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

In re the Marriage of:

KATIE CARRICO (FKA WICKSTROM)

Appellant,

v.

VANCE WICKSTROM,

RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 93-1-00039-1

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
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Copy to counsel listed at left.**

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion when modifying the child support order dated July 31, 2017?

2. Whether the trial court manifestly abused its discretion when entering Respondent's "Final Order and Findings on Petition to modify Child Support Order" and "Child Support Order and Worksheet" dated March 18, 2018?

3. Whether the trial court manifestly abused its discretion when modifying the child support order of July 2017, by granting a deviation when there was substantial evidence justifying the modification and supporting the deviation presented by Respondent?

4. Whether the trial court erred when granting a deviation when written findings of fact were included in its Order on Respondent's Motion to Modify Child Support Order under the subtitle of "Factual and Procedural History" and elsewhere throughout the order and were based on substantial evidence presented by the father and the court record?

5. Whether the trial court manifestly abused its discretion finding the change of circumstance necessitating the modification was "uncontemplated" when, at the time of the entry of the child support Order and CR2(a) agreement, it was not contemplated by the father that a relocation would occur anytime in the near future, or, alternatively, whether the revised

RCW 26.09.170, requires that a change of circumstance be unanticipated to modify child support.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On February 10, 2017, the parties attended a settlement conference in their dissolution matter, the same day the guardian ad Litem filed her initial report. CP 1-6, RB February 10, 2017¹. The GAL recommended that due to the mother's recent relocation from where the family had resided, and where the father remained in North Kitsap County, to Shoreline, a ferry ride away, that the mother should remain the primary residential parent giving the father substantial residential time over the weekends and that if the father was ever able to relocate closer to the mother the parents should share a 50/50 custody schedule. CP 1-6. At the settlement conference, the parties settled the issues of child support and maintenance announcing the specific amounts for the monthly payments, but not reciting the basis for those figures, and a future trial date was set to resolve "outstanding issues" in the parenting plan and that the guardian ad litem would evaluate those "issues". February 10, 2017 Transcript, 7: 10-15. Six and a half months later, after a subsequent GAL report was filed on May 18, 2017, the trial on the parenting plan was

¹ For simplicity's sake, the Respondent is using the same method of citing to the record that was used in the Appellant's brief. See, App.'s Br. at 4.

held on August 31, 2017. CP 160-221. The GAL documented in her report that the father had intended to move to the Shoreline following the parties' separation, but his plans fell through, because he could not afford the increased standard of living in Shoreline, and that he estimated it would be at least another year until he could relocate there. CP 16-221. Petitioner/Appellant's attorney reported to the trial court during opening statements, that Respondent had stated, during an August 2017 deposition shortly before trial, that he did not have present plans to relocate to Shoreline. Trial Transcript 8/31/17; CP 107-113. However, at trial, Respondent provided evidence that he had, in the short time following the deposition, obtained unexpected approval for housing assistance in Seattle, allowing him to relocate close to Petitioner and the children. Trial Transcript 8/31/17; CP 107-113. Petitioner subsequently conceded to a shared parenting arrangement, based upon Respondent's recent change of circumstance and the court ordered a 50/50 parenting plan. Trial Transcript 8/31/17; CP 107-113.

Following the ruling at the trial court on the 50/50 parenting plan, the issue of child support was addressed by the trial court. Trial Transcript, 8/31/17; CP 107-113. Respondent's counsel informed the court that the parties did not have an agreement as to what would happen if a residential credit became available. Trial Transcript 8/31/17; Report of Proceedings

2/10/2017; CP 107-113. The trial court advised the parties that child support would have to be addressed at a subsequent hearing. Trial Transcript 8/31/17; CP 107-113.

On November 30, 2017, Respondent filed a Summons and Petition to modify Child support, seeking 1) a newly available residential credit that was not contemplated to be available at the time of the settlement conference and entry of the Order of Child Support, and 2) a proportional allotment of child care costs, because the children were now in need of professional childcare during the father's residential time, which was not contemplated at the time of the settlement conference and entry of the Order of Child Support. CP 27-32; CP 107-113. This petition was opposed, and a hearing was held on January 24, 2018. CP 33-35; CP 94. CP 107-113. The court found in favor of the Respondent on both requests. CP 107-113.

B. FACTS

At the Support Modification Hearing, before the same judge who heard the trial on the parenting plan, the trial court reviewed materials presented by the parties, which included financial information provided by Respondent, but no financial evidence provided by Petitioner/Appellant, extended oral argument, and further briefing and argument on the topic prior to presentation of the ruling.² CP 36-138; CP 258-269. The trial court found

² Note that Petitioner filed her first financial declaration in this entire post dissolution proceeding, last weekend on 7/28/2018 in the appellate case, thus this evidence was not

that the Respondent had not contemplated relocating to Seattle at any time in the near future, and thus his unexpected award of housing assistance, that happened just before the trial date of August 31, 2017, was not contemplated at the time the Child Support Order was agreed to and entered . CP 107-113. Further the court found there was no indication in the record or orders that the parties agreed child support could not be modified if a 50/50 residential schedule became possible by respondent's potential relocation to Seattle in the future. CP 107-113. Settlement Conference Proceeding Transcript, 2/10/2017.

The only evidence regarding the financials of the parties the trial court had to review was evidence by the Respondent. CP 107-113. Proceeding Transcript 3/16/2018. Petitioner did not provide any financial evidence or a financial declaration. CP 107-113. Respondent testified, through his declaration, in support of his petition to modify a child support order, that at the time of the hearing he had in fact had negative income as a result of having to relocate his custom cast metal countertop business from less expensive North Kitsap to Seattle, where the cost of doing business was higher. CP 36-59, 90-93. Due to this fact and the very recent and uncertain changes to his income, he imputed his own income to what it had been at the time of the entry of the order of child support. CP 36-59. As no income

available to the trial court, subject to responsive briefing and argument, and not reflective of her financial situation at the time of the trial court's decision on the issue of child support

information, including a no financial declaration, was provided by Petitioner, the court also imputed her income to what it had been in the prior order, and allowed the deviation of the child support order, based upon a residential credit formula and stating, “there was no testimony or evidence to counter the financial figures provided by Respondent, this Court accepts respondent’s figures as established fact.” CP 107-113. The trial court further found that because the mother had not exercised her first right of refusal to care for the children that child daycare expenses should be apportioned between the parties, noting in a footnote that Petitioner provided no evidence to counter proof offered by Respondent on that issue. CP 107-113. Further, the in support of the Order, the trial court found, as notated in a footnote, that “Respondent testified that his financial situation had changed for the worse since moving to the Seattle area, due to higher rents and other factors. However, he did not alter his financial figures to reflect the same, thus benefiting Petitioner.” Id. CP 107-113.

III. ARGUMENT

- A. THE PETITIONER HAS FAILED TO SHOW THAT THE TRIAL COURT MANIFESTLY ABUSED ITS DISCRETION IN GRANTING THE RESPONDENT’S MOTION TO MODIFY THE CHILD SUPPORT, BECAUSE THE RESPONDENT PROVIDED SUBSTANTIAL EVIDENCE, IDENTIFIED BY THE TRIAL COURT, THAT JUSTIFIED CHILD SUPPORT**

modification.

MODIFICATION.

The Petitioner argues that the trial court had a manifest abuse of discretion, because it was not provided with substantial evidence to justify the court's conclusion, pursuant to *In re Marriage of Littlefield*, 133 Wn2d 39, 45 940 P.2d 1362, 1366 (1997), and *State ex rel. Stout v. Stout*, 89 Wn. App 118, 124, 949 P.2d 851, 854 (1997). App.'s Br. At 7. This claim is without merit, because the Respondent has failed to show that the trial court manifestly abused its discretion in granting the Respondent's Petition to Modify, as the Petition and supporting declarations and exhibits outlined numerous reasons for the Modification, justifying the granting of the Petition under Washington law.

A trial court's decision to grant a Petition for Modification of Child Support is reviewed for manifest abuse of discretion. *In re Marriage of Choate*, 143 Wn. App. 235, 240, 177 P. 3d 175, 177 (2008). Discretion is abused if its decision is "manifestly unreasonable or based on untenable grounds or untenable reasons". *Id.* A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based upon untenable grounds if the factual findings are unsupported by the record; it is based upon untenable reasons if it is based on an incorrect stand or the facts to not meet the requirements of the correct standard. *Marriage of Littlefield*, 133 Wn.2d. 39, 45 940 P.2d 1362, 1366 (1997) (citations omitted.)

Petitioner is arguing that the trial court erred by allegedly not providing written findings of fact, supported by substantial evidence, to justify the court's conclusion, as required by *State ex rel. Stout v. Stout*, 89 Wn. App. 118, 124, 948 P.2d 851, 854 (1997). App.'s Brief at 7. However, the trial court, in its Order granting Respondent's Petition for Modification of Child Support, made numerous fact findings supporting its decision in the section entitled "Factual and Procedural History", and further throughout the "Analysis and Discussion" Section and in the various footnotes though out the entire Order. CP 107-113. It is of note that the trial court specifically noted that there was a lack of factual evidence disputing Respondent's evidence supplied to the court by the Petitioner, which lead the court to believe that the evidence provided by the Respondent was true. CP 107-113.

In addition to alleged lack of written findings of fact, the Petitioner is arguing that the court lacked substantial evidence in support of the child modification comparing this situation to the facts *In re Marriage of Arvey*, 77 Wn.App.817, 894 P.2d 1346 (1995). App.'s Brief. At 8. The case before the court, is clearly distinguishable to *Arvey*, because in order to obtain 50/50 residential custody, Mr. Wickstrom had to be able to relocate to the city the mother had previously chosen to relocate, increasing his living expenses substantially. CP 107-113, CP 36-59. This was supported by his financial declaration and declaration in support of his Petition to Modify support. CP

36-65. Additionally, he incurred substantial child care expenses, because he now needed to find child care for his children during his residential time while he worked. CP 36-59, CP 90-93. During the several months preceding his Petition to Modify Child Support and the entry of the final parenting plan, the mother lived nearby and did not work outside the home or attend school, she would not exercise her right to first refusal to care for the children while he was at work and told him to pay for professional child care, which was not contemplated at the time of the entry of the child support order. CP 36-59; CP 258-260; CP 90-93. Further he testified he had three children living with him 50% of the time, as opposed to just on weekends, which required him to obtain additional bedrooms in an area that had a higher cost of living. CP 36-59. He testified he required additional food and supplies for all three children over what he would have needed to provide, if he only had them two to three weekends a month as would have been the situation, pursuant to the GAL recommendations, had he not relocated to the city, enabling the 50/50 residential time. CP 36-65. This evidence was supplied to the court and cited by the trial court in the order and contained within respondent's pleadings reviewed by the court. CP 107-113.

Respondent is arguing that an evidentiary basis of declaratory evidence only is insufficient for a finding of a substantial change of circumstances pursuant to *Arvey*. App.'s Br. At 8-9. That was not the finding

in *Arvey*; the ruling in *Arvey* on this issue was that the is that evidence provided by the father, including testamentary and documentary, was simply insufficient. *Arvey*, 77 Wn. App at 827, 894 P.2d at 1352 n. 3. It was not the form of the evidence that was a problem, it was the facts the evidence provided that failed to prove the father incurred a higher expense as a result of the change in that case, which notably was much less significant than in this case before the court. *Id.* In *Arvey*, the father's only change was having residential time with only one child increase from 34% to 60%, whereas in this case, Mr. Wickstrom had to relocate both his residence and place of work to a local with a higher cost of living and doing business to be eligible for the additional residential time and went from having three young children, approximately 20% to 50% of their residential time. CP 36-65. He additionally provided evidence that because his residential time went from primarily weekend residential time to weekday residential time, when he needed to work he needed additional child care that he did not need at the time of the agreement on the order of child support. CP 36-59. Further, he testified, that because he moved, he could no longer rely on family and friends to provide low cost childcare when he needed it, as he had done prior to relocation, and when the parties agreed to the Order of Child Support at the Settlement Conference on February 10, 2017. *Id.* Finally, there was significant evidence that the mother, who initially was going to provide the childcare for the children when they were going to have residential time with

her during the father's work week, did not exercise her right to do so, after the parenting plan shifted to the father having 50/50 residential time with the child. *Id.* There was also evidence of numerous written communications between the parties on the parenting app "Our Family Wizard", attached as exhibits to Mr. Wickstrom's declaration, in which the respondent refused to care for the children during the Mr. Wickstrom's residential time while he was working leading to a significant an increase in child care expenses, despite not working or attending school. *Id.* All of this evidence, testamentary and documented communications, are facts in the record and referenced in the trial court's order. CP 107-113. The evidence before the trial court was sufficient for the court to make a discretionary decision to grant Respondent's Petition to Modify the Order of Child Support.

B. THE COURT PROVIDED SUBSTANTIAL EVIDENCE TO SUPPORT ITS DISCRETIONARY DECISION TO GRANT THE DEVIATION DOWNWARD AND APPLY THE RESIDENTIAL CREDIT TO THE CHILD SUPPORT CALCULATION.

The Petitioner misguidedly argues that the case before the court is similar to the facts in *Choate*, which found that an unsupported deviation is an abuse of discretion. *Choate*, 143 Wn. App. At 243, 177 P3d at 178. In *Choate* the court only noted the status of the change in family composition of the father to support its finding. *Id.* This is not what happened in the case before the court; the trial court here reviewed not only the declarations of the

parties in reference to the Modification, but also “all the pleadings and filings in this matter.” CP 107-113. Included in those filings are the Guardian ad Litem reports, among other records and pleadings, that detail the difference in the cost of living for the father between residing and working in North Kitsap County vs. where the children had relocated with the mother in the Seattle area and this cost was prohibitive to the father moving to the area in the near future. CP 1-6, CP 160-221. The Respondent further testified in his declarations, that he had received some financial assistance, assisting with his ability to relocate to be closer to the children, but that his expenses were still far greater as a result of the additional residential time and the relocation to the Seattle area from North Kitsap, which has a lower cost of living and doing business. CP 36-65.

The petitioner provided no evidence to contradict respondent’s declarations regarding his changed financial circumstance. CP 107-113 Petitioner also did not provide any evidence, even in financial declaration form, that if respondent received the downward deviation, due to the residential credit, that she would have a shortfall in her household. *Id.* The court was not able to consider how her household budget would be impacted, because she never filed a financial declaration. *Id.* Respondent testified in his declaration that he suspected her silence on this issue was because she had additional resources available to her, including housing paid by family,

additional household income, and additional child support from the father of another child born to her after separation. CP36-59, 90-93. Petitioner never denied Respondent's testimony regarding her suspected additional resources, leading the trial court to accept it as fact. CP 69-89, 107-113.

The application by the trial court of the residential credit, did not rise to a manifest abuse of discretion; it was not manifestly unreasonable or based on untenable grounds or untenable reasons. The trial courts order was also not outside the range of acceptable choices, given the facts outlined in the order, which are supported by the record, that was reviewed and considered by the trial court, pursuant to the legal standard prescribed by *Littlefield*, 133 Wn.2d 39, 45.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE ABILITY OF THE FATHER TO RELOCATE TO THE AREA WHERE THE CHILDREN RESIDED, JUST PRIOR TO THE TRIAL, ENABLING A 50/50 RESIDENTIAL SCHEDULE, WAS AN UNCONTEMPLATED CHANGE OF CIRCUMSTANCES.

The trial court accurately identified that there is no current case law outlining a test to determine whether a change of circumstances was "contemplated" or not "contemplated" and no such case law has been cited by petitioner, leaving it to the court's discretion to make this determination on a case by case basis. CP 107-113. The without further guidance available, the trial court applied the Webster's dictionary definition of contemplated as

“to view as likely or probable”. Id. The trial court specifically, reviewed the record to apply its discretion to the facts presented by the parties and determined that, though there were hopes in the future of relocating eventually at some unknown date years in the future, there were not any evidence that Mr. Wickstrom’s ability to relocate to the Seattle area to be closer to the children was viewed by he, the other parties, or the GAL, as “probable”, but was merely foreseeable at some point in the future “years down the road”. CP 107-113. Thus, relocating to the Seattle area, enabling 50/50 custody, was an identified as unanticipated substantial change in circumstance at the time the order of Child Support was agreed to at the settlement conference and later entered with the court. Id. As an unanticipated change of circumstance at the time of entry of the child support agreement, the trial court was then free to use its discretion to decide on whether the modification sought should be granted and to what extent.

D. SINCE *ARVEY* AND *SCANLON* WERE DECIDED, RCW 26.09.170 HAS BEEN AMENDED, ARGUABLY NO LONGER REQUIRING AN “UNCONTEMPLATED” CHANGE OF CIRCUMSTANCE PRIOR TO MODIFYING AN ORDER OF CHILD SUPPORT, BUT ALLOWING A MODIFICATION BASED ON A CHANGE OF CIRCUMSTANCE “AT ANY TIME,” ELIMINATING THE NEED FOR DETERMINATION WHETHER THE CHANGE WAS CONTEMPLATED BY A PARTY FOR THE PURPOSE OF MODIFY CHILD SUPPORT.

RCW 26.09.170 was significantly rewritten by the Legislature in

2010, significantly changing the passages of the statute cited by petitioner in *In re Marriage of Scanlon*, 109 Wn. App. 167 (Wash. App. Div. 1 2001), and *In re Marriage of Arvey*, 77 Wn.App. 817, 820 (Wash. App. Div. 1 1995), which came down many years prior to the revised statute controlling the modification of child support. Both these cases made significant decisions in other areas of family law, but the arguably the decisions no longer apply to the particular issue of modification of child support, based upon a substantial change of circumstances. Even if the court finds, in this case, the change of circumstance related to the father's ability to relocate after the entry of the Order of Child Support, was contemplated before the Order of Child Support was entered on July 31, 2007, this finding is arguably not determinative, because the legislature's revision of the Child Support Modification Statute arguably eliminated this requirement by specifically *adding* the language that a child support modification may be made "*at any time*" if based on a substantial change of circumstance. RCW 26.09.120(5)(a) (emphasis added). "A party to an order of child support may petition for a modification based upon a showing of substantially changed circumstances *at any time*." RCW 26.09.120(5)(a) (emphasis added).

At the time the courts ruled that to modify child support based upon a substantial change of circumstance be unanticipated in both *In re Arvey* and *In re Scanlon*, the statute regarding modifying child support, RCW 26.09.170 was worded completely differently, instead it read,

- (1) Except as otherwise provided in subsection (7) of RCW 26.09.070, the provisions of any decree respecting maintenance or support may be modified:(b) except as other provided in subsections (5), (6), (9), and (10) of this section, only upon a showing of a substantial change or circumstances...

The former version of the statute did not include the language, “at any time.”

Arguably, the legislature responded to the court interpreted requirement that the substantial change in circumstance be “uncontemplated” by adding the language “at any time” for child support modifications based upon a substantial change of circumstance(s) to remove the requirement that the court determine whether the substantial change was contemplated or not. See RCW 26.09.170. The Court should note that the additional language of “at any time” was not added to portion of the statute that refers to modification of maintenance, thus, theoretically applying a higher burden of proof for a modification of maintenance, than is required for a modification of child support. See *Id.* This clarification of the law by the legislature also supports public policy, in that child support should reflect what is in the best interests of the children in their present circumstances at any given time.

Petitioner has not cited any cases, that came down after this significant revision of the governing statute in 2010 that support her argument that change in circumstances must be uncontemplated to modify child support, as the appellate courts have not ruled on this issue since the statutory revision.

E. PETITIONER FAILS TO ADDRESS CHANGED CIRCUMSTANCES, OTHER THAN THOSE REGARDING THE FATHER'S CONTEMPLATION OF RELOCATION, THAT ARE IDENTIFIED BY THE TRIAL COURT SUPPORTING ITS DECISION TO GRANT PETITIONER'S PETITION TO MODIFY THE ORDER OF CHILD SUPPORT.

In addition, to modifying the child support order by applying the residential credit, Respondent also sought to Modify the Order of Child Support based upon unforeseen circumstances in which 1) the father would have significant residential time during the work week, and 2) that the mother would fail to exercise right to care for the children during his residential time. CP 36-65, 107-113. This was despite living nearby and not working or attending school at the time while she insisted on professional child care for the children to be paid solely by respondent. *Id.* Evidence of this changed circumstance was reference by the trial court in support of its decision to modify the order of child support to include both 1) proportional division of the child care cost that was now needed during the father's residential time with the children, and 2) evidence of increased expenses by the father, due to his increased time with the children, justifying a downward deviation on the child support through the application of the residential credit. *Id.* These facts were 1) not disputed by Petitioner during the hearing before the trial court, 2) were supported by both declaration and copies of communications between the parties, 3) were identified by the trial court as a

fact supporting its order, and 4) finally are completely omitted from Petitioner's Appellate Brief. CP 36-59, 69-89, 90-93, 107-113, App.'s Brief. Arguably, these facts support both areas of the Order of Child Support modified by the trial court, proportionate responsibility for childcare and residential credit provided to the father.

F. EVEN IF THIS COURT DETERMINES THE FATHER CONTEMPLATED THE ABILITY TO RELOCATE IN THE NEAR FUTURE TO SEATTLE AT THE TIME OF THE SETTLEMENT AGREEMENT, THE TRIAL COURT'S DECISION CAN STILL STAND.

Not all facts identified by the trial court which are supportive to the trial court's ruling have been identified as an error by the Respondent. App.'s Brief. Instead the Petitioner only appeals the trial court's decision based upon the argument that the father contemplated the relocation at the time of the time of the agreement on the child support order and thus the courts finding otherwise was an abuse of discretion. The trial court identified other facts that supported its decision to modify, other than the father's relocation to the Seattle area. CP 107-113. Thus, even if this court finds with Petitioner on that issue, Petitioner has failed to, appeal as a manifest abuse of discretion the other factors that independently support the trial court's decision. Thus, the trial court's decision should still stand, and award of attorney fees is not appropriate.

G. THE REQUEST FOR ATTORNEY FEES TO PETITIONER SHOULD BE DENIED, AS NO

EVIDENCE OF PETITIONER'S RESOURCES IS BEFORE THE COURT, AND THIS COURT SHOULD USE ITS DISCRETION TO ORDER ATTORNEY FEES BE PAID TO RESPONDENT FOR HAVING TO MAINTAIN THIS APPEAL.

Petitioner has misstated RCW 26.09.140, claiming it "allows the court to award attorney fees due to disparity of income." Appellate Brief 14.

RCW 26.09.140 actually states:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Petitioner's income and household resources are unknown as she did not file a financial declaration. Her income was imputed by the trial court and Mr. Wickstrom, since there was not sufficient evidence to determine her actual income, resources, and budget, meaning her resources could be significantly different than the income disparity would lead one to believe. CP 107-113, 36-65. If Petitioner has significantly reduced expenses and other household income, as Mr. Wickstrom's uncontested declaration surmised, though their imputed income may be very different, their net household resources may not. Basing an award of attorney fees on evidence of income alone will not determine the resources of the parties for a determination on attorney fees.

Despite the above, RCW 26.09.140 also states that, “Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.” RCW 26.09.140. In this case, it would be appropriate for the court to use its discretion to award attorney fees to Respondent for having to respond to this appeal, when the trial court’s decision was not a manifest abuse of discretion.

CONCLUSION

For the foregoing reasons, the trial court’s decision to grant Respondent’s Petition to Modify the Order of Child Support should be upheld, and attorney fees should be awarded to him.

DATED August 1, 2018.

Respectfully submitted,



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