No: 45956-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

IN RE THE MARRIAGE OF:

PATRICIA MCCARTHY,
Respondent,

and

FEARGHAL MCCARTHY,
Appellant.

Appeal from the Superior Court of Clark County
Case No: 05-3-01349-1

APPELLANT'S REPLY BRIEF

Fearghal Mc Carthy
Appellant, Pro-Se

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April 14, 2015

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I. SUMMARY OF REPLY

Modification of the final order of child support (the "Final OCS") was error because: i) RCW 26.09.170(1)(b) unambiguously requires a substantial change in circumstances for modification; ii) unlike in *Pippins* and *Schumacher* the trial court made no finding that the stipulated Final OCS was statutorily deficient or violated public policy; iii) the legislative intent is to promote voluntary child support agreements, RCW 26.19.001; and iv) the trial court's disregard of the modification procedures set forth in RCW 26.09.175 denied Fearghal due process. Because the dissolution decree (the "Decree") ordered a marital debt of $225,000 pursuant to a promissory note (the "Note"), entry of judgment on this unpaid marital debt does not constitute a substantial change in circumstances.

The trial court failed to apply the unambiguous instructions set forth in the Child Support Schedule to the *undisputed* evidentiary facts, as mandated by RCW 26.19.035(1). This error caused faulty data to be used as a basis for calculating the parties' child support obligations.

It is undisputed that the trial court failed to enter written findings in support of a deviation modification as required by RCW 26.19.075(2).

Children have constitutional rights for child support proceedings to be administered without unnecessary delay and for child support decisions to be made effective within 90 days. Const. art. I, §10 & art. IV, §20. These constitutional rights were violated.

Patricia's request that the trial court be instructed to alter the parties' child support obligation based upon alleged income being received on the Note should be denied because: i) no evidence exists as to any income

being received on the Note; and ii) Patricia is not entitled to affirmative relief because she failed to file a cross-appeal.

II. STATEMENT OF THE CASE IN REPLY

A. Key Facts and Dates

On 1/23/09 the parties entered the stipulated Final OCS that fully complied with the child support statutes and the Child Support Schedule. CP 1-12. On 1/29/10, the Decree was entered subject to Patricia's Chapter 7 bankruptcy proceedings which were still ongoing. The Decree adopted as final the Final OCS and awarded Fearghal a debt of $225,000 pursuant to the Note. CP 13-16. Entry of judgment on the Note was deferred pending certain conditions stipulated by the parties. CP 16. CP 274.

On 4/24/13, judgment for the $224,200 balance on the marital debt was entered. CP 279. Four days later, on 4/28/13, Patricia voluntary filed for Chapter 13 bankruptcy. CP 124. Just 12 days prior to filing this second bankruptcy, Patricia purchased a new car incurring a debt of $39,991. CP 64, CP 84 ¶ 5.10. Patricia budgeted an $800 monthly payment for this brand new car in her bankruptcy plan. CP 65.

On 12/11/13, an Order re Adjustment of Support (CP 173-174) and order of child support were entered. On 1/31/14, on revision, the Adjusted OCS with worksheets (CP 210-223) and Order re Motion for Adjustment of Child Support (CP 209) were entered.

B. Resolution of Dissolution Proceedings

After three years of contentious litigating, the parties stipulated to findings in support of a *parenting plan* (the "Findings"). Respondent's Brief ("RB") at 1. Unlike Patricia, Fearghal does not view the parties stipulation to these Findings as particularly relevant to this appeal.

The stipulated Findings and entry of the Decree were the result of over three years of contested proceedings that the trial court resolved by requesting legal memorandum to determine sanctions for Patricia's gross intransigence. CP 359-360. Patricia had been found in contempt in excess of 30 times. CP 18, 255. The court found that Patricia lied repeatedly[1], perjured herself, forged evidentiary documents, tampered with witnesses, refused to provide discovery, made false allegations, violated domestic violence restraining orders, and more.[2] Patricia had exercised her Fifth Amendment rights in the proceedings. CP 397. The facts stated in the Findings were already in the record via prior contested proceedings. Prior declarations in support of contested parenting plan motions, a Motion to Strike Patricia's pleadings and other motions asserted facts later stated in the Findings. CP 316-320, 336-349, 363-374, 379-387. Duly concerned about the motion to strike, pending sanctions, findings on contempt, facts already in the record, and her exercise of her Fifth Amendment rights; Patricia proposed a settlement. Thus, the parties' stipulations were the product of three years of controversy and prior findings made by the court.

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[1] See Appendix A.

[2] For findings of contempt re perjury, forgery of evidence, tampering with witnesses, making false statements, violating restraining orders, violating parenting plan, discovery violations, intransigence, and gross intransigence; see CP 331, CP 357-359, CP 351-352 and CP 389-390.

III. ARGUMENT IN REPLY

A. De novo review is applicable to this appeal.

Resolving the issues raised on appeal requires interpretation of law including RCW 26.09.170(1)(b), 26.09.170(7)(a), 26.09.175, 26.19.001, 26.19.075(2), Const. art. I, §10 and Const. art. IV, §20. The trial court's application of law and application of the Child Support Schedule instructions to the undisputed evidentiary facts requires review. Patricia's response requires appellate interpretation of the Final OCS.

Statutory meaning is a question of law that is reviewed de novo.[3] A trial court's application of law to the facts in a child support case is a question of law that is reviewed de novo.[4] "Interpretation of a child support order is a question of law that we review de novo." [5]

The Adjusted OCS was entered on revision based only upon the parties' written submissions. RB 10. Appellate courts in as good a position as the trial court to review written submissions such as affidavits and other documentary evidence generally review a trial court's decisions de novo. *In re Marriage of Rideout*, 150 Wn.2d 337, 350, 77 P.3d 1174 (2003).[6]

> "[T]he general rule relating to de novo review applies when the trial court has not seen or heard testimony requiring it to assess the credibility of witnesses." *Id,* citing *Progressive Animal Welfare Soc'y* at 252.

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[3] *In re Marriage of McCausland*, 159 Wn.2d 607, 615, 152 P.3d 1013 (2007). *State v. Morales*, 173 Wn.2d 560, 567, 269 P.3d 263 (2012).

[4] *State ex rel. M.M.G. v. Graham*, 123 Wn. App. 931, 938, 99 P.3d 1248 (2004). See also; *In re Marriage of Rossmiller,* 112 Wn. App. 304, 309, 48 P.3d 377 (2002).

[5] *In re Marriage of Sagner*, 159 Wn. App. 741, 749, 247 P.3d 444 (2011).

[6] Citing *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994); *Smith v. Skagit County*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969); *In re Marriage of Flynn*, 94 Wn. App. 185, 190, 972 P.2d 500 (1999); *Danielson v. City of Seattle*, 45 Wn. App. 235, 240, 724 P.2d 1115 (1986), aff'd, 108 Wn.2d 788, 742 P.2d 717 (1987).

A ***narrow exception*** to this general rule is when the trial court proceedings turn on credibility determinations. *Rideout*, at 351. But, this Court is not being asked to assess witness credibility. Witness credibility is simply not at issue for purposes of reviewing the undisputed evidence in this appeal. The parties agree on the documented evidentiary facts underlying the child support Worksheets, consisting of Patricia's paystubs, written submissions made by Patricia together with the court's written orders (i.e. the Final OCS and the Adjusted OCS). The appellate court is in the exact same position as the revision court to review the parties' documentary submissions already in the record. De novo review is therefore proper.

B. The trial court erred by modifying the Final OCS beyond the limited scope of an adjustment proceeding and without finding a substantial change in circumstances as required by RCW 26.09.170(1)(b).

1. Summary of Opening Brief Argument:

Adjustment proceedings and modification petitions are substantially different in scope and procedure. *In re Marriage of Scanlon*, 109 Wn. App. 167, 173, 34 P.3d 877 (2001). An adjustment may be made upon changes in the parties' incomes. RCW 26.09.170(7)(a). In contrast, a modification requires a substantial changes in circumstances. RCW 26.09.170(1)(b). An adjustment proceeding for income changes, such as this case, anticipates only those limited changes *necessary* to conform an existing support order to changes in parties' incomes. *Scanlon* at 173. In contrast, modification is "significant in nature and anticipates making substantial changes." *Id.* The limited scope of changes permissible on adjustment must be respected and cannot be expanded into the broad substantial changes permitted upon modification. Improper out-of-scope

modifications in adjustment proceedings undermine the legislative intent to maintain child support "commensurate with the parents' incomes" by imposing fears on parents seeking adjustment that courts may order broad unanticipated substantial modifications in breach of RCW 26.09.170(7)(a). In this case, under the color of an adjustment proceeding, the court made multiple modifications to the Final OCS violating the limited scope of RCW 26.09.170(7)(a) and without a finding of a "substantial change in circumstances" as required by RCW 26.09.170(1)(b).

2. RCW 26.09.170(1)(b) cannot be put aside because, unlike in Pippins and Schumacher, the trial court made no findings that the stipulated Final OCS provided an inadequate support amount or was statutorily non-compliant or violated public policy.

Patricia does not dispute that the trial court modified the Final OCS without finding a substantial change in circumstances. Instead, Patricia argues for the first time on appeal that the statutory requirement of a substantial change in circumstances is nullified for stipulated support orders. An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal. *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008); RAP 2.5(a); *State v. Moen*, 129 Wn.2d 535, 543, 919 P.2d 69 (1996); *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 518 (2011), (late blooming issues cannot be unleashed as new weapons on appeal.)

Patricia relies on *Schumacher v. Watson*, 100 Wn. App, 208, 213, 997 P.2d 399 (2000) and *Pippins v. Jankelson*, 110 Wn.2d 475, 478, 754 P.2d 105 (1988). However, both these cases are very distinguishable.

In *Pippins*, the modification court made "several findings of fact."

> "First, the child support amount originally established....was 'not based upon the reasonable needs of the child' and was not the result of any analysis of relevant facts mandated by former RCW 26.26.130(5). Second, the amount provided 'was considerably below the usual amount of support for a child given the respective incomes of the parties.'" *Pippins* at 477.

Thus, Pippins is distinguishable because the trial court found that the prior child support amount was inadequate and was statutorily deficient due to the absence of statutorily mandated findings. The *Pippins* Court affirmed modification absent a substantial change in circumstances reasoning that:

> "[A]greements which restrict a minor child's right to seek increased support are "**invalid as against public policy**." *Id* at 479, (emphasis added). "The language of the statute [former RCW 26.26.130(5)] is mandatory and **it does not matter whether the court itself is determining the amount or whether the amount is stipulated by the parties.**" *Id* at 480-481, (emphasis added).
>
> "Any presumption that the court **did not determine a reasonable level of child support** or make the statutory required findings **can be overcome by clear evidence to the contrary."** Id at 481-482, (emphasis added).

In stark contrast to Pippins, the trial court in this case did not make any findings that the Final OCS provided an inadequate support amount, was statutorily non-compliant or otherwise violated public policy. The absence of any such findings rebuts any presumption that the Final OCS did not provide a reasonable level of child support. An appellate court generally will not review a matter on which the trial court did not rule. *Meresse v Stelma*, 100 Wn. App, 857, 867, 999 P.2d 1267 (2000).

The economic table is presumptive for combined monthly net incomes up to twelve thousand dollars. RCW 26.19.020. The Court must calculate the presumptive amount and, absent findings supporting a deviation, order the presumptive amount. *In re Marriage of Sacco,* 114 Wn.2d 1, 4, 784 P.2d 1266 (1990). Every support order requires written findings and the completion of worksheets signed by the judge which are

filed or attached to the order. RCW 26.19.035(2).

Unlike in *Pippins*, the Final OCS fully complied with the statutory requirements of RCW 26.19.035. The requisite statutory findings were made. The mandated worksheet calculated the presumptive support. Upon adoption of the Final OCS in the Decree on 1/29/10, the presumptive amount was ordered **creating a presumption** that support was adequate to meet the children's needs. The worksheet was signed by both parties under penalty of perjury as well as by the judge and DSHS, and was attached to the Final OCS. CP 8-12. Neither party appealed the Final OCS. Because the Final OCS fully complied with the statutes and ***presumptively*** provided an adequate support amount using the Worksheets, it is distinguishable from the support order in *Pippins* that violated public policy. Thus, clear evidence exists that the Final OCS provided an adequate support amount rebutting any presumption to the contrary. For this reason, modification of the Final OCS required finding a substantial change in circumstances as mandated by RCW 26.09.170(1)(b).

In *Schumacher,* similar to *Pippins*, the modification court also made findings that the prior support order failed to provide an adequate support amount and was statutorily non-compliant. The prior child support order caused severe economic hardship and the calculation method retroactively modified past support making it unwieldy and unpredictable. *Schumacher* at 211. In essence, the parties estimated support instead of using the worksheets prescribed by the Child Support Schedule. The *Schumacher* Court affirmed modification of the prior support order reasoning:

> "The law prohibits retroactive modification of child support because it opens the door to uncertainties, costs and hardship." *Schumacher* at 212. "RCW 26.19 controls the method of [child support] calculation." *Id.* "Here, Watson and Schumacher estimated support, and later had an accountant adjust it after the fact, requiring either a refund or an extra payment. This method of calculation constitutes an annual retroactive modification of past support and does not comply with the controlling statute." *Id* at 212.

The *Schumacher* court relied exclusively on *Pippins* in holding that a substantial change of circumstances was unnecessary due to the statutorily non-compliant prior support order. *Schumacher* at 213. Similar to *Pippins, Schumacher* is inapposite because the Final OCS ordered the presumptive amount of child support amount based on the economic table and findings in the statutorily mandated Worksheets. In *Schumacher,* the prior support order failed to do so creating severe economic hardship and causing retroactive modifications that violated public policy.

Modification of a child support order must be supported by written findings of fact. *Scanlon* at 174. RCW 26.19.035(2). In both *Pippins* and *Schumacher*, modification was supported by findings that the prior child support orders provided inadequate support and were otherwise statutorily deficient. In this case, the trial court made no such findings. Absent such findings, a finding of a substantial change of circumstances pursuant to RCW 26.09.170(1)(b) is required to support modification.

3. The Pippins decision preceded enactment of RCW 26.19. The legislative intent of RCW 26.19 is to promote voluntary settlements of child support obligations. RCW 26.09.170(1)(b) is unambiguous in requiring a substantial change in circumstances for modification.

Notably, the seminal *Pippins* decision, preceded the July 1988 effective date of the Child Support Schedule, RCW 26.19. In *State v. Cooperrider,* 76 Wn. App. 699, 887 P.2d 408 (1994), Division III noted:

> "In 1989, RCW 26.26.130(5) was amended to provide that support shall be "determined pursuant to the schedule and standards adopted under RCW 26.19.040 [now repealed]. The amendment was likely a response to *Pippins v. Jankelson*, 110 Wn.2d 475, 481, 754 P.2d 105 (1988) which noted that the support schedule would apply but for the factors enumerated in the then-current version of RCW 26.26.130(5).

Thus, since 1989, the Child Support Schedule has been the sole method for calculating child support replacing the fact determinations required by former RCW 26.26.130(5). The legislative purpose of the Child Support Schedule, RCW 26.19, and the statutory mandated use of the child support Worksheets has been discussed by the Washington Supreme Court.

> "This statute aimed to increase the equity and adequacy of child support orders. RCW 26.19.001 (1), (2). It also sought to reduce "the adversarial nature" of child support proceedings "by increasing **voluntary settlements** as a result of the greater predictability achieved by a uniform state-wide child support schedule. RCW 26.19.001(3)." *In re Marriage of Sacco*, 114 Wn.2d 1, 3, 784 P.2d 1266 (1990). "The thrust of the statute is to require the court to set forth the basis, for its calculations in order for subsequent courts to determine precisely what the underlying facts are and how the trial court reached its decision. This process should promote more predictability, more consistent awards, and, hence, more **voluntary settlements**." Id. at 4.

The Final OCS incorporated the statutorily mandated Worksheets. Thus, the legislative purpose was served because the Worksheets promoted the parties' voluntary stipulation. Any ruling that stipulated child support orders based upon the Worksheets prescribed by RCW 26.19 have a different standing from non-stipulated orders based on the exact same Worksheets would undermine the legislative intent and unreasonably chill voluntary child support settlements contrary to RCW 26.19.001(3).

RCW 26.09.170(1)(b) unambiguously restricts modification to "**only** upon a showing of a substantial change of circumstances" except for four specific exceptions stated in RCW 26.09.170(6) (not applicable here).

Patricia asks that a fifth exception be imputed, namely when a prior child support order is stipulated rather than contested.

> "When interpreting a statute, we do not construe a statute that is unambiguous, but rather assume that the Legislature means exactly what it says. Plain words do not require construction. The terms of RCW 26.09.170 reflect no ambiguity." *Scanlon* at 172. "In this case, the relevant pre-requisite [for modification] is a substantial change in circumstances." *Id* at 173.

4. The trial court's circumvention of the statutory procedures for modification was prejudicial to Fearghal and was not harmless error.

On revision, Fearghal asserted that the failure to comply with the statutory procedures in RCW 26.09.175 was not harmless.[7] Fearghal also asserts harm in his Opening Brief.[8] Given Patricia's history of perjury, false testimony, and presenting forged documents as evidence to the court; discovery was essential to Fearghal's due process rights for modification. Fearghal would have submitted additional evidence to argue modification matters.[9] Fearghal would have undertaken discovery.[10] The court's sua

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[7] Fearghal asserted adverse financial consequences (loss of tax credits, reduced support from deviation) and denial of the more significant due process protections and requirements applicable in modification petitions. CP 200.

[8] Fearghal asserts prejudicial harm by: i) being limited to presenting evidence on the sole issue of changes in the parties' incomes and not the modification matters; ii) no prior notice via the required summons and petition to impart prior knowledge that pending litigation of modification matters; iii) sua-sponte rulings making modifications (unrequested by either party) that denied Fearghal the opportunity to do discovery, submit evidence, and prepare argument; and iv) the Commissioner's letter dated 11/21/13 giving notice of added modifications not even discussed at the hearing (CP 172). Appellant's Opening Brief, Page 27.

[9] For example, Fearghal would have submitted evidence showing "Daycare and Special Child Rearing Expenses" exceed the $230 per month in the Final OCS due to the boys now being years older; and having higher educational and extra-curricular expenses since entering high-school and middle school. The court modified this $230 monthly expense to zero.

[10] For example, later discovery in Patricia's bankruptcy evidences: i) Patricia health insurance premiums were reduced after removal of her spouse and his children from her health insurance (who were doubly insured); and Patricia's financial declaration falsely states grossly inflated monthly household expenses of $6,791 (CP 82-83).

sponte modifications at the hearing and post-hearing by letter on 11/21/13 (CP 172) denied Fearghal due process and was harmful error.

In re Marriage of Morris, 176 Wn.App, 893, 309 P.3d 767 (2013), a mother sought post-secondary educational support for her two daughters using the wrong form. *Morris* is distinguishable. The father received actual notice of the modification matter, assented to the modification proceedings, and invited error by; i) requesting a deviation modification himself, and ii) asking the revision court to uphold post-secondary support awarded to the younger daughter. Notably, the father failed to assert any prejudice or procedural harm. On revision, the father specifically declined the court's offer of a remedy (i.e. a continuance to allow him submit additional evidence or undertake discovery) affirming instead that he had ample opportunity to submit evidence.[11] As the matter being litigated was clearly noticed, albeit on the wrong form, the appeal Court held the father received actual notice of the modification matter. Unlike *Morris*, Fearghal did not invite error. The matter before the court was adjustment based upon changes in the parties' incomes. The Commissioner made sua sponte modifications at the hearing and post-hearing by letter (CP 172) that denied Fearghal notice, and the opportunity to present evidence and undertake discovery. Unlike in *Morris*, Fearghal asserted prejudice on revision but wasn't offered any procedural remedy by the revision court. The court's failure to follow the statutory procedures for modification in RCW 26.09.175 denied Fearghal due process and was prejudicial.

[11] The father also stated his intent to support his older daughter in college, but without the authority of the court.

5. Modification of the Final OCS provisions for Termination of Support and Post-Secondary Educational Support is error because: i) no findings whatsoever were made to support modification, and ii) the Final OCS unambiguously ordered post-majority support without reservation.

Patricia doesn't address the trial court's failure to enter *any* findings whatsoever to support modification of ¶3.13 and ¶3.14 of the Final OCS. Because no written findings were made to support modification - either a substantial change in circumstances or that the Final OCS failed to provide an adequate child support - modification of these provisions was error.

It is well established that child support orders may provide for post-majority and post-secondary educational support for minor children.

> "If a decree expressly provides for postmajority support, a parent "owing a duty of support" may have a continuing obligation to pay college expenses as child support for a child who remains in fact dependent. RCW 26.09.100(1), .170(3)" *Balch v. Balch*, 75 Wash. App. 776, 779, 880 P.2d 78 (1994), citing; *Childers v. Childers*, 89 Wn.2d 592, 597-599, 575 P.2d 201 (1978).

> "Under Washington law, an obligation to provide postmajority support can be imposed provided the support-paying parent has notice that the support obligation will extend past the age of majority." *Rains v. Dep't of Soc. & Health Servs.*, 98 Wn. App. 127, 137, 989 P.2d 558 (1999).

Post-majority support was ordered in the Final OCS to i) reflect the parties' mutual desire for the children to attend college, and ii) obviate litigation of post-majority support at the critical time when the children would most need parental accord and support in choosing a college. The Final OCS language ordering post-majority support is unambiguous; and postsecondary support was *not reserved.* CP 4, ¶3.13 & 3.14.

> "Support **shall** be paid until the children reach the age of 18 or for as long as the children remain enrolled in high school **or an accredited post-secondary school, whichever occurs last**, except as otherwise provided in par 3.14" CP 4, ¶3.13. "The parents expect both children to complete a post-secondary education. While a child **has applied for** or **remains enrolled** in an accredited post-secondary school, the Obligor **shall pay**....." CP 4, ¶3.14.

The Final OCS states a finding that: "The parents expect both children to complete a post-secondary education". CP 4, ¶3.14. No appeal was filed. The clear language and intent of the Final OCS must be respected.

> "We interpret a child support order as written if it is clear and unambiguous on its face. A document is unambiguous if its terms are susceptible to solely one meaning. We review a document's construction "by examining the document itself to find out its intended effect."" *In re Marriage of Jess*, 136 Wn. App. 922, 926, 151 P.3d 240 (2007), (internal citations omitted).

Despite post-secondary educational support being unambiguously ordered *without reservation*, a modification was made imposing a new condition (matter must be brought back to court before support terminates absent the parties' agreement) that *changes the parties' rights* by reopening the issue for future litigation.[12] When post-secondary support is affirmatively ordered in a support order *without reservation*, modification without the statutory prerequisite of a substantial change of circumstances is error.[13]

The Child Support Schedule is advisory for postsecondary educational support. RCW 26.19.090(1). *In re Marriage of Daubert*, 124 Wn. App. 483, 99 P.3d 401 (2004), the Court specifically held that *both* basic standard support (per the economic table) and postsecondary educational support may be ordered as the economic table in the Child Support Schedule is advisory.[14] This is not a "double payment". The child

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[12] The Adjusted OCS added a provision opening the door for re-litigation: "*If the parents cannot reach an agreement [on post-secondary educational support], **either parent may bring this matter back before the court, provided the right is exercised before support terminates as set forth in par 3.13)***" CP 214, ¶3.14.3; and eliminated the phrase "or an accredited post-secondary school" from the termination of support provision (see CP 213, ¶3.13).

[13] In contrast, when post-secondary educational support is reserved, a substantial change of circumstances is not required. *Morris* at 893.

[14] The trial court also recognized this principle when ordering that the parties shall continue to provide medical insurance for children while in college.

remains dependent but has added post-secondary educational expenses.

> "The trial court, after deciding postsecondary support is appropriate, may consider the basic needs of the student **and** the costs of attendance." *Daubert* at 505. "The economic table may advise the level of support obligation placed upon the parents or it may be ignored." *Id.*

Daubert, therefore, contradicts Patricia's notion that support for dependent post-majority children may not encompass both their basic needs (per the economic table) and their postsecondary education. Patricia cites no other legal authority to support this notion.[15] RB 13. Moreover, parental agreements, such as the stipulated Final OCS, that provide post-majority support consisting of both basic standard support and post-secondary educational support are typically enforced and not modified.

> "On the contrary, courts have enforced provisions [obligating a parent to pay more than the law requires] in separation agreements that appeared to benefit the children but which the court would not normally have awarded." *In re Marriage of McCausland*, 129 Wn. App. 390, 411, 118 P.3d 944 (2005).

> "[W]e find no public policy which prevents a parent from being as generous to his children as he wishes, even if he contracts to pay more support than is legally required." *In Re Marriage of Olsen*, 24 Wn. App. 292, 299-300, 600 P.2d 690 (1979), citing *Kinne v. Kinne*, 82 Wn.2d 360, 363, 510 P.2d 814 (1973); *Riser v. Riser*, 7 Wn. App. 647, 501 P.2d 1069 (1972); *Bauer v. Bauer*, 5 Wn. App. 781, 788, 490 P.2d 1350 (1971).

Thus, modification of the post-secondary support provision was error.

Modifications to the Final OCS removed: i) a 10-day period for direct payment of post-secondary educational expenses to institutions; and ii) a 15-day period for Patricia to reimburse educational expenses paid by Fearghal. History shows Patricia's reticence to paying her child support

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[15] "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

obligations having accrued over $19,000 (22 months) of arrears. CP 198. Patricia was held in contempt for non-payment of support. CP 17-21. Patricia has twice declared bankruptcy. These factors made the specific timelines in the Final OCS appropriate. These timelines in the Final OCS protect the children's best interests by providing reliability that their college education won't be interrupted by unreasonable delays and delinquency as has been the case historically. The unsupported modifications removing the: i) 10-day direct payment requirement, and ii) 15-day reimbursement requirement, are error.

Absent the requisite substantial change in circumstances, the modification precluding the children from working part-time in order to contribute to the cost of their college education is also error.

Certain other changes incorporate existing relevant statutory provisions (e.g. support to terminate when child reaches 23, ¶3.14.10; make academic records available to both parents ¶3.14.11). These changes do not constitute a modification and thus no error is assigned because their incorporation into the Final OCS was already presumed. *In re Marriage of Briscoe*, 134 Wn.2d 344, 348, 949 P.2d 1388 (1998).

6. *Other modifications to the Final OCS are error absent any findings to support modification.*

a) Deviation for Patricia's third child: The Final OCS found that Patricia had a third biological child "EM, age 1". CP 11. No deviation was ordered. EM was fully supported in Patricia's dual income household ($8,190 income) whereas Fearghal had a single income household with much lower income ($2,610). CP 8, 11. When no deviation is ordered in a

prior support order, such as the Final OCS, a deviation modification cannot be ordered absent finding a substantial change in circumstances. *In re Marriage of Burch*, 81 Wn. App. 756, 760-761, 916 P.2d 443 (1996). Therefore, this modification was error.

b) Expenses not included Transfer Payment: Modifications made in ¶3.15 of the Adjusted OCS limit educational expenses to driver's education, graduation pictures, cap and gown, and up to ten college applications. These limitations *change rights* and are adverse to the children's best interests. The older boy takes Advanced Placement courses to earn him college credits and reduce the future cost of his college education. He came first in State in his theatre production. He is concerned that a ten application limit will also limit his chances of a generous college scholarship; and that his chances of winning a generous scholarship are best served by making multiple applications.[16] Absent specific findings supporting modification , these modifications are error.

c) Allocation of Income Tax Exemptions: Under the Final OCS, Fearghal receives the tax exemptions, which also yield $2,000 in tax credits that benefit the children's household. CP 45-46. Patricia does not dispute that the reallocation of tax exemptions from Fearghal to Patricia (Adjusted OCS, ¶3.17) changes rights and benefits of the parties. The modification causes the children's household to lose this financial benefit. Absent a substantial change in circumstances, this modification is error.

[16] What if it is the 11th or 12th college application is the one that yields a generous college scholarship? If applicable, nothing prevents Patricia from returning to court if she feels that the actual number of college applications becomes unreasonable.

d) Removal of Special Expenses: The Final OCS provided $230 per month to support the children's educational and extracurricular activities. CP 9. The Adjusted OCS Worksheet removed this support providing **zero dollars** instead of $230 per month to support these ongoing educational and extracurricular activities. CP 221. Ongoing educational and extracurricular activities now cost more than the $230 provided in the 2009 Final OCS and certainly exceed zero.[17] Patricia does not dispute this. Absent finding a substantial change in circumstances, removal of this $230 monthly support amount for these ongoing expenses is error.[18]

7. Entry of judgment on the Note and Patricia's voluntary Chapter 13 bankruptcy do not constitute a substantial change in circumstances.

It is well established that child support orders entered in conjunction with a dissolution decree may be modified upon a substantial change of circumstances since entry of the dissolution decree. *In re Marriage of Moore*, 49 Wn. App. 863,865, 746 P.2d 844 (1987).

> "The modification of a decree must be supported by a substantial change in circumstances ***not contemplated when the decree was entered.*** RCW 26.09.170." *In re Marriage of Jarvis*, 58 Wn. App. 342, 346, 792 P.2d 1259 (1990), citing *Childers v. Childers*, 89 Wn.2d 592, 575 P.2d 201 (1978); *In re Marriage of Belsby*, 51 Wn. App. 711, 713, 754 P.2d 1269 (1988).

It is undisputed that the Note and was incorporated into the findings of the dissolution decree and that its $225,000 amount was awarded pursuant to the dissolution decree. CP 16. Accordingly, nothing about the Note represents a substantial change of circumstances since entry of the decree.

The trial court fully considered Patricia's voluntary bankruptcy

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[17] See footnote 16. See Appellant's Brief, page 22, 30-31

[18] Patricia declines to address this issue in her Respondent's Brief.

when entering the Adjusted OCS, including the $39,991 debt for the brand new car purchased by Patricia just 12 days prior to declaring bankruptcy and the $800 monthly payment budgeted for that brand new car in her bankruptcy plan and other evidence.[19] Patricia invoked bankruptcy protection to incur an $800 monthly car payment for a brand new car while avoiding making any payments on the Note. This did not merit an additional *downward* deviation for hardship. The court was correct in this regard and thus declined to order a deviation for Patricia's voluntary Chapter 13 bankruptcy beyond the "whole family formula" for Patricia's third child. Notably, Patricia was in Chapter 7 bankruptcy proceedings when the Decree was entered, and thus her subsequent Chapter 13 bankruptcy does not constitute a substantial change of circumstances.

It is well established that a parent may not reduce their child support obligations through voluntary acts. Parental agreements to waive child support obligations violate public policy. *In re Marriage of Pippins*, 46 Wn. App. 805, 808, 732 P.2d 1005 (1987). Nor can parents diminish their child support obligations by voluntarily unemployment. *In re Marriage of Shellenberger*, 80 Wn. App. 71, 81, 906 P.2d 968 (1995). For these same reasons, Patricia's voluntary filing of Chapter 13 bankruptcy, which she can revoke any time at her discretion, (CP 124-125), cannot be a factor that would cause an artificial basis to reduce her child support obligations.

[19] As the debtor, only Patricia has standing to originate or alter her Chapter 13 payment plan, and Patricia also has standing to discontinue her voluntary Chapter 13 plan at any time. CP 124-125. Further, because child support is a priority debt in bankruptcy, any change in Patricia's child support obligations have no net effect on Patricia's net disposable income and merely alters the allocation of Patricia's Chapter 13 plan payments between child support and her unsecured creditors. CP 64-65.

Otherwise, any parent could voluntarily run up a debt to purchase a brand new $40,000 car, then file for Chapter 13 bankruptcy and then seek modification of child support order based on a "substantial change in circumstances." Here, the marital debt from the Note was awarded in the dissolution decree and therefore there cannot be any substantial change in circumstances merely because judgment was entered on that marital debt.

C. The Child Support Schedule instructions were erroneously applied to the non-disputed evidentiary facts thereby failing to comply with RCW 26.19.035(1), and causing faulty data to be used as a basis for the support calculations in the Adjusted OCS Worksheets.

1. Summary of Opening Brief Argument:

The instructions in the Child Support Schedule must be applied to all orders determining child support. RCW 26.19.035(1). The evidentiary facts are not disputed. Error is assigned to the application of the Child Support Schedule instructions to the non-disputed evidentiary facts.

2. The Child Support Schedule's instructions were erroneously applied to undisputed facts from Patricia's paystubs and tax refund information, resulting in faulty data being used in the Worksheets.

Patricia does not dispute that the payroll deductions from her most recent paystub for federal income tax and FICA equate to $278 and $506 per month respectively.[20] Despite this, amounts of $689 and $542 were inputted into the Worksheets respectively for these taxes. This is error.

The federal income tax calculation used in the Worksheet should consider prior years' tax refunds in order to adjust for overpayment of taxes through payroll deductions.[21] Patricia's 2012 income tax refund was

[20] See Appellant's Opening Brief at 10; CP 110.
[21] See Child Support Schedule, Page 6, Instruction for Line 2a.

$7,041. CP 65. In her Chapter 13 plan, Patricia plans to retain the **first** $1,400 of future expected tax refunds. RB 26. CP 111. Thus, her expected tax refunds are between $1,400 - $7,041. The low estimate of her income tax overpayment, the *first* $1,400 of her refund, equates to $116.67 per month. To correctly apply the Child Support Schedule instructions, the Worksheets should state Patricia's income tax deduction as $161 ($278.01-$116.67) and her FICA deduction as $506.

3. The Child Support Schedule's instructions for calculating health insurance were not correctly applied in determining Patricia's cost.

It is undisputed that i) $467.50 is Patricia's total monthly medical insurance, ii) $282 is attributable to Patricia and her spouse, iii) $134.92 is attributable to Patricia, iv) $62 is attributable to Patricia's third child "EM"; and v) $122.77 is attributable to the parties' two children subject to the support order.[22] Only the premium attributable to the parties' two children is properly included in the worksheets.[23] The Worksheets deduct only Patricia's cost for an incorrect amount of $333 ($467-$134), while the findings deduct the costs for Patricia and her spouse for an incorrect amount of $185.46 ($467-$282). CP 216, 221. Deducting the premium attributable to Patricia, her spouse and "EM" from the total cost is the correct method of calculating the premiums attributable to the parties' two children for an amount of $123 ($467-$282-$62).The court erred.

Patricia argues her costs should be allocated to the children because she is doubly insured. RB 25. Notably, the trial court rejected this notion

[22] RB 25. See also CP 74 for source documentation showing bi-weekly costs. See Appellant's Opening Brief, page 11-12 for conversion to monthly amounts.
[23] *Scanlon* at 175; Child Support Schedule, Page 7, Instruction for Line 10a

by subtracting: i) the cost attributable to Patricia to calculate the $333 amount in the Worksheets, and ii) the costs for Patricia and her spouse to calculate the $185 amount in its findings. Moreover, Patricia cites no legal authority to support this notion.[24] The correct calculation is $123.

4. Excluding Fearghal's health insurance costs for the children from the Worksheet is error because no findings were made to support a determination of which party's health insurance coverage is better.

Fearghal maintains health insurance for the children to provide better coverage than Patricia's policy. The best interests of the children are served by being insured by both parents.[25] Patricia does not dispute the court's finding that Fearghal's monthly cost of health insurance for the children is $260.68. CP 216. Patricia's argument that the cost should be excluded from the Worksheets ignores the children's best interests. The court is authorized to order a parent to provide health insurance coverage exceeding 25% of the parent's basic support obligation if it is in the child's best interests. RCW 26.09.105(7). A parent who pays health insurance premiums for a child is entitled to a credit against their child support obligation for the monthly premium.[26] Because the children's best interests are served by having the health insurance coverage provided by Fearghal, the exclusion from the Worksheets of this cost is error.

In general, both parents are required to provide health insurance for any child subject to a support order. RCW 26.09.105(1). If both parents have health insurance coverage that is accessible to the child, such as is

[24] See footnote 15, *DeHeer v. Seattle Post-Intelligencer* at 126.
[25] See Appellant's Opening Brief, page 30.
[26] *Scanlon,* at 175. See also Appendix II, the Child Support Schedule, page 7, instruction for Line 10a.

the case here, the court can order one parent to provide health insurance coverage only *following a determination of which health insurance coverage is better, after considering the needs of the child* etc. RCW 26.09.105(4)(b). The court made no such findings here, declining to consider which party had the better health insurance policy. Thus, both parents' health insurance costs for the children are allowable and should be included in the Worksheets pursuant to the Child Support Schedule instructions (page 7, Line 10a). Excluding Fearghal's cost was error.

D. The deviation modification is error because no written findings were made to show consideration of all the income and resources of the parties, their spouses, and other adults in the household, as required by RCW 26.19.075(2).

Because no findings were made to support modification, the deviation modification for Patricia's minor child is error. ¶B.6(a) above. On other grounds, the deviation modification is error because the "whole family formula" and court record do not constitute findings; and the court must make *written* findings of fact in support of any deviation.[27] Patricia fails to provide any authority to contradict that the lack of written findings in support of a deviation, as required by RCW 26.19.075(2), is error.

E. Setting the Adjusted OCS commencement date to seven months after the adjustment motion was filed violates the children's constitutional rights to timely child support commensurate with their parents' incomes.

The legislative intent of the Child Support Schedule is:

> "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.

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[27] RCW 26.19.075(2); Appellant's Opening Brief, page 32-33; *In re Marriage of Choate*, 143 Wn. App. 235, 242, 177 P.3d 175 (2008), citing *McCausland* at 616. See also *In re Marriage of Booth*, 114 Wn.2d 772, 777, 791 P.2d 519 (1990).

When child support proceedings are unduly delayed, the remedy is to make the start date retroactive to an earlier date. *In re Marriage of Oblizalo*, 54 Wn. App. 800, 766 P.2d 166 (1989), where proceedings were delayed, the appellate court upheld the remedy of making commencement of the new order retroactive to the date the modification petition was filed, explaining that support belongs to the children.

> "Moreover, the question of which party occasioned delay is irrelevant. Child support belongs to the children, not the parent. The custodial parent receives the support only as a trustee for the children. Thus, the **children** are the real parties in interest; they have not caused any delay." *Oblizalo* at 806, citing *In re Marriage of Pippins*, 46 Wn. App. 805, 808, 732 P.2d 1005 (1987).

Thus, children have constitutional rights to have child support decisions made without undue delay within 90 days so that child support is timely accrued in compliance with the legislative intent. Const. art. I, §10 & art. IV, §20. The untimely commencement date of the Adjusted OCS seven months after the motion was filed has both practical and identifiable consequences as it delayed the accrual and receipt of support necessary to meet the children's basic needs and commensurate with their parents' incomes. Thus, the delay is manifest error. Because this raises a manifest constitutional issue, it should be reviewed on appeal. RAP 2.5 (a)(3).

A hearing on adjustment was first cited for 6/5/13. CP 36. The hearing was continued because Patricia did not file the required Financial Declaration, Worksheets and paystubs, responding instead with a short declaration objecting to the motion. CP 37-38. Patricia's bankruptcy proceedings caused delay. Summer vacation schedules caused delay. Patricia recited the matter for rehearing on 9/18/13, CP 957. But Patricia did not serve Fearghal with the citation, so the matter was recited for

10/9/13. CP 106. Then the Commissioner inexplicably deferred entry of the order until 12/11/13, two months after her 10/9/13 ruling. CP 172. Should the children suffer denial of the timely accrual of increased support necessary to meet their basic needs because of delays in entering child support orders? Of course not. The children are innocent parties here. Parental agreements to waive child support obligations violate public policy. *In re Marriage of Pippins*, at 808. Nor can parents diminish their child support obligations by voluntarily unemployment. *Shellenberger*, at 81. Likewise, equity requires that the children should not suffer harm and parents should not benefit from delays in child support proceedings.

Courts have discretion to order a commencement date anytime after a modification petition is filed. *In re Marriage of Pollard,* 99 Wn. App. 48, 55, 991 P.2d 1201 (2000). But this general rule presumes that the matter will be decided within 90 days and without unnecessary delay. Const. art. I, §10 & art. IV, §20. Children have no mechanism to protect their constitutional rights to have child support decisions made within 90 days. Instead, children rely on the discretion of the court. Thus, the court's discretion is governed by i) its duty to protect minors;[28] and ii) its duty to make determinations based on the children's best interests.[29] No person should be able to abrogate children's constitutional rights to timely child support decisions by causing delays, inadvertent or not. Thus, children's

[28] The court has a duty to protect the interests of minors. *In Re Guardianship of Karan*, 110 Wn. App. 76, 85, 38 P.3d 396 (2002).

[29] "The child support statutes are intended to support the best interests of the child." *In re Marriage of Mattson,* 95 Wn. App. 592, 599-600, 976 P.2d 157 (1999). The child's best interests is the standard upon which the court **shall** make its determinations. RCW 26.09.002.

constitutional rights to timely decisions on child support matters limit judicial discretion in setting a start date for an adjustment or modification to no more than 90 days from when the matter was filed. In *Pollard,* as in *Oblizalo*, the court exercised its discretion in favor of the child by making the modification start date retroactive to when the petition was filed over a year earlier. Fearghal has not found any Washington case where the court did not exercise its discretion in favor of the children by making the start date retroactive to an earlier date so as to provide a remedy when support proceedings were unduly delayed. The trial court abused its discretion and violated the children's constitutional rights by deferring commencement of the Adjusted Order of Child Support (the "Adjusted OCS") to seven months, (i.e. more than 90 days), after the adjustment motion was filed.

F. The Court should deny Patricia's request to alter the parties' *child* support responsibilities based upon considering the Note as an asset of Fearghal's and a liability of Patricia's.

Patricia voluntary filed for Chapter 13 bankruptcy prior to entry of the Adjusted OCS. RB at 3. Thus, the marital debt awarded in the Decree based on the Note is subject to the protection of the Bankruptcy Code. When Patricia voluntarily declared Chapter 13 bankruptcy, she divested herself of personal liability on the Note and the Note became uncollectible to Fearghal. Thus, there is no error in the Note not being listed as a liability of Patricia's and an asset of Fearghal's while Patricia remains in Chapter 13 bankruptcy. Patricia also argues:

> "If the trial court had properly considered Fearghal's income from the Note, the allocation of child support responsibilities would have been different. If this Court does remand for further proceedings, it should correct this error." Respondent's Brief, at 27.

The Court should deny this request. First, no evidence of any payment stream or income on the Note is in the record. Due to the insufficiency of the record as to any payment stream on the Note and the split of any such payment stream between principal repayment and income, it is impossible to fairly determine whether the Note is actually yielding any income. Thus, review of this issue is precluded by RAP 2.5(a). Second, Patricia's request to alter the parties' child support responsibilities is a request for affirmative relief for which Patricia failed to file a notice of cross-appeal.[30] Third, any deviation from the presumptive child support calculation would not be proper because Patricia incurred the marital debt voluntarily and deviation is only permitted for "extraordinary debt not voluntarily incurred". RCW 26.19.075(c)(i).

IV. CONCLUSION & REQUESTED RELIEF

The economic table in the Child Support Schedule, RCW 26.19, is presumptive for the calculation of child support in the Final OCS. The Final OCS ordered the presumptive amount of child support calculated based upon using the statutorily mandated child support Worksheets and the economic table. These facts overcome any suggestion that the Final OCS did not provide an adequate amount of child *support* and is not therefore subject to the modification requirement imposed by RCW

[30] "A respondent requests affirmative relief if it seeks anything other than an affirmation of the lower court's ruling. Respondents must cross appeal to obtain affirmative relief." *Singletary v. Manor Healthcare Corp.*, 166 Wn. App. 774, 271 P.3d 356 (2012), citing *State v. Sims*, 171 Wn.2d 436, 442-443, 256 P.3d 285 (2011). RAP 2.4(a). Absent an explanation as to why the necessities of the case require that relief be granted pursuant to RAP 2.4(a), such relief is properly denied. *Jacques v. Sharp*, 83 Wn. App. 532, 545, 922 P.2d 145 (1996).

26.09.170(1)(b) of finding of a substantial change of circumstances. Notably, the trial court affirmed the statutory propriety of the Final OCS as a result of a contested proceeding where the court found Patricia in contempt of the Final OCS for "intentionally fail[ing] to comply with a lawful order of the court dated January 2009" (i.e. the Final OCS). CP 18, ¶2.1.

It is undisputed that the trial court failed to enter any findings whatsoever to support modification. Absent any findings that the Final OCS failed to provide an adequate support amount or otherwise violated public policy, the modification requirements imposed by RCW 26.09.170(1)(b) must be respected.

Fearghal requests remand with instructions to correct errors as follows:

1) Except only for those adjustments necessary to conform the Final OCS to the changes in the parties' incomes, all modifications to the Final OCS must be reversed including the modifications for: i) deviation, ii) exclusion of special expenses, iii) reallocation of tax exemptions, iv) termination of support, vi) post-secondary educational expenses, vii) expenses not included transfer payment, and viii) health insurance.
2) The Child Support Worksheets should state: i) Patricia's monthly FICA and Federal income taxes at $506 and $161 respectively, ii) Patricia's monthly cost of health insurance for the children at $123, iii) Fearghal's monthly cost of health insurance for the children at $261, and iv) daycare and special expenses at $230.
3) The commencement date for the Adjusted OCS should be no later than 90 days from 6/5/13, the date Fearghal filed the adjustment motion.
4) Fearghal should be awarded costs and statutory fees.

RESPECTFULLY SUBMITTED ON THIS 14 day of April, 2015.

Fearghal Mc Carthy

Fearghal Mc Carthy,
Appellant, Pro se

APPENDIX A

EXCERPTS FROM CLERK'S PAPERS RELEVANT TO STIPULATED ORDERS ENTERED BY THE PARTIES.

"Petitioner has lied in this process and the court's sense about what is going on is that she will delay and frustrate the process" CP 307.

"Ms McCarthy has lied in her testimony to the court. Petitioner's allegations of child abuse and domestic violence by Respondent have been subject to a criminal investigation but have not resulted in any finding that Petitioner's allegations are true to any substantial degree." CP 309.

"Petitioner lost tremendous credibility by lying to the court." CP 315. "Court further orders that if the Court catches Petitioner in another lie, Court will order jail time, even if Petitioner is pregnant." CP 325.

"Petitioner has lied to the Court. If the Court finds that Petitioner has lied to the Court from now forward, he will fine her $50,000 - $75,000 previously threatened. Court cannot allow people to come into this court and perjure themselves." CP 327.

"Petitioner is in contempt for committing perjury by testifying falsely in open court." CP 331.

DECLARATION OF SERVICE

On April 14, 2015, I served the foregoing APPELLANT'S REPLY BRIEF on:

David J Corbett
2106 N. Steele Street
Tacoma, WA 98406
david@davidcorbettlaw.com

By **mailing** a full, true and correct copy thereof in a sealed, postage-paid envelope, and addressed to the attorney as shown above, to the last-known office address of the attorney, and deposited with the United States Postal Service at Portland, Oregon on the date set forth below.

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct on April 14, 2015 at Vancouver, Washington.

Fearghal McCarthy