at the level of a public school, and if there is a substantial change of circumstances that requires a true analysis of whether the parties can afford to assist

with the costs of a private school, either party remains free to
Petition for Modification per RCW 26.09.170.

In addition, the fact that Mr. Ghigleri's support was capped at below the cost of a public university means it is irrelevant whether her course of study is available at a public university. The court has ensured that the cost to Mr. Ghigleri is the same.

Mr. Ghigleri also argues that supporting J.G. "ignores" the parties' minor children by requiring him to forego their expenses because he is paying for the older children's college education. Given the fact that Mr. Ghigleri has three children in college and is only paying \$677 per month for postsecondary support, this seems overly dramatic and unrealistic in light of typical costs for supporting children in college. As Judge Schwartz noted, these children have made remarkable efforts to limit costs of their education to their parents, and the fact that they only need such limited assistance is a blessing considering the alternative.

Moreover, Mr. Ghigleri's argument ignores several financial factors: 1) his support now will only decrease as the children age, especially since A.G. will graduate soon, followed shortly thereafter by J.G. and B.G.; 2) he no longer pays support for B.G., who, by Mr. Ghigleri's own testimony to the court, is now able to support himself; 3) the home where he resides has little left on the mortgage and will be fully paid come November of 2017, which will

free up \$1,100 per month to use toward his support obligation; 4) his gross income includes a deduction for the maximum voluntary retirement contribution of \$416; 5) his gross income increased several hundred dollars in less than a year between trial and the modification, and it will likely continue to increase in the future; 6) he has several other assets, both liquid and illiquid, that he can use to assist with expenses; 7) his total support has changed by only \$223.25 (the trial court's Order required \$2,402.75 for six children (with him directly supporting B.G. who lived with him) plus \$300 per month for A.G., totaling \$2,702.75, and the modified Order requires \$2,249 for five children plus \$300 per month for A.G. and \$377 per month for J.G. (and no further support for B.G.) totaling \$2,926, which is a difference of \$223.25), and 8) the \$2,926 he currently pays is less than the \$3,297 Temporary Child Support/Maintenance he paid during the separation matter before trial (especially since he was no longer required to pay maintenance after trial). Based on these factors and the minimal expenses outlined in Mr. Ghigleri's Financial Declaration, he has ample funds to assist J.G. on such a minimal level with her postsecondary education.

Mr. Ghigleri also claims he will be forced to sell his home in violation of *Marriage of Shellenberger*, but his reliance on that case is misplaced. In *Shellenberger*, Division One of the Court of Appeals held that it was error for the trial court to impute income to

a father with a “permanent, total psychological disability” as “voluntarily underemployed” and continue to require him to pay 50% of the children’s postsecondary costs despite evidence that his actual income was minimal. *In re Marriage of Shellenberger*, 80 Wn. App. 71, 73, 906 P.2d 968 (1995). That father was unable to work full time, earned only \$2,500 per month from disability and what part-time work he could manage, and he had \$1,532 in mortgage expenses alone, which meant that even if he just paid his mortgages, he only had \$968 to cover his remaining expenses, which included “heavy” debts. *Id.* His total living expenses before considering postsecondary were at \$2,531, which meant he had no additional income after paying his expenses. *Id.* at 76. Even then, he had offered to pay \$200 per month for the child’s postsecondary education. *Id.* at 75. Despite these circumstances and the fact that the court found the mother earned \$56,188 per year compared to the father, the trial court found that the parents’ ability to pay support was equal. *Id.* at 79.

On review, Division One determined that the level of imputed income was inappropriate in light of the evidence presented, which did not demonstrate that the father was capable of earning that amount. *Id.* at 82. The Court remanded the case for a new trial so that evidence could be considered. *Id.*

The instant case differs greatly from the circumstances in *Shellenberger*. First, the *Shellenberger* court was primarily concerned with the fact that the trial court had not only imputed the father's income, but that it had imputed income to him without any evidence showing he could earn that level of income. In contrast, income was not imputed to Mr. Ghigleri, and the court used his actual income.

Second, in *Shellenberger*, the father's most basic expenses already exceeded his actual income, but in this case, Mr. Ghigleri's basic expenses represent only a fraction of his income (his monthly income is \$7,436, and his basic expenses barely total \$3,000 before considering the fact that his mortgage is almost paid off and he included automobile and phone expenses that are actually paid by his employer).

Third, in *Shellenberger*, Division One specifically determined that the father was heavily in debt, with two mortgages alone taking over 61% of his monthly income. In contrast, Mr. Ghigleri's debt is minimal/almost non-existent, as his mortgage is almost paid in full, and on his 2016 Financial Declaration, he listed a \$1,200 debt to his former attorney that he paid at \$100 per month, which should be paid in full by now.

In sum, *Shellenberger* does not support Mr. Ghigleri's position. In fact, it supports the opposite: Division One did not

question the fact that the mother was required to pay \$1,434.81 per month of her \$3,500 per month salary just for postsecondary education, which is much more than the \$677 per month Mr. Ghigleri is required to pay with twice the salary. Further, Division One did not question that \$1,434.81 per parent was appropriate (in 1995 no less) for two children in college (one at private school). Therefore, *Shellenberger* does not support the argument that support for J.G. is inappropriate. Instead, it shows that the costs of postsecondary education could be much, much more, and the fact that it is so limited for three children in college only demonstrates how much work these children have already done to alleviate financial strain on their parents as well as how much they truly need the support that has been required. Support for J.G. is well within reason even though she attends a private university, and Mr. Ghigleri has already been protected should J.G.'s ability to cover the bulk of her education herself changes.

D. **THE SUPPORT ORDER WAS APPROPRIATE WITH RESPECT TO THE 45% CAP**

Mr. Ghigleri claims that the postsecondary support awarded is error because, he alleges, it violates RCW 26.19.065 and the 45% cap on support, and the court's only finding of good cause to exceed this cap was that every child should be able to chase their dreams. This does not accurately represent the facts or the court's decision.

RCW 26.19.065(1) provides that “[n]either parent’s child support obligation owed for all his . . . children may exceed forty-five percent of net income except for good cause shown.” Good cause is defined by RCW 26.19.065 as including, but is not limited to, “possession of substantial wealth, children with day care expenses, special medical need, educational need, psychological need, and larger families.” In this case, the court specifically found that there was both educational need and that this is a larger family. As has been demonstrated throughout this brief, the parties do have a large family, and they specifically decided that they wanted a large family. A large family comes with greater need to support those children. Additionally, the court specifically found that the children have educational need for support, which also allows the court to exceed the 45% cap.

Further, as part of determining whether the exception to this statute applies, courts can consider not only the parents’ net monthly earnings at the time of the hearing, but also non-wage financial benefits from employment. For example, in *Marriage of Glass*, the father’s ability to pay support included not only his monthly net income but the benefits he received from employment that enabled him to live a comfortable lifestyle. *In re Marriage of Glass*, 67 Wn. App. 378, 387, 835 P.2d 1054 (1992). As discussed

above, Mr. Ghigleri has automobile and phone benefits not factored into his Financial Declaration which reduce his expenses.

In support of his argument, Mr. Ghigleri relies on *Marriage of Cota*, which does state that postsecondary support is subject to the 45% limitation, but does not otherwise support his position. In *Marriage of Cota*, the trial court ordered the father to pay the better part of \$22,282 per year in postsecondary support. *In re Marriage of Cota*, 177 Wn. App. 527, 532, 312 P.3d 695 (2013). On review, this Court upheld the trial court's support award amount even though the father claimed it would cause him "undue hardship" based on *Shellenberger*. *Id.* at 538-39. This was true not only because the trial court had considered the child's attendance at Pacific Lutheran University, but also because the court had evidence of each party's tax returns, pay stubs, and expenses, and this Court does "not second guess the trial court's discretionary evaluation of these factors." *Id.* at 538 (citing *In re Parentage of Goude*, 152 Wn. App. 784, 791, 219 P.3d 717 (2009) (holding that a trial court "does not abuse its discretion in determining postsecondary educational support if it considers all factors in RCW 26.19.090(2))). It did not even matter that the parents had not attended college themselves, as that was just one factor that the court was required to consider. *Id.* Further, even though the support ordered exceeded his income, this Court held that the

father had not demonstrated “sufficient financial hardship to trump the trial court’s discretionary ruling that postsecondary educational support was appropriate” *Id.* at 539.

For all of these reasons, *Cota* demonstrates that the postsecondary award is appropriate in this case. Like *Cota*, the trial court had all of the same information in front of it and declared on the record the factors to consider, which should not be second guessed by this Court. Additionally, like *Cota*, Mr. Ghigleri argues that assisting his children with postsecondary education will be financially difficult, but he provided no evidence of that fact. In *Cota*, the father’s income was actually exceeded by the postsecondary award amount, whereas in this case, the amount Mr. Ghigleri is required to pay represents only a fraction.

In fact, where *Cota* and the instant case differ most is on the trial court’s consideration of the 45% cap and whether good cause has been shown to exceed that cap. In *Cota*, there was no evidence that the court had considered the 45% cap and whether there was good cause to exceed the cap, which is what led to its remand. *Id.* at 542. In contrast, the trial court in the instant case did consider the 45% cap, making specific findings that there is good cause to exceed the cap due to educational need. Mr. Ghigleri argues that the commissioner commented that the cap did not apply, which is true, but as part of *de novo* review on the Motion

for Revision, Judge Schwartz specifically addressed the 45% cap and determined there was good cause to exceed the cap. *Cota* does not apply.

CONCLUSION AND REQUEST FOR FEES

For the foregoing reasons, Mr. Ghigleri's appeal should be denied, and the Order of Child Support should be affirmed. Further, Mr. Ghigleri should be required to reimburse Ms. Ghigleri's costs and fees incurred as part of defending against this appeal. Per *Paternity of M.H.*, 187 Wn.2d 1, 13, 383 P.3d 1031 (2016) and RCW 4.84.185, "A prevailing party is entitled to costs and attorney fees incurred at the trial level and on appeal." *Paternity of M.H.*, 187 Wn.2d at 13. See also *Hunter v. Hunter*, 52 Wn. App. 265, 273, 758 P.2d 1019 (1988). RAP 18.1 also allows a party to recover attorney fees in responding to an appeal, and RCW 26.09.140 also allows the appellate court to "order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs." The parties' financial information is before this Court, and as the Court can see, there is quite a disparity in their incomes and financial circumstances. Ms. Ghigleri has need for assistance with her fees, and Mr. Ghigleri has the ability to pay.

SIGNED AND DATED this 3rd day of August, 2017.

Margaret-Ann M. Ghiglieri
Margaret-Ann M. Ghiglieri, Respondent

MARGARET-ANN GHIGLERI - FILING PRO SE

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