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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 351394 -III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

IN RE THE MARRIAGE OF

ANGELA M. STACY,
nka Angel Base,

Appellant,

vs.

JOHN C. STACY,

Respondent.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred by denying the motion for new trial with newly available income information, despite the father's fraudulent misrepresentation of his income to the mother and to the court.
2. The trial court erred in its determination of father's income without consideration of new information regarding father's income, and finding that the court was not asked to determine incomes despite the court's fiduciary duty to the child regarding child support.
3. The trial court erred by assessing an arbitrary cap on tuition without actual costs of education fees and expenses and living expenses, despite the history of private schooling for the children and abandonment of the children by the father, and despite statewide decisions re child support for similar circumstances per the uniform intent of the statute.
4. The trial court erred in its failure to allow all related amounts of postsecondary educational expenses and costs, which should include all summer expenses, actual tuition and costs for university (including additional per-credit charges for tuition in excess of 16 credit hours), aviation program expenses, necessary equipment for

education (e.g. computer, electronic flight bag, etc.), and other costs incidental to postsecondary education (including living expenses between quarters and other necessities of life or costs incidental to postsecondary education) and for extraneous expenses not included in the school's estimate of expenses nor included in the court's oral ruling.

5. The trial court erred in assigning a disproportionate and inequitably high percentage of expenses as responsibility of the dependent college student, while assigning disproportionately and inequitably low overall contribution from the father, while not allowing the student's academic scholarship to apply first toward the student's contribution and while allowing the father to profit from the student's efforts in the academic scholarship, despite the father's longstanding abandonment of the child with lack of contribution to the child's aptitude.
6. The trial court erred in requiring DCS to determine amounts to collect for postsecondary support contrary to allowable/permissible DCS collection policies.
7. The trial court erred in its failure to set a constant monthly amount for DCS collection with a periodic accounting and adjustment for

postsecondary support similar to the established adjustment for special expenses already in place since 2012.

8. The trial court erred in its denial of a child support deviation up to 50% of net income for the father in light of his annual income and the history of this case, despite that the father chooses to live in a ski resort and has no other dependents to support while he voluntarily supports one to three other adults and denies his ability to provide additional support for his dependent children who he continues to abandon.

B. Issues Pertaining to Assignments of Error

1. Under Washington laws, must a court consider newly available information regarding a parent's income when that parent has concealed and failed to disclose all income information?
2. Under Washington laws, does a court have a fiduciary duty to consider all income information for purposes of child support despite agreement by the parents?
3. May a court impose a cap on postsecondary support or on expenses for allocation of responsibility for support, and if so what standards must a court consider?

4. What are allowable expenses and costs for allocation of responsibility in postsecondary support?
5. Must a court allocate a proportional responsibility to a dependent child for postsecondary support, and what standards must a court consider?
6. In an award of postsecondary support, what must a court consider in ordering a particular method of payment when a parent has a history of failure to pay?
7. What must a court consider in a postsecondary request for an award for basic needs in addition to educational expenses?
8. When may a court exceed the presumptive 45% limitation for child support?

II. STATEMENT OF THE CASE

John Stacy and Angel Base (fka Angela Stacy) married on March 10, 1996, and had two children who were ages 10 and 12 at the time of the dissolution of the parties on Apr. 7, 2010. CP 76-77, 81. At the time the parties were separating, Ms. Base had been caring for Mr. Stacy's son Dylan as a primary parent for a number of years. CP 6, 21. The parties had been living apart while Ms. Base cared for all three children and attended law school. CP 5, 36. The children were all in private school, and Mr.

Stacy had spent decreasing amounts of time with the children amid allegations of domestic violence and alcohol abuse. CP 5-7, 20-24. The children herein have been in private school since their two years each of preschool, by agreement of the parties during their marriage and repeatedly by court order throughout the dissolution to the present. CP 211-12, 333-34, 363-64, 431, 557, 732-34, 946-47.

Mr. Stacy was held in contempt on May 8, 2009, for his failures to comply with orders of 10/31/2008, 15/15/2008, 02/19/2009, and 4/17/2009, for failure to pay several items related to support and litigation and his tax refund was directed to be paid into trust. CP 30-34. The contempt was not purged on review of Aug. 13, 2009 as Mr. Stacy had not paid the items nor directed his tax refund as ordered. CP 35-36. Mr. Stacy was ordered to provide his 2008 tax return by Aug. 17, 2009. CP 36.

Mr. Stacy failed to comply with discovery and on Oct. 1, 2009 an order compelling was issued with per diem sanctions to begin on Oct. 15, 2009. CP 37-38. That same date Mr. Stacy was also held in contempt [still unpurged] for failing to provide his 2008 tax return and for "...apparent dishonesty with the court regarding the circumstances of the return" and "...he could have been honest about its circumstances." CP 39-43.

On Jan. 11, 2009, Mr. Stacy was held in contempt [unpurged] for violations of orders of 04/17/2009, 10/21/2009, and 10/01/2009, for failing to provide ordered income information and failing to pay uninsured medical expenses. CP 44-49. Mr. Stacy was not held in contempt re private school tuition on that date, but the court reiterated the order regarding his obligation as remaining in full force and effect. CP 48. The court denied Mr. Stacy's motion to revise the order regarding his obligation for private school tuition. CP 50.

Upon final dissolution on Apr. 7, 2010, the court entered a final order of child support adopting the worksheets entered on 03/01/2010, found Mr. Stacy's actual monthly net income at \$5995.00, and imputed Ms. Base at \$2446.00 based on median monthly net income table. CP 51-55, 66-74. Mr. Stacy was ordered to pay a \$1414.32 basic support obligation, plus 71% of private school tuition. CP 52-53, 68, 70. Postsecondary educational support was reserved, tax exemptions were allocated equally, and Mr. Stacy was to provide life insurance to secure support. CP 70, 73.

The final parenting plan was also entered Apr. 7, 2010 pursuant to the GAL's recommendation and agreement. CP 56. The GAL and court found Mr. Stacy engaged in substantial refusal to perform parenting functions, with his involvement/conduct having an adverse impact because of

neglect/substantial nonperformance of parenting functions, and he was ordered to undergo an alcohol evaluation. CP 57. Unsupervised weekend daytime visits was ordered pending the alcohol evaluation/treatment and re-establishing himself in the children's lives. CP 57-60. Reasonable phone contact was ordered, Mr. Stacy was to keep himself informed regarding activities of the children, disparaging remarks were prohibited, and the parents were to provide updates to contact information. CP 61-62.

Mr. Stacy was held in contempt [unpurged] on Mar. 18, 2011, for disparaging Ms. Base to a child and for failing to provide updates to his contact information. CP 85-89. Mr. Stacy was ordered to complete "...an extended parenting course (longer than one day), specifically geared toward the parenting of teens, preferably tailored to fathering." CP 88.

Ms. Base filed a Petition for the Modification of Child Support on Oct. 5, 2012, due to increased incomes, a child in a new age category, need for continued private school tuition, other special expenses, and for the father's failure to claim tax exemption benefits. CP 90-95. Mr. Stacy was compelled to file his tax returns for 2009, 2010, and 2011. CP 96-97. Mr. Stacy was held in contempt [unpurged] for failure to pay uninsured medical expenses. CP 98-102.

On Feb. 26, 2013, the court reserved a finding of contempt for Mr. Stacy's ongoing tax return issues; he failed to provide proof of filing as ordered and the court ordered him to sign releases for Ms. Base to acquire his tax records. CP 103-04. The court noted similarities to Mr. Stacy's dishonesty in 2009 regarding filing his 2008 tax return. CP 120-21. The court noted on Apr. 8, 2010, the unlikelihood Mr. Stacy would've filed his taxes at all without counsel and court intervention. CP 143.

On Apr. 18, 2013, Mr. Stacy was held in contempt [unpurged] for failing to provide proof of filing his taxes in a timely manner with allowed exemptions. CP 107. The court reconsidered the issues on May 16, 2013, with new evidence that Mr. Stacy had not filed his tax returns by the court's deadline; the court found, "Mr. Stacy has been found to mislead the court in the past by giving false statements ... The evidence supports that he has done so again. ... Candor with the court is a critical issue that, in the face of evidence to the contrary, the court must enforce." CP 147. The court denied Mr. Stacy's motion for revision of the Apr. 18 and May 16, 2013, orders, finding, "the court commissioner was concerned about a history of [Mr. Stacy] of ignoring issues which visits harm to the children and their household" and "The Commissioner was concerned about [Mr. Stacy]'s history of ignoring financial issues and court orders." CP 148-49.

On June 24, 2013, Mr. Stacy filed his Financial Declaration showing a monthly rental amount of \$1850, with income of other household adults, healthcare expenses, and children's expenses all as "none." CP 151-52. By Sep. 27, 2013, he claimed other household adult income as "unknown." CP 161. Evidence indicated Mr. Stacy intentionally increased his expenses (e.g. inflated monthly vehicle repair costs, and relocated from Issaquah at \$1205/month to \$1850/month in North Bend, increasing transportation and household expenses), and shared expenses without attribution to avoid increase in child support. CP 162, 165-209, 218. Mr. Stacy provided redacted records; the redactions showed another individual as responsible on the new home's lease. CP 179, 184, 185, 186-204. Mr. Stacy included a claimed vehicle expense he didn't actually pay, to a creditor who later sought judgment and collection, which compelled Mr. Stacy to seek bankruptcy protection. CP 152-53, 157-58, 162-63, 617-75.

Ms. Base provided an undisputed financial declaration. CP 205-09.

Regarding private school tuition, the 2013 court considered as follows:

"...it is not disputed that during the entire fourteen (14) years of marriage of the parties, the parties agreed and the children of the parties have only ever attended private religious (Seventh-Day Adventist (SDA)) schooling, since preschool... . The mother was raised SDA ... The father was ... accepted for membership ... before the parties married. ... (the mother's former step-son) was also ... accepted for membership into the SDA church while living

with the parties, and attended private religious schooling during the entire time that he lived with the parties ... The children ... and the mother continue in active membership with the SDA church. ...During the marriage the children ... participated in many church-affiliated activities ... such as socials and youth clubs ...and have attended ... church-sponsored private schools from two years of preschool through ... current ... years in school. ...the[] decision to attend the church-sponsored schools has ... has not been limited to any one particular individual school. The children have derived a sense of community belonging within that setting ...of particular importance and a strength to them throughout their forced adjustment to their abandonment by their father. Of note, the children are even beyond the age requirement for other community programs ...Out of real necessity the children have depended upon male teachers and male role models through the church and its connection with the school. The father's objection to private school... is not well-grounded ...this objection was made only after the dissolution began and he abandoned the children... Given that the children have been abandoned by the father... the father's objection indicates a desire that not only should he be allowed to abandon the children physically and emotionally, but also financially. ...the father's objection indicates that he is callous to the emotional connections formed in their school community that provide a necessary substitute to the sense of belonging that they desire from their father." CP 211-214.

Regarding the abandonment of the children, the 2013 court considered:

"...the father has not completed the alcohol evaluation, and ... exercised time ... only a total of ... (5) times for a total of ... (9) hours and ... (20) minutes... Numerous other visits were offered outside of the parenting plan and refused. No time has been exercised by the father under any parenting plan since March 2009. ...the father ... will go weeks and months with no contact with the children who attempt occasionally to contact him, and he will sometimes return[] their occasional voice or text messages and sometimes not. The Parenting Plan Order of Apr.

7, 201[0], requires the father to use best efforts to inform himself regarding activities of the children, but he does not make any inquiry. The father ... does not send gifts for birthdays or holidays... these factors ... decrease[] the father's actual contribution to the children (as he also fails to provide transportation, food, shelter, and daily activities ...), [and increase] the mother's contribution ... as she alone shoulders the obligations of feeding and sheltering the children and financing their daily activities ..." CP 212-13.

On Oct. 2, 2013, the court heard the support modification hearing and gave a detailed ruling. CP 224-42. Orders of judgment and sanctions were entered for unpaid items and inadmissible evidence. CP 220-23, 239, 243-44. Private school tuition and extracurricular expenses were included in the child support worksheet subject to periodic adjustment due to Mr. Stacy's history of failure to pay ordered amounts directly, and in consideration of DCS policies. CP 225, 229-37, 239-40, 246, 251, 256, 270-71. The court found curious the father's objection to private school tuition based on his ability to pay, when he did not make that argument in 2010 [with less income] and when the private schooling had been a "very nurturing portion of these children's lives." CP 227, 229. Both tax exemptions were awarded to Ms. Base because of Mr. Stacy's history of not filing his tax returns or using the exemptions. CP 225-27, 271.

On Oct. 16, 2013, the court entered the final orders for the child support modification. CP 245-75. Mr. Stacy's actual net monthly income

was found to be \$7033 until May 1, 2015, and \$7333 after May 1, 2015, accounting for a spousal maintenance obligation through that date. CP 266. Ms. Base's actual net monthly income was found to be \$4266 and \$3966 for those same periods. CP 266. Mr. Stacy's obligations for child support, including variable special expenses, were to be paid at \$2570/month and \$2681 for those same time periods. CP 267. Each year the parties were to make annual accounting retrospectively for actual amounts paid in special expenses and prospectively for estimated future expenses, to confer, to resolve any disputes on the family law motion docket, and to set presentment if a party fails to communicate. CP 270-71.

Mr. Stacy did not confer or appear for the annual adjustments of 2014 or 2015, otherwise the voluminous information would not have been necessary to file with the court. CP 276-329, 455-56, 500.

For the 2014 adjustment, Mr. Stacy's monthly obligation for child support, including variable special expenses, was \$2731 until May 1, 2015, and \$2849 after May 1, 2015. CP 291. The variable expenses for the children during those time periods was an average of \$1630/month, including \$1260/month in educational expenses. CP 277, 282.

For the 2015 adjustment, Mr. Stacy's monthly obligation for child support was \$2929 beginning Sept. 1, 2015. CP 320. The variable

expenses for the children during those time periods was an average of \$1743/month, including \$1445/month in educational expenses. CP 313.

On June 3, 2016, Ms. Base filed the Petition to Modify Child Support Order regarding postsecondary support. CP 330-335. The Petition requested modified monthly child support, postsecondary support at a private university, summer school support requested at community college and private university for timely graduation in rigorous programs, transportation support, continued health insurance, and a start date as of when support would otherwise be terminated. CP 333-35. The Petition requested “parents to share proportionally in the balance of all fees and costs of post-secondary education minus all grants and scholarships, including transportation ... room and board at school and ... at home, and including all equipment and supplies and all other ... expenses. ... payments ... to the primary parent ...with yearly accounting.” CP 335.

The Petition was Amended on June 6, 2016, to specify the request “to continue sharing proportionally all uninsured medical expenses so long as the child is eligible for post-secondary educational support.” CP 364. Additionally, the amended petition specified that “...the right/duty regarding the scheduled child support adjustment to occur in this case is RESERVED and not superseded herein by this request.” CP 365.

The postsecondary support request was supported initially by aptitude evidence and evidence of estimated expenses. CP 337-61.

The oldest child was experiencing "...serious health issues requiring ongoing specialized medical care, including medications and hospitalizations necessary for his care." CP 369. Mr. Stacy refused agreement to refrain from removing the child from his health insurance plan without court intervention, then agreed on the record in lieu of request for restraint. CP 366-75. The court found, "Communication between the parties is not the greatest, otherwise this could have resolved without court participation." CP 366.

On June 24, 2016, Mr. Stacy responded to the Petition agreeing for postsecondary support to include Walla Walla University but objecting to inclusion of community college or any summer term. CP 376-88. Mr. Stacy requested direct payments to the university, and signed proposed child support worksheets under penalty of perjury that his income was the same as in 2013. CP 382-86.

Further evidence was submitted in support of the Petition and a motion for temporary postsecondary support, including declarations and further records. CP 390-433, 462-87, 498-506.

Ms. Base proposed postsecondary expenses to be managed by adjustment as special expenses had been for 4 years. CP 335, 434-50.

The motion for temporary orders was heard on Sept. 13, 2016. CP 521-54. The court expressed confusion and reluctance regarding its authority to enter a temporary order for postsecondary support, and regarding its authority to enter any order regarding healthcare on an order for postsecondary support. CP 523-29, 534, 545. The court ordered legal briefing on the issue of medical support. CP 510, 545-46. The court expressed disdain for awards of postsecondary support for children of divorced parented versus children of married parents as “...an interesting, unequal way of treating children in different circumstances that has not as I know of been challenged.” CP 547. The court further stated, “There is no entitlement” and “The court could limit it to \$100 a month.” CP 551. The court entered a temporary order for the parents to pay proportional shares limited to the school’s initial estimate of expenses after scholarships and loans, directly to the school. CP 510, 547-53.

Ms. Base sought revision of the temporary order as to the order for Mr. Stacy to pay directly to the school, as to the requirement of the child to accrue student loans, as to characterizations of special expenses, failing to grant motion to strike and for sanctions on impermissible submissions, as

to the adoption of the father's child support worksheets, and as to issues affecting the support of the younger child. CP 517-20, 555-66. The court granted revision in part, with respect to the objection and motion to strike, the child support adjustment, and clarification of issues for the court's consideration on final orders. CP 582-83. The revising court directed the court on final orders to specifically address why the amounts ordered for Jonathen shall be included or excluded from the child support worksheet and as to how the amounts should be paid, to reconsider mother's argument that the father won't pay if he's ordered to pay the school and to consider whether father demonstrates actual payment, and to consider the extra expenses during the periods the child's home with mother. CP 583.

The parties mediated the child support adjustment for Michael and entered agreed orders in that regard. CP 584-93.

Mr. Stacy submitted a large amount of erroneous or fraudulent information, including claiming that he experienced hardship because of his support obligations resulting in his bankruptcy filing of Apr. 2015, and that he had qualified for Chapter 7 bankruptcy with his income and his household size of one. CP 492, 540. The court remarked at the temporary order hearing that the bankruptcy issue would be considered on final orders. CP 551. Ms. Base submitted the bankruptcy filing and garnishment

documents for his vehicle loan. CP 617-75. Mr. Stacy filed for bankruptcy protection because of that garnishment, and fraudulently claimed a household size of two including his adult son who joined the military; he made no correction before the discharge was granted. CP 596-98, 617-20, 637, 646, 701-03. Mr. Stacy's income exceeded the presumption of abuse threshold so he submitted inflated household expenses. CP 623, 647, 665, 667-75, 701-03. Mr. Stacy incorrectly listed child support payments, counting a back debt three ways. CP 634, 637, 645, 671, 637, 719, 721-25. Mr. Stacy omitted his girlfriend/co-lessee as a household member so as to not include her household income or division of household expenses to fraudulently obtain discharge of his obligations. CP 677-97, 701-03.

Mr. Stacy's bankruptcy documents reveal he failed to file his tax returns from 2012-14. CP 645, 647.

Mr. Stacy did not submit a financial declaration or any documents of household members or expenses until Ms. Base filed a motion to compel discovery; Mr. Stacy's landlord had also refused to provide the information by subpoena duces tecum. CP 698-703. Mr. Stacy was ordered to provide the actual income, with updates, for himself and each individual living with him, for any period he intended to argue his

positions on final orders, and provide the actual expenses (how much, for whom, and to whom) that he pays for other individuals. CP 754.

Mr. Stacy submitted evidence he supported his brother free of charge from Jun., 2016, until at least Nov. 12, 2016, with a likely return to Mr. Stacy's household after litigation. CP 496-97, 980-83, 996-97. Mr. Stacy submitted that his girlfriend continues to live with him and that he voluntarily supports her including rent, food and other expenses, with no verification of her actual income or contributions. CP 714, 987, 991-92.

Mr. Stacy was dilatory with his financial duties and did not timely make payment to the university; most of the payments he made were returned NSF with one STOP PAYMENT. CP 762-72, 775-76, 781-82, 1007-14. 1132-39, 1145-52, 1154-60. Mr. Stacy was found in contempt without evidence of inability to pay nor excuse. CP 1175-76, 1242-43.

Ms. Base provided further information and updates for the court, with further declarations and briefing. CP 727-52, 773-88, 793-956, 995-1002.

The matter was heard for argument on final orders on Nov. 28, 2016. CP 1064-1121. The court found the children have always been educated in a private faith-based education system¹, Jonathen has a high aptitude and ability for his chosen course of study, and he would've been supported

by the parents if they'd stayed together. CP 1102-04. Despite *Childers v. Childers*, 89 Wn2d 592 (1978), the court disdained postsecondary support and described it as “not a right” but “a very special privilege” and stated, “And frankly, I think divorced kids have a leg up on non-divorced kids because we have this statute that basically Court orders parents to pay postsecondary education.” CP 1105.

The court's aversion for postsecondary support was directly reflected in a punitive order for Jonathen, stating as follows:

“He is an adult but he is dependent ...I am going to order Jonathen to have a third stake of his education. I don't know if it would've changed where he went to school or not ...But every child should contribute to their expenses. ***So he will pay a third after the \$10,000 [per year] in scholarships as awarded.***” CP 1105-06 (*emphasis added*).

The court allowed \$49,084 in postsecondary expenses per year, and gave Jonathen a yearly obligation of \$23,028 (the \$10,000 scholarship plus a 1/3 obligation of the remaining \$39,084). CP 1106. The court did allow Jonathen to apply his smaller honors scholarships to his 1/3 additional obligation, leaving him a \$12,028 obligation each of his first two years and \$11,528 each of his last two years, while also obligating Jonathen for all other necessities of life including transportation, equipment and other

¹ Jonathen began with 2 years of preschool *at the same university he currently attends* and has only ever attended school in the same private school system, as agreed during the parties' 14 year marriage. CP 211-12, 333-34, 363-64, 431, 557, 732-34, 946-47.

expenses incidental to education, and meals, and all other expenses not included in the school's estimate of expenses. CP 1106-07, 1109-10.

Jonathen does not qualify for financial need grants because he is dependent on the parents whose incomes do not qualify, and his federal direct loan amount is maxed at \$5500. CP 359.

The court allocated Mr. Stacy only (at most) \$1409/month or 34% of *estimated* allowed expenses (with no proportional sharing of *actual* expenses) while allocating Jonathen 47% of estimated expenses and *100% of additional actual expenses*, even though John's 34% of allocated responsibility is only 14% of his \$117,000 gross income and the court found Jonathen dependent on the parents for the necessities of life with no income. CP 1101-02, 1106-07. The court provided a payment scheme for a total of 4 scenarios, none of which involve a proportional sharing of actual expenses and all of which exhibit the same inequitable penal effect on Jonathen without equitable or proportional sharing for John. CP 1106-10.

The court further told the mother twice that it would be up to the mother and the child to pay for the actual expenses beyond the estimates of expenses, declining the request for annual adjustments as historically utilized in this case, and stating that the father would not be ordered to contribute beyond the inequitably low proportion of low estimates. CP

1115, 1294. The court remarked that if Jonathen were unable to get a scholarship or other funding for a summer quarter that he should get a job (suspending support to sustain himself or rely entirely on the mother). CP 1294. The court further stated that the disproportionate order is likely to be repeated in the future for Michael's postsecondary support. CP 1116.

The court ordered a presentment date be set. CP 1116-20. Additional information became available and Ms. Base moved for a new trial and for contempt. CP 1004-63. Mr. Stacy failed to disclose all income as required by the order to compel and by law; despite his multiple declarations under oath regarding his income, relied upon with lack of information to the contrary, Mr. Stacy made at least \$26,500 more in 2016 than he disclosed and this information was only discovered by information made available by DCS after the hearing of Nov. 28, 2017. CP 1004-05, 1051-52.

Additional new information became available regarding the aviation degree. CP 1032-50. Students completing a minor in aviation must consult with their adviser upon demonstrating ability in prerequisite classes before approval for further classes; the student will not know their program expenses until going through that process. CP 1035. An additional \$27,000 is estimated in aviation program fees for Jonathen. CP 1032-33.

The presentment hearing and motion for new trial and other relief was continued. CP 1140-41, 1170-71. Further updates were submitted for a new trial. CP 1123-27, 1143-44, 1154-60, 1190-93. The court denied a new trial, finding that the parties had mediated incomes and agreed and that the court was not asked to determine incomes. CP 1194-95. On Jan. 11, 2017, the court entered final orders comports with the court's ruling of Nov. 28, 2016. CP 1196-1209. The order specifically excludes expenses for equipment and supplies for school or for extraneous expenses not included in the school's estimate of expenses, or for aviation program fees not ordered in the 11/28/2016 ruling, or for per-credit charges over 16 credits per quarter (anticipated to occur every term), or for any other expense not included in the court's oral ruling. CP 1199-1200. The court erroneously found that Mr. Stacy's support obligation is 43% of his net income when it is 26% to 41% at most as ordered. CP 1197-99. The court found "no good reason" to justify deviation to the requested 50% limitation. CP 1199. The court continued annual adjustment of special expenses for Michael, despite modifying that provision for Jonathen without findings to explain the disparate order. CP 1202-03. The court ordered the parties to submit a supplemental order if DCS has problems collecting the support with the language as drafted by the court. CP 1209.

DCS was unable to collect Mr. Stacy's obligation for Jonathen as drafted. CP 1251. Mr. Stacy again refused to communicate without litigation filed, enjoying no DCS collection since June, 2016. CP 1255-56. A supplemental order was entered on Jan. 26, 2017. CP 1257-58.

Ms. Base moved to revise the final orders. CP 1244-48. The motion was later amended to include the supplemental order of Jan. 26, 2017 (as related to the final orders). CP 1260-65. The issues were briefed with relevant bench copies provided. CP 1303-1322, RP 2. On revision the court grossly miscalculated its assumption of Mr. Stacy's obligation on postsecondary support as \$25,000 a year at 65% of \$39,000, when *at most* Mr. Stacy's postsecondary obligation at 64.9% of \$26,056 is \$16,910/year (despite that Mr. Stacy had been paying \$17,574/year for the same child prior to postsecondary support). CP 1106-10, RP 17, 20. The court considered argument by Mr. Stacy, without substantiation or any prior declaration under oath, that he lives in a ski resort because it's less expensive than living closer to his work in Seattle, despite the evidence that during the pendency of the previous support modification in 2013 Mr. Stacy moved from \$1205-1260/month rent alone in King County to \$1850/month rent with at least one roommate in King County, inflating his expense without deducting contribution from household members, in

effort to avoid a requested increase in child support. CP 165-204, 677-97. Mr. Stacy now claims \$2000/month in rent in his log home in the ski resort at Snoqualmie Pass in Kittitas County, along with commute expenses to Seattle, supports at least one other adult voluntarily and up to 3 other adults during the periods in question herein, yet complained without substantiation for the first time at revision hearing (over objection) that he cannot pay more or reduce expenses and will lose his transportation and housing if support is increased; the court noted the objection and took “judicial notice of the cost of living in King County” despite the fact that no one in this case lives in King County (though Mr. Stacy’s expenses were less when he did live there), and despite the actual evidence in the record for Mr. Stacy’s expenses and his history of expenses. CP 496-97, 646, 704-11, 714, 980-83, 987, 991-92, 996-97; RP 16-17, 20. The court denied revision of final orders and the motion for new trial, finding no basis to revise as the court would have issued the same order. CP 1323, RP 19. Ms. Base timely appeals the denial of the motion for new trial and the final orders, inasmuch as the court denied revision of those orders.

III. SUMMARY OF ARGUMENT

The trial court abused its discretion in several ways. The court failed to properly include all income of the father and to determine income

independently regardless of the agreement of the parents, considering the revelation of misconduct of the father in his intentional concealment of his income. The court erred in its reluctance in awarding postsecondary support at all, failed to give proper weight to the history and particular facts and circumstances of this case, and improperly capped postsecondary support at an arbitrary or improperly low amount without allowance of actual costs and expenses necessarily or incidentally related to postsecondary education. The court further erred in disproportionately assigning an inequitably high responsibility for postsecondary support on the dependent adult child while allowing an inequitably low proportional responsibility on the father. The court erred in requiring the Division of Child Support to determine collection amounts for postsecondary support and failing to allow a constant monthly amount for DCS collection with periodic accounting and adjustment similar to the established periodic adjustment for special expenses in this case. The court erred by denying an upwards deviation without requiring the father to show any substantial hardship that would result in the granting of the requests, with the court failing to give adequate consideration to the father's concealment of income and his voluntary abdication of parental duties while he voluntarily supports one to three other independent adults and elects to rent a home in

a ski resort at a high cost far from his place of employment. All errors constitute abuse of discretion and warrant reversal.

IV. ARGUMENT

A. The Court May Review A Trial Court's Child Support Decision for Abuse of Discretion.

“A trial court's decision to award child support is reviewed for abuse of discretion.” *In re State v Base*, 131 WnApp 207, 218 (2006), *citing In re Marriage of Pollard*, 99 WnApp. 48, 52 (2000). “The party who challenges such decisions must show that the trial court manifestly abused its discretion.” *Id.*, *citing In re Marriage of Booth*, 114 Wn2d 772, 776 (1990). “A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.” *Id.* at 218-19, *citing Drury v. Tabares*, 97 WnApp. 860, 863 (1999).

B. The Commissioner's Findings Establish the Facts for Review.

Where a court denies a motion for revision, “The commissioner's oral findings adopted by the revision court are sufficient for review.” *Williams v. Williams*, 156 WnApp 22, 28 (2010). “A revision denial constitutes an adoption of the commissioner's decision and the court is not required to enter separate findings and conclusions. *Williams*, at 27-28, *citing In re Dependency of B.S.S.*, 56 WnApp. 169, 171, (1989). Here, the trial court adopted the commissioner's findings by denying revision.

C. Definition of Postsecondary Support: Educational support is child support for all purposes under RCW 26.09.

“The legislature’s stated intent in enacting the child support schedule statute, chapter 26.19 RCW, was ‘to insure that child support orders are adequate to meet a child’s basic needs and to provide additional child support commensurate with the parents’ income, resources, and standard of living.’ RCW 26.19.001.” *Marriage of McCausland*, 159 Wn 2d 607, 611 (2007). “The legislature also intends that the child support obligation should be equitably apportioned between the parents.” RCW 26.19.001.

The standards for postsecondary educational support awards are found at RCW 26.19.090, providing, “[t]he child support schedule shall be advisory and not mandatory for postsecondary educational support.” RCW 26.19.090(1). The court is required to “...determine whether the child is in fact dependent and is relying upon the parents for the reasonable necessities of life.” RCW 26.19.090(2). This analysis does not require a court to determine whether or not a child would choose another school or can borrow enough money to go to school without parental support, but instead to consider “...factors that include but are not limited to the following: Age of the child; the child's needs; the expectations of the parties for their children when the parents were together; the child's prospects, desires, aptitudes, abilities or disabilities; the nature of the

postsecondary education sought; and the parents' level of education, standard of living, and current and future resources. Also to be considered are the amount and type of support that the child would have been afforded if the parents had stayed together.” RCW 26.19.090(2).

“Postsecondary educational support is granted to support an otherwise adult child while pursuing education beyond high school; it is money paid to support a dependent child, therefore it is child support.” *In re Schneider*, 173 Wn2d 353, 368 (2011). “The court explained that postsecondary educational support “fits within the structure of the child support statute in general” and in some situations “can function just like ordinary child support.”” *In re Marriage of Cota*, 177 WnApp. 527, 541 (2013), citing *Schneider* at 368.

For postsecondary child support, “A trial court abuses [its] discretion when its decision is based on untenable grounds or reasons.” *Cota* at 536, citing *In re Marriage of Newell*, 117 WnApp. 711, 718 (2003).

D. The court abused its discretion by refusing to consider newly available information regarding a parent’s income when that parent concealed and failed to disclose all income information.

RCW 26.19.071 mandates the disclosure of each parties’ household income, and provides standards for verification including “other sufficient verification” for income. RCW 26.19.071(3)(g) specifically

mandates inclusion of income from a second job. Mr. Stacy deliberately and fraudulently lied about his income to the court and to Ms. Base at least four times under penalty of perjury. Mr. Stacy intentionally omitted income from a second job shown on his reported employment security income information obtained from the Division of Child Support. Mr. Stacy signed his proposed worksheets under penalty of perjury which he submitted using only his 2013 income information. Mr. Stacy signed again under penalty of perjury regarding his income on further worksheets and again on his Declaration and Financial Declaration.

CR 59 permits a new trial upon motion of aggrieved party for certain causes where the substantial rights of affected parties are materially affected, filed within 10 days after the entry of judgment. CR 59 (a), (b).

“CR 59 (a)(2) permits a trial court to grant a new trial based on “[m]isconduct of prevailing party.” Again, such misconduct must “materially affect[] the substantial rights” of the moving party.” *M.R.B. v. Puyallup School Dist.*, 169 WnApp 837, 854 (2012), *citing* CR 59 (a); *quoting Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn2d 517, 538 (2000). “In order to obtain a new trial: “As a general rule, the movant must establish that the conduct complained of constitutes misconduct (and not mere aggressive advocacy) and that the misconduct is prejudicial in the

context of the entire record.... The movant must ordinarily have properly objected to the misconduct at trial, ... and the misconduct must not have been cured by court instructions.” *M.R.B.* at 854, *citing Aluminum* at 539 (internal citation omitted). Mr. Stacy committed misconduct as above, it was objected to, and there was no cure from the court for the misconduct.

Ms. Base requested a new trial because of newly discovered additional income of at least \$26,600 that Mr. Stacy earned in 2016 but intentionally failed to disclose, and because of additional new information regarding educational expenses not available prior to hearing. The court pointed to the parties’ agreement reached regarding income amounts, without properly considering the deliberate concealment and fraud by Mr. Stacy in his income statements to the court in writing signed under penalty of perjury. If the court had determined the income of the parties, it would offend the court for Mr. Stacy to intentionally fail to disclose income to the court. It is just as offensive for Mr. Stacy to lie during negotiations.

Even after his statements submitted under penalty of perjury, the court ordered on Nov. 15, 2016, full disclosure of all income by Mr. Stacy for all periods for which he was arguing income (and he had already argued prior income with respect to his bankruptcy in 2015 and as to the effect of his income in 2016). Mr. Stacy continued to lie on his Financial

Declaration and Ms. Base was unable to discover the income information prior to the hearing of Nov. 28, 2016; the only source to discover the information prior to that date was Mr. Stacy himself and he was already actively lying about it under penalty of perjury. It is counter-intuitive for the court to order full disclosure of income, and then to deny consideration of that income after discovery despite the misconduct.

Mr. Stacy's intentional failure to disclose substantial additional income should be considered; the income should be included in the worksheets, or the income should be considered as a factor in overcoming the presumption of the 45% limitation, and Mr. Stacy should be ordered to disclose all additional income in the future.

It is similarly unjust to deny inclusion of further evidence of expenses not available until after the hearing of Nov. 28, 2016. CR 59 (a)(4) authorizes a court to vacate a verdict or other decision based on "newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial." *Go2Net, Inc. v. C I Host, Inc.*, 115 WnApp. 73, 88 (2003). "A new trial may be granted on the basis of newly discovered evidence only if the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered

before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.” *Id.*, citing *Holaday v. Merceri*, 49 WnApp. 321, 329 (1987). “Failure to satisfy any one of these five factors is a ground for denial of the motion.” *Id.* citing *Holaday* at 330.

The income information as available from employment security through the Division of Child Support was not available prior to the hearing of Nov. 28, 2016, and was a surprise; Ms. Base necessarily relied on Mr. Stacy’s sworn statements about his income when they came to agreement regarding the child support adjustment for Michael and when they argued at hearing about the postsecondary support for Jonathen. The DCS income information was received in the mail two days after that hearing, and verified verbally through the Division of Child Support that there were two employers reporting income information for Mr. Stacy. Mr. Stacy could have and should have provided this information, but he deliberately concealed this information to obtain orders favorable to him.

Additionally, further information was discovered regarding aviation expenses. That information was also not available prior to the Nov. 28, 2016, hearing. Students completing a minor in aviation must consult with their adviser upon demonstrating ability in prerequisite classes before approval for further classes; the student will not know their

program expenses until going through that process. There is an additional previously unknown \$27,000 estimated for Jonathen's aviation program.

Ms. Base promptly moved for new trial, after the hearing and prior to the entry of orders, and was denied on January 11, 2017. The matter was preserved on motion for revision, which was also denied, and properly preserved for appeal.

The court was mandated to consider the income information under RCW 26.19.071(3)(g), and the income is not subject to exclusion under RCW 26.19.071(4)(i).

With proper consideration of the income and the aviation expense information, this should have changed the result at trial. The information was not available prior to the court's determinative ruling of Nov. 28, 2016, and was discovered since that time. It is material evidence, not cumulative or merely impeaching. The court abused its discretion by failing to consider the new information constituting reversible error.

E. The court ignored its fiduciary duty to consider all income information for child support purposes despite parties' agreement.

The trial court is not bound by parties' agreement concerning child support, but **"instead, the trial court must independently determine child support according to the statutory requirements in chapter 26.19 RCW. ... [T]he trial court is not bound by parties' agreements**

with regard to child support. *Pippins v. Jankelson*, 110 Wn.2d 475, 478 (1988). ... **[T]he trial court must first independently determine child support according to the statutory requirements.**” *Marriage of McCausland*, 129 Wn App 390, 410 (2005), (*review declined on these points of law*) (emphasis added). The statute requires paystubs and tax returns and other evidence of income; the income information provided by Ms. Base subsequent to the hearing of Nov. 28, 2016, is sufficient evidence of additional undisclosed income of Mr. Stacy for at least \$26,600 for 2016, and the income should be considered in determining Mr. Stacy’s income for child support calculation or at least for increasing his obligation beyond the 45% presumptive limitation.

F. The court impermissibly capped the postsecondary support at an arbitrary amount and used incorrect assumptions regarding total cost. The court may not arbitrarily impose a cap on postsecondary support and must consider the facts of the case in light of statutory factors and similar cases in allocating responsibility for support.

The statute mandates that the court “Incr[eas]e the equity of child support orders by providing for comparable orders in cases with similar circumstances.” RCW 26.19.001(2).

The court must evaluate all of the facts and circumstances relative to each parent and these children with the considerations of RCW 26.09.170, 175, and 26.19 in mind. The overall consideration will always remain “to

insure that child support orders are adequate to meet a child's basic needs and to provide additional child support commensurate with the parents' income, resources, and standard of living” and to insure “that the child support obligation should be *equitably* apportioned between the parents.” RCW 26.19.001 (emphasis added).

“A trial court abuses [its] discretion when its decision [in a child support order] is based on untenable grounds or reasons.” *Cota* at 536, *citing Newell* at 718. The court below stated “I am allowed to cap that if I want to” and stated several times that the award made herein was more than the court normally awards in a request for postsecondary support. The court made no reference point for a basis for a cap other than “if I want to” and the court made no comparison to any case with similar circumstances, as required by the statute. The court further states, “And frankly, I think divorced kids have a leg up on non-divorced kids because we have this statute that basically Court order parents to pay postsecondary education.” CP 1105. The court in *Childers v. Childers*, 89 Wn2d 592 (1978) found that children of divorced parents are in need of special protections, stating:

“In all probability more married parents will be making sacrifices financially for their children 18 and up than will the divorced parents who, in the sound discretion of the trial court, will have a legally imposed duty to do so. Even if the legislation does create a classification, it rests upon a reasonable basis. It is based on considerations already mentioned, and the facts known to the

legislature and this court as well as to the layman, of the disruptions to homelife, bitterness and emotional upset which attend most marital breaks. The irremediable disadvantages to children whose parents have divorced are great enough. To minimize them, when possible, is certainly a legitimate governmental interest.” *Childers*, at 604.

The *Childers* court explained:

“That the divorced parent, especially noncustodial, will sometimes not willingly provide what he otherwise would have but for the divorce, we recognized long ago ... Parents, when deprived of the custody of their children, very often refuse to do for such children what natural instinct would ordinarily prompt them to do. ... Nothing more is expected of divorced parents than married parents, and nothing less.” *Childers*, at 602-03, citing *Esteb v. Esteb*, 138 Wn 174, 184 (1926).

Again, the statute requires that the court provide “comparable orders in cases with similar circumstances.” RCW 26.19.001(2). This necessarily should include a review of cases published across the state with similar circumstances, and the review must not be limited to the experience of the judicial officer in past cases with no reference to any similarities of facts.

The court must consider the non-exhaustive list of factors in RCW 26.19.090(2), specifically including the type of support that the child would have been afforded if the parents had remained together. *Sprute v. Bradley*, 186 WnApp 342, 354-55 (2015). Similar to the circumstances and facts herein, the father in *Sprute* didn’t argue that the factors didn’t support an award for postsecondary support at a private school but,

“Instead, he argues that it is not fair to make him pay for the most expensive college alternative, and that he does not have sufficient income to pay the award. However, the parents’ current and future resources is only one of several factors the trial court can consider.” *Sprute*, at 355.

Mr. Stacy makes a similar argument as did the father in *Sprute*, and his argument should fail for similar reasons:

“[Mr.] Bradley cites to *In re Marriage of Shellenberger*, 80 WnApp. 71 (1995), apparently in support of his argument that he cannot afford to pay the award. In *Shellenberger*, Division One of this court held that a trial court abuses its discretion if it awards a postsecondary educational support obligation that would force a parent into bankruptcy or would require liquidating the family home. *Id.* at 84, 906 P.2d 968. ... However, Bradley produced no evidence that paying Joshua’s postsecondary educational support would burden him to the point of filing for bankruptcy. *See Cota*, 177 WnApp. at 539, (holding that father failed to demonstrate sufficient financial hardship to negate the trial court’s award of postsecondary educational support when the father showed only that his expenses exceeded his income).” *Sprute*, at 355.

Again analogous to *Sprute*, Mr. Stacy benefits from the lower court’s apparent misunderstanding of caselaw regarding any benchmark for cap on tuition using a cost comparison for a state college, and that reasoning should also fail here for similar reasons:

“Bradley argues that in ordering payment of postsecondary educational expenses, the trial court abused its discretion by failing to cap Joshua’s total expenses at the amount charged by UW. He claims that he should not have to pay extra

because of Joshua's decision to attend an expensive out-of-state college. We disagree." *Sprute*, at 354.

"Neither *Shellenberger* nor *Stern* compels a cap on postsecondary educational support. Here, the trial court made specific findings justifying Joshua's selection of an out-of-state school that had an outstanding program in his chosen field. Moreover, Bradley and Sprute had a history of sending their children to private educational institutions and incurring tuition and fees far above what parents would incur if they sent their child to a public school. The trial court here recognized that this familial tradition, which was a special circumstance under *Stern*, reasonably justified the court's award of postsecondary educational support that was above the amount of tuition at UW." *Sprute*, at 356-57.

Further authority reflects similar rationale:

"When the obligor parent's obligation is directly related to the child's needs, the rationale of the *Edwards* ceiling requirement is inapplicable. We thus hold that the lower court acted within its discretion by ordering Hannan to pay a percentage of Miranda's college expenses without imposing a maximum dollar amount." *Kelly* at 792, citing *Edwards v. Edwards*, 99 Wn2d 913 (1983).

"A trial court necessarily abuses its discretion if its decision is based on an erroneous view of the law." *Sprute* at 357, citing *In re Marriage of Choate*, 143 WnApp. 235, 240 (2008). The lower court's references to state tuition are erroneous and an abuse of discretion here. The lower court ignored or discounted the importance of the history of the parents herein sending their children to private schooling for their entire lives, and failed to grasp the uniqueness of the outstanding combined

major and minor programs available for Jonathen in his chosen fields at his chosen university.

Mr. Stacy argued he filed bankruptcy in 2015 due to amounts ordered to be paid, however the record shows that Mr. Stacy filed bankruptcy to avoid a collection action out of King County, WA, for an unsecured loan to Blue Mountain Credit Union. Further, the shows that Mr. Stacy claimed he was supporting his oldest adult son when that man was age 22 and had joined the military. Mr. Stacy fraudulently failed to correct the bankruptcy record, and filed an inflated listing of household expenses based on his claimed obligation of support when he did not qualify for bankruptcy protections otherwise due to his income exceeding the presumptive threshold. Mr. Stacy omitted his girlfriend/co-lessee as a household member so as to not include her household income or division of household expenses to fraudulently obtain discharge of his obligations. Mr. Stacy did not lawfully qualify for bankruptcy protection, but has now been absolved of the debts that led to his bankruptcy of 2015 and thus is now in even better position to pay the requested postsecondary support.

Here, as in *Sprute*, the “history of sending their children to private educational institutions and incurring tuition and fees far above what parents would incur if they sent their child to a public school” should be

considered as well as the “familial tradition, which [is] a special circumstance” along with the fact that the child is attending an “outstanding program in his chosen field.” Mr. Stacy’s obligations under the prior order with private schooling were greater than the maximum variable amount ordered by the lower court for postsecondary support.

The court below repeatedly used incorrect numbers for the total support being requested (incorrectly citing \$86,000/year, then stating that the father’s was ordered to pay \$25k/year when it’s actually maximized up to \$16908/year at most), and repeatedly stated Jonathen has five years to complete his postsecondary education (up to age 23) even though Jonathen was age 19 by his Freshman year and has only four years. CP 1292-95.

The court ordered \$692.00 to be paid by the father for summer months the child attends community college and lives at home. Jonathen does not receive any scholarships for summer. The court states (without citation), “...I look at SCC’s costs and per year it’s \$14,319 that’s for all the expenses that Walla Walla includes, the tuition, and room and board estimated costs, or \$4773 per quarter.” CP 1108. Reviewing the SFCC estimate of expenses, the court’s total does not include the \$4389/year in tuition/fees for SFCC, which make it total \$18,708/year to attend there, or \$6236/quarter. Dividing the expenses by the shortened two months for the

quarter, not three, the father's total per month would be \$1349.06 for summer months for SFCC, or \$2023.58 if the child is excused from summer contribution, not \$692 as the court erroneously calculated.

The court's arbitrary cap of \$49,000 per year, and the court's imposition of a 1/3 contribution of the child AFTER application of the academically-earned scholarships, solely benefits the father who saves at least \$600/month without yet including additional necessities and expenses incidental to education. Mr. Stacy saves \$28,800 for 48 months, or basically the same as the amount the court arbitrarily excluded and ironically similar to the father's undisclosed additional income for 2016.

As demonstrated, the school's estimate of expenses was not enough to cover even books and supplies, let alone the necessities of life paid separately by Ms. Base. Receipts were provided by Jonathen and Ms. Base for Jonathen's actual expenses between late Sept. and late Nov. 2016 totaling an additional \$2085.83 just for those two months including food and supplies not included by the school, and including trips home for medical specialist appointments and surgery, but not including further necessities of life (food, utility, supplies, etc.) for Jonathen while home during those times. Car maintenance will continue as necessary, with commutes between university and airport for training. Jonathen's

additional necessities of life is closer to \$650/month for car maintenance, fuel, and insurance, and for supplies, clothing, and groceries. All actual expenses should be considered and shared proportionally by the parents.

The court has discretion to not order a cap at all, as the expenses are directly related to the child's needs as in *Kelly*, but if the court does cap the contributions of the parents then the court should do so not arbitrarily and the cap should be no less than 50% of the parents' net incomes.

G. All expenses incidental to postsecondary education are allowable for allocation of responsibility, and should be included for division; a refusal to include the expenses in allocation of postsecondary support is reversible error.

Because postsecondary support is child support within all practical meanings for child support, additional amounts for support are authorized similarly to healthcare support and other special expenses unrelated to a basic support obligation, and should be considered in light of the abdication of parental responsibilities discussed in *Selley* and *Krieger* as well.² “The lower court’s judgment validly included Miranda’s transportation expenses, health fees and insurance, hall dues, copy costs, lobby fees, and linens within the amount for which Kelly was awarded reimbursement from Hannan.” *In re Marriage of Kelly*, 85 WnApp. 785, 795, (1997). “While some of these expenses may be considered incidental

to educational costs, the trial court has broad discretion to order postmajority support as it deems necessary and fair in the circumstances.” *Kelly* at 795, citing *Childers v. Childers*, 89 Wn2d 592, 601, (1978). “Each expense listed in the order is sufficiently related to Miranda’s postsecondary educational needs.” *Kelly* at 795. In the instant case, healthcare support is requested for a child with documented serious medical needs and other incidental expenses are requested for the adult dependent child, especially in the absence of his father’s involvement.

The monthly net incomes for the parents in *Daubert* was similar to the incomes at issue in this present matter. See *Marriage of Daubert*, 124 Wn. App. 483, 488 (2004). “Daubert asked for additional child support for orthodontia, missed travel opportunities, missed college test prep classes, missed summer camps, and better computers and accessories.” *Id.* at 496. As a matter of distinction, Daubert was asking for these amounts to be included in the transfer payment without substantiation of the expense and for the support award to be extrapolated above the economic table. See *Daubert, generally*. The court took issue with that notion, stating “Without cost estimates, the court had no basis to determine an amount to award for the opportunities sought and had no basis to make findings about the

² See generally *In re Marriage of Selley*, 189 WnApp. 957 (2015); See also *In re Marriage of Krieger*, 147 WnApp. 952 (2008).

reasonableness of that amount.” *Id.* at 498. In other words, the court found that the expenses that Daubert was seeking to have determined as special expenses were reasonable, it was just that she was not substantiating the expenses and she was asking for the wrong form of payment.

Ms. Base sought a cost share of incidental expenses with documented estimated amounts for categories of expenses, and with opportunity for yearly adjustment based on the actual amounts of the expenses. “The opportunities and expenditures must be appropriate bases for adding additional support and must be both necessary and reasonable. Orthodontia is an appropriate basis for additional support under RCW 26.19.080(2). Report at 14. Summer camp, SAT prep classes, computers and travel for extra-curricular activities or cultural experiences are within the appropriate bases for additional support under RCW 26.19.080(3). Report at 14.” *Daubert* at 497. The law mandates comparison here, as analogous to the use of the child support schedule to determine a basic obligation, as the statute mandates that the court “Increas[e] the equity of child support orders by providing for comparable orders in cases with similar circumstances.” RCW 26.19.001(2).

The method for payment of expenses for postsecondary support should continue in this case as the method of special expenses has been for

several years before, and the method historically utilized for special expenses in this case should be similar for postsecondary support. These children have already been provided for with orders for a similar structure or school tuition and other special expenses, there is no need to reinvent the wheel for postsecondary educational support. The court remarked with some concern regarding a return in litigation for accounting of postsecondary support, but the court's transcendence of that concern into an inequitable order of support is an abuse of discretion in divergence of the statutes and caselaw requiring similar orders to be issued in cases with similar circumstances. The court is required to issue an order for proportional division of support and allow for litigation for accounting afterwards if there is overpayment or underpayment. However, there are simpler solutions available here in order to manage the expenses without a pile of receipts for all necessities of life: A basic support obligation should continue for the children on postsecondary support herein, and the postsecondary support and incidental expenses, minus room and board and necessities of life, should be added to basic support. If there still be a dispute regarding underpayment or overpayment, then the parties should be ordered to mediation before returning to court. The court should not punish or shortchange the child or force the mother into a position of being

the primary financial support for the child just because the father refuses to pay or to communicate unless compelled to do so, especially when the father has over 65% of the combined income and is otherwise obligated only to support himself.

H. The court erred in ordering inequitably disproportionate responsibility to the dependent child and to the mother. A court must consider the statutory factors and facts of the case in equitably allocating responsibility for postsecondary support.

The court's initial consideration in determining an award of postsecondary support is that the child is dependent and relying upon the parents for the necessities of life. RCW 26.19.090(2). This determination can be inferred from knowledge that the child "was a recent high school graduate enrolled in a full-time university program and there was no evidence she had ... an income sufficient to meet her 'reasonable' necessities of life." *In re Marriage of Cota*, 177 WnApp 527, 538 (2013).

"[P]ostsecondary support must be apportioned according to the net income of the parents as determined under the chapter." *Daubert*, at 505. *See also Newell v Newell*. However, RCW 26.19.065(1) allows a court to exceed the presumptive 45% net income limitation on child support for "good cause shown" which includes "educational need." *Cota*, at 539-542, *citing* RCW 26.19.065(1), (*also defining postsecondary support as child*

support for purposes of the presumptive 45% limitation and the rules for exceeding the presumptive limitation).

Because postsecondary support is child support within all practical meanings for child support, additional amounts for support are authorized similarly to healthcare support and other special expenses unrelated to a basic support obligation, and should also be considered in light of the abdication of parental responsibilities discussed in *Selley* and *Krieger*.³ “While some of these expenses may be considered incidental to educational costs, the trial court has broad discretion to order postmajority support as it deems necessary and fair in the circumstances.” *In re Marriage of Kelly*, 85 WnApp. 785, 795 (1997), citing *Childers v. Childers*, 89 Wn2d 592, 601 (1978).

Here, the combined expenses for the child’s necessities of life and educational expenses are expected to exceed the 45% presumptive limitation on the father’s income. There is good cause to exceed the presumptive limitation as the father has an ample six figure income, shares a home and living expenses with one to three other independent adults (or makes a voluntary choice to support those other adults in abdication of his priority duty to his children), has abdicated his parental duties which has

³ See *In re Marriage of Selley*, 189 WnApp. 957 (2015); See also *In re Marriage of Krieger*, 147 WnApp. 952 (2008).

increased the mother's duty of support, and the child has demonstrated necessity in educational and living expenses.

Again, as in *Sprute*, the "history of sending their children to private educational institutions and incurring tuition and fees far above what parents would incur if they sent their child to a public school" should be considered as well as the "familial tradition, which [is] a special circumstance" along with the fact that the child is attending an "outstanding program in his chosen field." *Sprute* at 354-57.

Of note, the maximum monthly amount possible for Mr. Stacy's obligation under the court's current order for postsecondary support for Jonathen is \$1409/month, which is less than the \$1464.50 that Mr. Stacy was paying for Jonathen's basic support obligation with added private school and extracurricular expenses. While many families are increasing their obligations for a child from a basic support obligation in minority to a greater obligation for postsecondary support, the court herein actually lowered Mr. Stacy's monthly support obligation while arbitrarily and inequitably shifting Mr. Stacy's burden to Jonathen after determining that Jonathen is dependent upon the parents.

Additionally, despite the threshold requirement of dependency on the parents for the necessities of life in order to qualify for postsecondary

support, the court remarked that if Jonathen were unable to get a scholarship or other funding for a summer quarter, as necessary for his attendance in order to graduate on time with his chosen major and minor, that Jonathen should get a job (and with support to then be suspended entirely while Jonathen would somehow be expected to independently sustain himself with minimum summer wages, or rely entirely on the mother with no contribution from the father). CP 1294. The court further remarked that the disproportionate order is likely to be repeated in the future for Michael's postsecondary support. CP 1116.

The court erred in ordering an inequitably disproportionate burden on the child (and consequently, the mother) while relieving the father to a greater degree than he was ordered to pay even for secondary private school tuition. The court should place higher consideration on the history of this family for private schooling while accounting for the father's abdication of his parental duties as contemplated by the *Childers* court and as discussed in *Selley* and *Krieger*. The court should be reversed and an order entered to increase the father's responsibility to equitable proportion including a deviation above the presumptive limitation as argued herein.

I. In determining the method of payment for postsecondary support the court must consider the history and facts of the case and order an equitable solution. The issues of this case warrant payment to be made

to mother with collection enforceable by the Division of Child Support, subject to periodic adjustment.

The court may direct the payments for postsecondary education to be made by both parents to the institution or to the child, or the court may direct the payment to be made to a parent that the child lives with. RCW 26.19.090(6). The history of this case demonstrates that it is not feasible to order both parents to make payments to the institution, as the father not only has a longstanding history of nonpayment herein but even during the pendency of this action he has incurred NSF and STOP PAYMENT charges to the child's university account after he was temporarily ordered to pay the institution.

The child does not want direct payments and has requested the payments to go through the mother. Additionally, the child continues to live at home, returning home for all school breaks, medical appointments, and other family events, and has attended summer session while living at home. The Division of Child Support cannot enforce or collect on an order of support to be paid directly to an institution. Additionally, the Division of Child Support cannot collect on a variable order of support, and amount to enforce must be set.

In the pendency of this action, the court tried again to allow the father to pay bills directly, and that effort failed as it has every time in the history

of this case. The court then ordered a variable amount for DCS collection of payments to be made to the mother, but DCS wrote and stated they could not collect on such an order. The problem with the court's variable order is the same problem with the court's order for any set amount, and that is that there is no proportional sharing of expenses incorporated into the court order. The collection amount should be fixed, but based on accurate estimates of expenses and proportional sharing, with opportunity for periodic adjustment.

This case already has a fair and equitable mechanism in place for proportional sharing of expenses beyond a basic support obligation, and that is allowance for a periodic adjustment for special expenses. Support was adjusted herein two years in a row without contentious litigation and the third year the litigation contentions primarily surrounded establishment of postsecondary support and the parties resolved in mediation the adjustment for special expenses. The parties should be ordered to do the same for postsecondary support: A basic support obligation should continue for the children on postsecondary support herein, and the postsecondary support and incidental expenses, minus room and board and necessities of life, should be added to basic support. If there still be a

dispute regarding underpayment or overpayment, then the parties should be ordered to mediation before returning to court.

J. The court may consider an award for basic needs in addition to educational expenses with periodic adjustment, and failing to do so in this case is reversible error.

1. A trial court may calculate support using the basic support obligation and adding the educational expenses.

“The child support schedule shall be advisory and not mandatory for postsecondary educational support.” RCW 26.19.090(1). “The economic table may advise the level of support obligation placed upon the parents or it may be ignored.” *In re Parentage of Goude*, 152 WnApp 784, 792 (2009), *citing Daubert* at 505. “If a postsecondary student lived at home, application of the schedule including the economic table may be practical.” *Goude*, at 792-93, *citing Daubert*, at 504-505. “While the trial court may ignore the economic table in setting post-secondary support, it may also utilize the economic table when setting the support amount.” *Goude*, at 793, *citing Daubert*, at 505.

In *Goude*, the child at issue was attending a community college for at least part of her education and would live at home with the mother for that time. *See Goude, generally*. The court of appeals found no abuse of discretion where “in calculating the amount of post-secondary support, the trial court added the basic support obligation from the economic table of

the child support schedule to the costs of attending Big Bend while living dependent with a parent, less the cost of room and board. *See* RCW 26.19.020 (child support economic table).” *Goude*, at 793.

Herein, the child at issue attended summer semester at community college, and will continue to spend periods of time living at home. The father has abandoned the child and does not provide any transportation, food, shelter, or expenses for any daily activities which would normally be expended during residential time with a child (or, here, during visits over school breaks of a child when the dormitory and cafeteria are closed). It is reasonable to add the educational expenses of the child to the basic support obligation as has been done in this case for private educational expenses and other incidental special expenses for this child.

Support should be calculated using a continued basic support obligation and adding postsecondary expenses and incidentals (minus room and board and necessities of life, as included in the basic support obligation), and for a yearly adjustment similar to what the parties have been doing for secondary years. If there still be a dispute regarding underpayment or overpayment, then the parties should be ordered to mediation before returning to court.

2. The request to calculate basic support then add the educational expenses is reasonable given the facts and history of this case.

Ms. Base has demonstrated the estimate of expenses for 48 months of Jonathen's educational expenses to be \$222,488, or \$96,263.14 for the father's 64.9% portion of 2/3 of the expenses, after the child meets a 1/3 obligation (to properly include his scholarships in his 1/3). The father's share of those expenses is averaged to \$2005.48/month. Additionally, Jonathen will be on school breaks about 99 days per year, for which there should be an additional basic support contribution from the father of \$2916.54/year, or \$243.05/month. And, Jonathen will incur about \$650/month in necessities of life and costs incidental to the education which are not included in the estimate of expenses, as stated in paragraph B, above, of which the father's portion of 64.9% would be \$421.85. These three sums for the father's contributions would total \$2670.38/month.

If the court were to instead follow Ms. Base's proposal to order a basic support obligation and then to add the educational expenses as the parties have historically done with private school tuition and other special expenses, the math would calculate as follows: subtract \$27,248 for the estimates of room and board for all schools for 48 months, and the educational expenses left for division would be \$195,240, of which the

father's 64.9% of 2/3 is \$87,483.84 or \$1759.87/month. Add to that the father's basic support obligation of \$896/month and the total is \$2655.87. The math is estimated to be about the same for either method of calculating, but a major advantage in awarding a basic obligation and then actual educational expenses with equipment and other expenses incidental to education is that there is no piles of receipts necessary for the child's basic necessities of life while staying in the dormitory or living at home. Only the post secondary expenses and expenses incidental to education (supplies, equipment including computer, fees, etc.) would be necessary to go through the tedium of accounting using the mother's proposed method.

If the court were to award a basic support obligation and then add postsecondary expenses, but give the child first a 1/3 responsibility of the monthly \$1380 as calculated for basic support in the same manner as educational expenses, that would leave the child with a \$460/month basic support obligation, with \$920 to be shared by the parties leaving \$597.08 to be paid by the father and \$322.92 by the mother. Adding the father's \$1759.87/month for educational expenses, his total is \$2356.95/mo.

The father's net income as previously reported is \$7333/month. His 45% presumptive maximum is \$3300, and a 50% obligation would be \$3667 per month. The father's current obligation for the youngest child is

currently \$1651/month (\$896 for basic support and \$755/month in special expenses, subject to annual adjustment for special expenses), leaving the father with \$1649/month for postsecondary support for Jonathen at the 45% presumptive limitation, or \$2016 for Jonathen currently if the court grants the request for exceeding the 45% presumptive limitation to 50%.

Of note, Michael is a senior in high school with \$1164 monthly in variable expenses to be adjusted annually. If Michael's support is adjusted downward, then Mr. Stacy's monthly obligation for Jonathen should be adjusted upward to the court's ordered proportional limitation on income, so long as Jonathen's expenses continue to exceed any capped obligation.

Regardless how the postsecondary support is calculated, the mother and child are left with greater proportional burdens for the support when the father's contributions are capped at 45% or 50%. There is an advantage to the court and to the parties in awarding an amount for a basic support obligation and adding the postsecondary expenses, in that this method provides for the child's necessities of life both during and between school quarters such that onerous piles of receipts for basic necessities (room and board, personal supplies, etc.) would not be required or disputed. The parties and the court could then focus on the accuracy of the accounting for school tuition and fees and books and school supplies and equipment.

The court should order that room and board be excluded from the school's estimates, that basic support be paid for Jonathen, and that school expenses be calculated separately and then added to the basic support obligation. The father should be ordered to pay the mother, and the mother should be ordered to pay the child's basic necessities and to ensure that the proportionally shared obligation of the parties is paid to the school.

3. The court failed to allow any support for the child's extra expenses for during the school break periods as ordered for consideration by the revision order of September 22, 2016.

The first consideration in determining an award of postsecondary support is a mandated determination of whether or not the child is in fact dependent and is relying upon the parents for the reasonable necessities of life. RCW 26.19.090(2). To receive postsecondary support, "The child must enroll in an accredited academic or vocational school, must be actively pursuing a course of study commensurate with the child's vocational goals, and must be in good academic standing as defined by the institution. The court-ordered postsecondary educational support shall be automatically suspended during the period or periods the child fails to comply with these conditions." RCW 26.19.090(3).

Accredited institutions consider a student to be enrolled and actively pursuing a course of study when the child attends fall, winter, and spring

quarters. A child remains enrolled during school breaks, and that may even include the summer break (for which most institutions do not require class attendance for the student to remain enrolled or be said to be actively pursuing a course of study). The child receiving postsecondary support for the academic year has already been determined to be dependent upon the parents for the necessities of life, and cannot then be said to be independent with the ability to be self-supporting during school breaks. Someone, then, has the responsibility to support the child during school breaks. Without an award for the sharing of support for the child for the necessities of life over school breaks, the custodial parent is left to shoulder the support of that child at 100% during school breaks. This is inequitable, especially when the non-custodial parent has long voluntarily abdicated their parenting duties to their own financial benefit while thereby increasing the burden on the custodial parent.

Our courts have already contemplated this circumstance of a child needing support over school breaks, in amounts that cannot be covered by institutional dormitories and meal plans, when the dormitories and cafeterias are closed during school breaks and summer services are greatly reduced even if a child does attend over the summer months. In one such case, the court ordered that “Miranda must stay enrolled as a full-time

student and be actively pursuing a course of study and must remain in good academic standing. ... [T]he child shall make effort to obtain summer employment and her earnings are to be applied to her costs of attending college.” *In re Marriage of Kelly*, 85 WnApp. 785, 789, (1997).

The court found Miranda Hannan to be “in need of post-secondary educational support because the child is in fact dependent and is relying upon the parents for the reasonable necessities of life.” *Kelly*, at 795.

Someone was supporting Miranda Hannan over the summer months, and it was obviously not Miranda Hannan supporting herself because any earnings that she made over the summer had to be applied to her college costs. Miranda was not even required to actually obtain employment, but only to make an effort. “While the order only provided that Miranda shall make “effort to obtain summer employment,” the court need not condition support on the child’s obtaining employment.” *Kelly*, at 795.

Here, \$1380 is the monthly basic support obligation for each child of a 2-child family using the parents incomes as ordered, or \$896 per child per month for Mr. Stacy’s 64.9% proportional responsibility. This basic obligation is \$10,752/year for Mr. Stacy per child, or \$206.77 per week or \$29.46 per day. The current academic calendar has breaks as follows: 10 days over Thanksgiving, 20 days over Christmas, 12 days for spring, 12

days before summer quarter begins, and about six weeks (45 days) between summer and fall quarters, totaling 99 days of school breaks over one calendar year if Jonathen attends all four quarters per year as currently planned. **These break times represent a savings to Mr. Stacy of at least \$2916.54 per year (or \$243.05/month, or total share savings of \$11,666.16 for 48 months) in basic support obligation for Jonathen** that is not covered by any school's estimate of expenses because the dorms and cafeterias are closed during those times and the expenses are not included in room and board charges when the facilities are closed. The living expenses for the child during school breaks should be shared proportionally.

K. The court erred in denying a support deviation to exceed the presumptive 45% limitation and failed to properly consider the statutory factors and facts of this case, and the abuse of discretion is reversible error. The court must consider factors supporting a greater award of support.

“When the trial court issues a child support order, it begins by setting the ‘[b]asic child support obligation.’ RCW 26.19.011(1). The basic child support obligation is generally determined from an economic table in the child support schedule and is based on the parents’ combined monthly net income and the number and age of the children.” *McCausland* at 611, *citing* RCW 26.19.011(1) and RCW 26.19.020. “Additional amounts for

support are authorized by several provisions of the statute. Extraordinary health care expenses are an additional amount of child support to be apportioned between the parents. RCW 26.19.080(2). Day care and special child rearing expenses are also additional amounts of child support to be apportioned between the parents. RCW 26.19.080(3). Special child rearing expenses include but are not limited to private school tuition, daycare, and long distance transportation between the parents' residences under the residential schedule. *Id.* The Washington State Child Support Schedule Commission (Commission) listed orthodontia, tutoring, and summer camps as other examples of additional shared costs. Report at 14, and Supplemental Report Worksheet Instructions at 2.” *Daubert*, at 494. Similar expenses are requested herein.

An abuse of discretion is found “when [the trial court] concluded that it had no legal authority to deviate from the child support schedule based on the obligor parent’s noninvolvement with the children.” *In re Marriage of Selley*, 189 WnApp. 957, 962 (2015). The *Selley* court examined a similar case finding: “...Division One held that an obligor parent’s abdication of parental responsibility could provide a reasonable basis for an award above the advisory child support amount. The court found that Mr. Krieger’s choice not to spend time with his children improved his

financial position because Marilyn Walker bore the burden of all of the children's day-to-day expenses, including food, recreation, entertainment, extracurricular activities, and other incidentals. Consequently, Ms. Walker necessarily carried an increased financial burden. Because the parties' financial circumstances was a necessary factor in the determination of whether to award additional support above the advisory amount, the trial court could consider Mr. Krieger's abdication in its calculation of the support award." *Selley* at 961-2, *citing Krieger* at 965. "[B]ecause an obligee parent pays a higher portion of child expenses when the obligor parent chooses to abdicate most or all visitation, we hold that in such a situation, the trial court has the authority to deviate upward from the standard calculation when an upward deviation would better achieve an equitable apportionment." *Selley*, at 962. The father herein is similarly enriched while he abdicates responsibilities leaving the mother to bear all the burden for expenses not covered by the school's initial low estimate. Here, the court has not even awarded equitable responsibility for postsecondary support up to the presumptive limitation on incomes, allowing only the low initial cost estimate from the school for consideration in division, and the court also allowed the father to benefit in whole from the child's largest scholarship before division of

responsibility. The court acknowledges there are additional tuition fees and expenses incidental to the education, as well as other expenses for the necessities of life, and yet additionally places that burden on the dependent child and consequently on the mother. The court erred by denying an upwards deviation without requiring the father to show any substantial hardship that would result in the granting of the requests made by the mother, with the court failing to adequately consider the father's fraudulent concealment of income and his voluntary abdication of parental duties while he voluntarily supports one to three other independent adults and elects to rent a home in a ski resort at a high cost far from his place of employment. The court should be reversed, with an order entered for a deviation upwards of the presumptive 45% limitation

L. Fees

Ms. Base requests fees and costs on appeal. Pursuant to CR 60 (b), RAP 18.1, and RCW 26.26.140, in the event that the court grants the relief as requested by Ms. Base, an award of costs and fees on appeal is appropriate. *In re Marriage of T*, 68 WnApp. 329, 338-39 (1993). Mr. Stacy is unjustly enriched by the order as it stands. Ms. Base should be awarded reasonable fees or lost wages and costs on appeal as assessed against Mr. Stacy, with cost bill to follow on award of fees and costs.

V. CONCLUSION

Both parents are required to support their children. Ms. Base seeks a fair and equitable order regarding child support including postsecondary support, taking into account the financial circumstances of each party as required by statute as well as the statutory considerations for postsecondary support, considering the history of private school education for the children and the ongoing history of the father's voluntary abdication of his parental duties. The court failed to properly consider the history of this case and failed to properly consider the facts of this case as compared to published cases with similar facts. The court committed error in clear disdain for orders of postsecondary support contrary to law and placed an arbitrary cap on expenses while issuing an order that was inequitable in allocation of responsibility without proper proportional sharing. The court failed to independently examine the income information of the parties with new information demonstrating Mr. Stacy's misconduct in concealment of income. The trial court failed to require Mr. Stacy to demonstrate any substantial hardship that would result in the granting of Ms. Base's request to exceed the 45% presumptive limitation for child support on income; the evidence and Mr. Stacy's own testimony shows that he voluntarily supports 1-3 other adults instead of devoting those

funds to the children herein. Mr. Stacy is unjustly enriched by the trial court's order which allows him to pay even less on an order of postsecondary support than he did for child support during the child's minority and which orders the child and the mother to pay more than Mr. Stacy despite his income being at least twice that of the Ms. Base and 100% more than the child attending college. The court abused its discretion in requiring the Division of Child Support to determine the postsecondary support collection amount despite DCS policies disallowing that method, and by failing to set a constant monthly amount for collection with a periodic accounting and adjustment pursuant to the established history of this case. All errors constitute abuse of discretion and warrant reversal; the orders should be reversed and the matter remanded for a determination of child support consistent with the facts herein, with fees or lost wages and costs awarded to Ms. Base.

Respectfully submitted on December 21, 2017 by,



Angel M. Base, Pro Se Appellant/WSBA #42500