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COA No. 84402-4-I

Supreme Court of the State of Washington

In re:

Alexi Mikele Turner,

Respondent,

and

Michael Matthew Turner,

Petitioner.

Petition for Review

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1. Identity of Petitioner

Michael Turner, Appellant at the Court of Appeals, asks this Court to accept review of the Court of Appeals decision terminating review, specified below.

2. Court of Appeals Decision

In re Marriage of Turner, No. 84402-4-I (July 17, 2023) (unpublished). Michael filed a timely motion for reconsideration, which was denied by Order dated August 11, 2023. However, the Order was never served on Michael's counsel until after the Mandate was issued. By Ruling dated November 30, 2023, the Court of Appeals recalled the Mandate, delivered the Order Denying Reconsideration, and gave the parties until December 29, 2023, to file any petition for review.

3. Issues Presented for Review

1. A circumstance that was anticipated in a parenting plan is not a substantial change in circumstances permitting modification. The 2020 parenting plan specifically anticipated the child reaching school age. **Did the trial**

court err in finding that the child reaching school age was a substantial change in circumstances?

2. The Court of Appeals reasoned that the trial court resolved the parents' school-choice dispute first and then found substantial change based on ordering H.T. attend public school. But Alexi brought a petition to modify, not a motion for dispute resolution. **Did the Court of Appeals err in affirming the improper procedure?**

3. In resolving parenting disputes, courts must give preference to carrying out the existing parenting plan. The trial court did not consider which schooling option would best carry out the 2020 parenting plan. **Did the trial court abuse its discretion in ordering the child to attend public school?**

4. The factual findings behind a court's decision must be supported by substantial evidence. The trial court made findings contrary to unrebutted expert testimony and not supported by any other evidence. **Did the trial court abuse its discretion by ordering the child to attend public school based on unsupported findings?**

5. For any permanent parenting plan, including on modification, the court must consider the factors in RCW 26.09.187. The trial court failed to consider those factors, particularly

the child's community connections and activities that would be impacted by the change. **Did the trial court abuse its discretion by applying an incorrect legal standard?**

4. Statement of the Case

4.1 Introduction

Michael and Alexi Turner entered an agreed, modified parenting plan in 2020, to allow their child, H.T., to continue her 50/50 residential schedule even after starting school. Michael started homeschooling H.T. during his residential time the year before H.T. was to start kindergarten. H.T. thrived under this part-time home-based instruction. Alexi insisted that H.T. should attend public school. When the parties could not reach agreement, Alexi petitioned to modify the parenting plan.

The trial court erroneously granted the modification. Even though the 2020 parenting plan anticipated H.T. reaching school age, the trial court

found that reaching school age was a substantial change in circumstances. The trial court failed to consider the required factors in RCW 26.09.187 for crafting a permanent parenting plan and based its decision on factual findings that were contrary to unrebutted expert testimony and not supported by any other evidence.

The Court of Appeals affirmed on alternative grounds, pretending that the trial court had first been called upon to resolve the school-choice dispute. The court reasoned that it was the trial court's decision to send the child to public school that created a change in circumstances justifying modification of the parenting plan. The Court of Appeals misinterpreted the expert testimony at trial as supporting the trial court's school-choice decision and then held that the trial court was not required to consider the §187 factors in crafting its changes to the parenting plan.

4.2 Michael and Alexi Turner successfully co-parented their daughter, H.T., with a 50/50 schedule for five years.

Michael and Alexi Turner lived in Kitsap County before they divorced. RP 96. They had one daughter, H.T., born in October 2015. RP 96. They separated in December 2016, and Alexi moved to King County. RP 96. The parties maintained a 50/50 schedule with H.T. after separation. RP 96.

The parties' original parenting plan started with a 50/50 schedule but anticipated H.T. living with Alexi after she started kindergarten. CP 16-17. In 2020, Michael asked Alexi to modify the parenting plan to continue the 50/50 schedule after H.T. started school. RP 114, 243-44. Alexi agreed that the 50/50 schedule was in H.T.'s best interest, and she signed the agreement. RP 114.

4.3 Michael and Alexi disagreed on whether H.T. should be homeschooled or attend public school.

Unfortunately, the parties misunderstood each other's intent in signing the new plan. RP 396-97. Alexi believed that Michael was agreeing to move from Kitsap to King County so he could be close to H.T.'s public school. RP 114-15. But Michael never agreed to move. RP 247. On the other hand, Michael believed that Alexi had agreed to homeschool. RP 243-44. But Alexi testified that she never wanted homeschool. RP 117-18.

The parties realized their misunderstanding in January 2021. RP 117-18, 208, 303. They attempted mediation to resolve the dispute, but they were unable to come to agreement. RP 118-19, 303.

4.4 Alexi petitioned for modification of the parenting plan to place H.T. with her.

Alexi filed a petition to modify the parenting plan, asking the court to place H.T. primarily with her

so H.T. could attend public school near Alexi's home. CP 44-47, 56-57. She alleged as a substantial change in circumstances that H.T. was reaching school age and that Michael had failed to move to King County. CP 45, 54.

Michael argued that there was no substantial change, the 2020 plan contemplated H.T. being school age, Michael had never promised to move, and H.T. was already excelling in her homeschool curriculum under the 50/50 schedule. CP 88, 90, 92-93, 206.

4.5 The trial court found adequate cause to proceed with the modification.

The trial court found adequate cause to proceed to trial. CP 490. The trial court found that H.T.'s reaching school age was a substantial change in circumstances. RP 33; CP 490-91. The trial court temporarily placed H.T. with Alexi and ordered that H.T. would attend public school. CP 494.

4.6 At trial, the court found that H.T. reaching school age was a substantial change of circumstances and that the parties' geographical separation created a detrimental environment.

After trial, the trial court granted the request for modification. The trial court found that H.T. reaching school age was a substantial change in circumstances. CP 681. The trial court found that the parties' geographical separation made the 50/50 schedule detrimental to H.T. CP 681. The trial court felt the central issue in crafting a new parenting plan would be whether H.T. should attend public school or home-based schooling. RP 399.

4.7 In modifying the parenting plan, the trial court determined that public school was in H.T.'s best interest, despite uncontested expert testimony on the benefits of homeschool.

Michael presented unrebutted testimony from an education expert, Dr. Brian Ray, with extensive experience in both public education and home-based

education. *See* RP 308-13. Dr. Ray testified, generally, to the benefits of home-based instruction. RP 313-14, 318-19.

Dr. Ray testified that, according to H.T.'s Peabody assessment results, HT had "already met all of the kindergarten goals and requirements" before being sent to public kindergarten. RP 323. Dr. Ray described the Peabody assessment as "a very longstanding, well-respected, valid and reliable measurement instrument." RP 324. Dr. Ray explained that HT's Peabody results showed that after her year of half-time homeschool with Michael, her reading comprehension was "like a child [at the beginning of] the 2nd grade would be performing." RP 325.

Dr. Ray compared H.T.'s post-homeschool Peabody scores with her mid-year public school report card: "So according to a nationally normed valid and reliable instrument, the Peabody, about 10 months ago she's extremely well. She's well above average. And

now after a second year of kindergarten, in an institutional school, she's basically proficient or average." RP 328. He was concerned about H.T.'s lack of progress in the public school setting: "Which is -- which, you know, on the face of it looks like a major decline. After -- after several more months of teaching and instruction, it should be quite a bit higher than that." RP 328.

While acknowledging that the Peabody and the report card are not directly comparable, Dr. Ray clarified that if we assume that the report card is an accurate measure of H.T.'s capabilities, then it reflects a decline: "If you look at the teacher's ratings, and if she's relatively accurate, and -- and if you look at the Peabody journal, if you assume that they're both telling you something valid and reliable, then, yeah, you have a significant decline." RP 328.

When the trial court asked how H.T. could have declined when repeating kindergarten, Dr. Ray had two

possible answers—either an actual decline due to failure of the public school system or no actual decline but a failure to perform due to boredom from not being challenged with new material: "I would wonder what has the teacher been doing or the system been doing with that child to cause her to perform lower or to lose interest so that maybe she's just kind of like, as we say in the vernacular, possibly bored or not engaged at school." RP 334.

Dr. Ray testified that, because reading ability should be maintained, not decline, H.T.'s situation raised concerns with what was going on in the public school: "it really questions the system she's in, you know, for the teacher or the system. It really makes us question a lot of what's happening there." RP 335.

The trial court asked Dr. Ray whether both parents in a week-on/week-off situation would need to be teaching in the same way. RP 333. Dr. Ray responded that all that is needed is "at least one parent

who is committed and intentional and believes in what's going on… If the other parent is not very interested or not very committed, at least if that other parent … does not undermine the situation, you'll be fine, because the child is getting intentional hard work by a parent who is committed to that." RP 333. The minimum is that the uninterested parent should support the child in the same way they would support a child attending public school. RP 334. He testified that home-based education can cover the same material as public school in less than half the time. RP 330.

Despite Dr. Ray's testimony that one-parent instruction would work fine, the trial court found that home-based education would require "buy-in," "consistency," and "an extraordinary flexibility in employment and environment" on the part of both parents. RP 401. The trial court explained that it did not find Dr. Ray's testimony not credible, the trial court

simply did not agree that split teaching was possible. RP 407-08. Despite Dr. Ray's testimony about H.T.'s evaluations, the trial court found that it was home-based education, not public education, that had failed to produce results. RP 404. On the basis of these findings, the trial court ordered H.T. to attend public school. RP 404.

Having resolved the schooling issue, the trial court proceeded to enter a parenting plan that placed H.T. primarily with Alexi, with visitation with Michael three weekends per month and 50/50 time during the summer. RP 405. In determining this new parenting plan, the trial court expressly did not consider H.T.'s connections with the Kitsap County community, believing it was not proper to consider the §187 factors in a modification. RP 408-09.

4.8 The Court of Appeals affirmed, pretending that the trial court had resolved the school-choice dispute first and then found a change of circumstances as a result.

The Court of Appeals started with the school-choice issue. Despite Dr. Ray's unrebutted testimony that single-parent homeschool would work, the court affirmed the trial court's finding that it would not work, reasoning that because Dr. Ray did not present any studies to reinforce his testimony, that was sufficient reason for the trial court to disbelieve him. App. 5 (citing ***Brewer v. Copeland***, 86 Wn.2d 58, 74, 542 P.2d 445 (1975)). Despite Dr. Ray's unrebutted testimony that any decline in H.T.'s reading performance was due to the public school setting, the court affirmed the trial court's finding that it was homeschool that was inadequate, misinterpreting portions of Ray's testimony to say that it supported the trial court's finding. App. 5-6.

The Court of Appeals treated the trial court as having resolved the school-choice dispute before

moving on to the question of modification. App. 8-9. Apparently recognizing that this was not actually what the trial court had done, the court noted that it can affirm "on any basis supported by the record." App. 10. The court found that, after deciding that H.T. should attend public school, there was then a substantial change in circumstances justifying modification. App. 11. The court found that this change created a detrimental environment for H.T. App. 12-13. The court then held, contrary to the statute, that the trial court was not required to consider the §187 factors in crafting a modified parenting plan. App. 13-14 (citing ***In re Marriage of Pape***, 139 Wn.2d 694, 715, 989 P.2d 1120 (1999), and three unpublished opinions).

5. Argument

A petition for review should be accepted when the Court of Appeals decision conflicts with a decision of the Supreme Court or the Court of Appeals or if the

case involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

The Court of Appeals decision here conflicts with that court's prior published decision in ***Young v. Thomas***, 193 Wn. App. 427, 378 P.3d 183 (2016), by allowing the trial court to ignore the §187 factors in determining the best interests of the child. The decision also conflicts with that court's prior published decision in ***In re Custody of Stell***, 56 Wn. App. 356, 783 P.2d 615 (1989), and this Court's prior decision in ***Brewer***, 86 Wn.2d 58, by allowing the trial court to arbitrarily disbelieve competent, unrebutted expert testimony. This Court should accept review of these issues, as well as the other issues presented for review.

5.1 The Court of Appeals decision conflicts with *Young* regarding the §187 factors.

The Court of Appeals decision conflicts with *Young*. In *Young*, the Court of Appeals reversed a

parenting plan where the trial court failed to consider the §187 factors in determining whether the plan was in the child's best interests:

> The trial court stated that it ... considered C.T.'s best interests. However, the record does not reflect any clear consideration of the statutory factors [RCW 26.09.187(3)(a)] when the final order was entered, and thus, insufficient evidence supports the trial court's findings of fact and conclusions of law. Therefore, the trial court abused its discretion because its decision as to the parenting plan was made on untenable grounds and did not adequately consider if the plan was in C.T.'s best interests.

Young, 193 Wn. App. at 444.

The *Young* court made clear what is implicit in the statutes: that the §187 factors are the method for a court to determine what residential provisions are in a child's best interests. If a trial court fails to consider the §187 factors, its finding that a plan is in the child's best interests is not supported by substantial evidence and should be reversed.

The primary goal of a parenting plan is to "protect the best interests of the child consistent with RCW 26.09.002." **RCW 26.09.184(1)**.

> In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities. … The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care.

RCW 20.09.002. Every parenting plan must include residential provisions "consistent with the criteria in RCW 26.09.187 and 26.09.191." **RCW 26.09.184(6)**. Where §191 is not dispositive, trial courts must consider the factors in **RCW 26.09.187(3)(a)**.

Under the statutes, the mandatory requirement of considering the §187 factors to determine what is in the best interests of the child applies not only to an original parenting plan but also to any modification. RCW 26.09.184 and .187 set the requirements for a

"permanent parenting plan." *E.g.,* RCW 26.09.184(2) ("The permanent parenting plan shall include … residential provisions for the child."). A "permanent parenting plan" means "a plan for parenting the child … incorporated in any final decree *or decree of modification*." RCW 26.09.004(3) (emphasis added). Thus, under the statutes, §184 and §187 apply to modifications just as they apply to an original parenting plan.

Because the statutes apply equally to modifications, under *Young*, a trial court modifying a parenting plan *must consider* the §187 factors that are relevant to the modifications being considered. As part of the modification analysis, the trial court must determine "that the modification is in the best interest of the child and is necessary to serve the best interests of the child." RCW 26.09.260(1). Under *Young* and the statutes, the best interest of the child is determined by considering the §187 factors. RCW 26.09.260 does not

provide an alternate analysis. RCW 26.09.184 requires that a parenting plan modification be based on the criteria in §187. As the *Young* court recognized, a determination that a parenting plan is in a child's best interests is not supported by substantial evidence if it is not based on an analysis of the §187 factors.

The Court of Appeals decision conflicts with *Young* and the statutes by affirming the trial court's modified parenting plan even though the trial court explicitly did not consider §187 factor five, "the child's involvement with his or her physical surroundings, school, or other significant activities." **RCW 26.09.187(3)(a)(v)**; RP 408-09.

The Court of Appeals erroneously relied on ***In re Marriage of Pape***, 139 Wn.2d 694, 989 P.2d 1120 (1999), for the proposition that §187 applies only to original parenting plans and that modifications need only consider §260. App. 13. But *Pape* did not reach such a sweeping conclusion. Rather, the *Pape* court was

emphasizing the limitations of a minor modification of a parenting plan, where the primary residential placement of the child will not change. In a minor modification, the primary placement that is in the best interests of the child has already been determined and does not need to be reconsidered. ***Pape***, 139 Wn.2d at 715. The *Pape* court did not say that the §187 factors do not need to be considered in a modification, only that the *primary placement* need not be considered in a *minor* modification.

The *Pape* court noted that in a modification, the trial court presumes the best interests of the child require the primary placement stay intact. ***Pape***, 139 Wn.2d at 715. But this is nothing more than explaining the threshold requirements in RCW 26.09.260(1) and (2), *e.g.,* substantial change in circumstances and detrimental environment. Once the threshold conditions are met, the presumption ends, and the trial court must craft a modified plan that meets the

requirement that "the modification is in the best interest of the child and is necessary to serve the best interests of the child." RCW 26.09.260(1). As explained above, this "best interest" analysis requires examination of the §187 factors.

The unpublished cases cited by the Court of Appeals do not support its decision, either. ***In re Marriage of Carpenter & Correa***, 13 Wn. App. 2d 1136, 2020 WL 4219764, *2 n.1 (2020) (unpublished, cited under GR 14.1), does not suggest that a modification court can ignore the §187 factors. Rather, it merely notes that the appellant's arguments about the §187 factors in that case were unhelpful when the appellant had failed to challenge the trial court's finding that the proposed modification was not in the children's best interests.

Two of the cited cases are actually contrary to the Court of Appeals decision here. In ***In re Marriage of Hardin***, 3 Wn. App. 2d 1024, 2018 WL 1831136, *10

(2018) (unpublished, cited under GR 14.1), the court held that it is appropriate (*i.e.,* not error) to consider the §187 factors in the context of a modification, so long as the standards of RCW 26.09.260 are met. In ***In re Marriage of Monoskie***, 1 Wn. App. 2d 1034, 2017 WL 5905764, *2 (2017) (unpublished, cited under GR 14.1), the court held that where a child has a 50/50 schedule (as H.T. did here), the trial court's analysis *should be under §187* and not §260.

RCW 26.09.260 does not provide a framework for determining what is in a child's best interests. It simply requires that the modification *must be* in the child's best interests. Section 187 provides the list of factors for determining what is in a child's best interests, and the statutes require that those factors be considered for all final parenting plans, including modifications. A court does not choose one statute or the other; the statutes work together. *E.g.,* ***Floramo v. Ellington***, 22 Wn. App. 2d 1044, 2022 WL 2467464, *4,

5-6, 7 (2022) (unpublished, cited under GR 14.1); ***In re Marriage of Gogolowicz***, 16 Wn. App. 2d 1017, 2021 WL 242113, *6-7 (2021) (unpublished, cited under GR 14.1). An analysis of the §187 factors that are impacted by the change in circumstances gives a trial court the tools to determine, under §260, what modifications to the parenting plan will be in the child's best interests.

The Court of Appeals decision here conflicts with *Young* and the statutes. The trial court erred in failing to consider the §187 factors that would be relevant to the modification being considered. This Court should accept review, clarify that the §187 factors must be considered in determining whether a modification is in the best interests of the child, reverse the trial court's error, and remand for further proceedings.

5.2 The Court of Appeals decision conflicts with *Stell* and *Brewer* regarding expert testimony.

The Court of Appeals decision conflicts with *Stell* and *Brewer* by allowing the trial court to substitute its

own subjective opinion for the unrebutted expert testimony of Dr. Ray, without any reasons supported in the record.

In *Stell*, a third-party custody action, multiple expert witnesses testified that the third-party would provide the most stable parenting environment and that placement with the father would be detrimental to the child. ***Stell***, 56 Wn. App. at 360-63. The expert opinions were "uncontroverted and unrebutted." ***Id.*** at 368, 369. Yet the trial court found no detriment and placed the child with the father. ***Id.*** at 366.

The appellate court held that the trial court's findings contrary to the unrebutted expert testimony "cannot be sustained." ***Stell***, 56 Wn. App. at 368. "[T]rial courts should rely on expert opinion to help reach an objective, rather than subjective, evaluation of the issue." ***Id.*** "In sum, we conclude that the trial court's refusal to give any credence to the

overwhelming and unrebutted expert testimony of detriment cannot be sustained." ***Id.*** at 369.

In *Brewer*, the court allowed a trial court to disbelieve an expert witness based on deficiencies in the expert's testimony. At trial, the police officer who investigated the accident testified regarding the maximum safe speed to navigate the curve. The trial court explained why the opinion was not persuasive:

> For example, ... he stated that he thought 30 miles an hour was the maximum safe speed for that corner under similar circumstances with a wet road, and then he amended that to 35; but in two places in his testimony he was reluctant to answer counsel's questions at all, saying in one place, 'It's hard for me to answer that' (that had to do with whether the physical evidence bore out the speed), and in another place, when invited to discuss whether heavy or light cars are better able to negotiate curves, that he was 'no expert on that.' He repeated that statement in another place, although he was offered as an expert.

Brewer, 86 Wn.2d at 74.

The trial court was not persuaded by the expert testimony due to deficiencies in the testimony itself. There was uncertainty in the expert's conclusions (whether safe speed was 30 or 35). He was unable or unwilling to answer certain questions and even undermined his own qualifications as an expert. The deficiencies identified by the trial court had all been revealed through the officer's testimony and cross-examination. This Court affirmed, finding the trial court's reasoning from the testimony was reasonable and not arbitrary. ***Brewer***, 86 Wn.2d at 74.

This makes sense. After all, an expert's opinion may be "disregarded entirely where the factual basis for the opinion is found to be inadequate." ***Hash v. Children's Orthopedic Hosp.***, 49 Wn. App. 130, 135, 741 P.2d 584 (1987). But any inadequacies in the factual basis must be brought out in cross-examination because otherwise the expert is not required to disclose the basis of their opinion. ER 705; ***Queen City Farms v.***

Central Nat'l Ins. Co., 126 Wn.2d 50, 103, 882 P.2d 703 (1994). Naturally, any deficiencies in an expert's opinion must be revealed through the course of the trial, not assumed by the trial court after the fact. *See Brewer*, 86 Wn.2d at 74.

Under *Brewer*, a trial court may disbelieve expert testimony that is flawed. But under *Stell*, it is untenable for a trial court to disbelieve expert testimony that is not deficient and not disputed. The Court of Appeals decision conflicts with these cases by allowing the trial court to disregard Dr. Ray's unrebutted testimony without identifying any deficiencies that were revealed at trial.

Here there was no showing that Dr. Ray lacked a factual basis for his opinions. Neither Alexi nor the trial court questioned Dr. Ray about studies to back up his opinion on the feasibility of 50/50 homeschool. It was untenable for the trial court to disbelieve Dr. Ray on the basis of a "deficiency" on which there was no

testimony at trial. Nothing in the testimony called into question Dr. Ray's interpretation of H.T.'s evaluations as showing the ***public school system had failed*** H.T. It was untenable for the trial court to find the opposite.

The record in this case does not present a *Brewer* situation, where an expert's testimony was deficient. Rather, it squarely presents a *Stell* situation, in which Dr. Ray's expert testimony was neither flawed in its foundations nor challenged in its conclusions. There was no rational basis for the trial court to reject Dr. Ray's unrebutted testimony. In affirming the trial court's untenable findings, the Court of Appeals decision conflicts with *Stell* and *Brewer*. This Court should accept review and clarify that unrebutted expert testimony with a solid foundation cannot simply be disregarded.

5.3 The Court should also review the other issues presented.

The Court of Appeals also erred in its decisions on the first three issues presented, above at p.1-2. This Court should review these issues as well.

The Court of Appeals erred in excusing improper procedure. *Pape* distinguishes between the dispute resolution process and the petition process to modify a parenting plan. ***Pape***, 139 Wn.2d at 703-04 ("The mother's motion for the temporary order was not a petition to modify the parenting plan. Rather, it was an attempt to comply with the mutual decision-making and alternative dispute resolution provisions of the plan."). Resolution of a parenting plan dispute "is not a modification of the plan itself." ***Kirshenbaum v. Kirshenbaum***, 84 Wn. App. 798, 807, 929 P.2d 1204 (1997).

Alexi should have brought a motion to resolve the school-choice dispute. She did not. She brought a petition to modify the parenting plan. The trial court

treated it as a petition to modify. The trial court bent over backwards to find a "substantial change in circumstances" that did not actually exist[1], in order to address the parenting dispute through the modification process. This was error, both at the adequate cause stage and at trial. The Court of Appeals erred in affirming this improper procedure, affirming the finding of substantial change, and in not reversing the adequate cause decision and the resulting modification (Issues 1 and 2, p.1-2 above).

The Court of Appeals also erred in affirming the trial court's resolution of the school-choice dispute without considering which schooling option would best carry out the existing parenting plan. *See* Br. of App. 30-35.

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[1] Because the 2020 parenting plan specifically anticipated and provided a school-age residential schedule, reaching school age was not a substantial change. *See* Br. of App. 21-24. There was also no detrimental environment. *See* Br. of App. 24-29.

In the dispute resolution process, "Preference shall be given to carrying out the parenting plan." **RCW 26.09.184(4)(a)**. When the trial court is called upon to resolve a parenting dispute, the trial court must "listen to the parties and decide who should prevail *in light of the parenting plan*." ***In re Smith-Bartlett***, 95 Wn. App. 633, 642, 976 P.2d 173 (1999) (emphasis added).[2] The Court of Appeals erred in allowing the trial court to apply an improper legal standard to the resolution of the school-choice dispute.

6. Conclusion

The Court of Appeals decision conflicts with the prior published Court of Appeals decision in *Young* on

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[2] The Court of Appeals minimized this holding, reasoning that the case had a unique procedural posture. App. 9 n.3. But because the trial court's review was de novo, the proper considerations were the same whether it was a review of an arbitrator's decision or if the issue had been brought directly to the court in the first instance.

the issue of erroneously failing to consider the §187 factors in a parenting plan modification. The decision also conflicts with the prior published Court of Appeals decision in *Stell* and this Court's prior decision in *Brewer* on the issue of erroneously disregarding unrebutted expert testimony. This Court should accept review of these issues, as well as the other issues presented for review.

I certify that this document contains 4,979 words.

Submitted this 29th day of December, 2023.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of: ALEXI MIKELE TURNER, Respondent, and MICHAEL MATTHEW TURNER, Appellant.	No. 84402-4-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, A.C.J. — Michael Turner appeals from an order that modified a parenting plan and ordered the parties' daughter to attend public school. Because the court did not abuse its discretion, we affirm.

FACTS

Michael and Alexi Turner[1] have one daughter, H, who was born in October 2015. The couple divorced in 2017. The parenting plan entered at that time provided that when H started kindergarten, she would primarily reside with Alexi, but, until then, she would spend equal time with each parent on a schedule of alternating weeks. Michael and Alexi changed the parenting plan in 2020 by agreement, and provided that H would continue the alternating schedule even after she reached school age. The parenting plan did not expressly describe the mode of H's education upon reaching school age, but did set out that education

[1] Because the parties share a last name, we refer to them by their first names for clarity. No disrespect is intended.

decisions were to be made jointly by the parents. The parenting plan also provided a method for dispute resolution if the parents could not agree on schooling.

The parents each had a sincere, but incorrect belief about the other's intentions in creating the 2020 modified parenting plan. Alexi believed Michael was agreeing to move from Kitsap County to King County, while Michael believed Alexi was agreeing to homeschool H. Under either of those scenarios, the alternating residential schedule would have been compatible with H's education. Once the miscommunication was discovered, the parties attempted to resolve the disagreement through mediation, an informal phone conversation, and a second mediation session. These efforts were ultimately unsuccessful, and Alexi moved to modify the parenting plan. She requested that the court resolve the education dispute by ordering H attend her local public school and to modify the residential schedule contained in the 2020 parenting plan to place H with Alexi for the majority of the time during the school year. Michael opposed the petition.

In September 2021, a commissioner found there was adequate cause for modification. Michael moved for revision of the adequate cause determination. A judge granted the revision in part and issued a temporary order that continued the schedule of alternating weeks provided that "during their residential time the parent shall reside with the child in a location that is no more than 20 miles from [the] elementary [school]."

The parties proceeded to trial on the modification on May 16, 2022. The court heard testimony from both parents and Dr. Brian Ray, Michael's expert

witness on home-based education. After trial, the court found there had been a substantial change in the child's situation, the current living situation was detrimental to her, and that the best interests of the child supported a modification. The court ordered that H attend the elementary Alexi requested, and changed the residential schedule such that H would reside with Alexi the majority of the time and with Michael three weekends per month during the school year, and with each parent equally on a weekly alternating basis during the summer. Michael timely appealed.

ANALYSIS

This court generally reviews trial court decisions related to a parenting plan for an abuse of discretion. In re Custody of Halls, 126 Wn. App. 599, 606, 109 P.3d 15 (2005). This court also reviews "a trial court's rulings dealing with the provisions of a parenting plan" for abuse of discretion. In re Marriage of Christel, 101 Wn. App. 13, 20-21, 1 P.3d 600 (2000). If a trial court's decision is "based on untenable grounds or untenable reasons," it abuses its discretion. Halls, 126 Wn. App. at 606. Likewise, a court abuses its discretion if it "fails to follow the statutory procedures or modifies a parenting plan for reasons other than the statutory criteria," or if its "decision is outside the range of acceptable choices" based on the law and facts. Id. This court will uphold the trial court's findings of fact so long as they are supported by substantial evidence. In re Marriage of Hansen, 81 Wn. App. 494, 498, 914 P.2d 799 (1996). Substantial evidence is "'defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.'" In re Marriage of DeVogel, 22 Wn. App.

2d 39, 48, 509 P.3d 832 (2022) (quoting Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003)). We may affirm the trial court "on any basis supported by the record." In re Marriage of Raskob, 183 Wn. App. 503, 514-15, 334 P.3d 30 (2014). With this standard of review in mind, we turn to the assignments of error.

I. Substantial Evidence and Expert Testimony

Michael argues that the trial court abused its discretion because its factual findings are unsupported by substantial evidence and are contrary to unrebutted expert testimony. Again, we review a trial court's findings of fact for substantial evidence to "'determine only whether the evidence most favorable to the prevailing party supports the challenged findings, even if the evidence is in conflict.'" DeVogel, 22 Wn. App. 2d at 48 (quoting Thomas v. Ruddell Lease-Sales, Inc., 43 Wn. App. 208, 212, 716 P.2d 911 (1986)).

First, Michael contends the court erred in making findings contrary to his expert's unrebutted testimony. "'[T]rial courts should rely on expert opinion to help reach an objective, rather than subjective, evaluation of the issue.'" In re Custody of Stell, 56 Wn. App. 356, 368, 783 P.2d 615 (1989) (quoting In re Marriage of Woffinden, 33 Wn. App. 326, 330-31 n.3, 654 P.2d 1219 (1982)). However, "the trial court is free to reach its own conclusions from the testimony before it." Id. Further, "[t]he factfinder is given wide latitude in the weight to give expert opinion," and, as an appellate court, we do not reweigh expert testimony. In re Marriage of Sedlock, 69 Wn. App. 484, 491, 849 P.2d 1243 (1993). "A trial court has the right to reject expert testimony in whole or in part in accordance

with its views as to the persuasive character of that evidence." Brewer v. Copeland, 86 Wn.2d 58, 74, 542 P.2d 445 (1975).

Here, while Ray's opinions were unrebutted, the court clearly stated the reasons it found his testimony unpersuasive. The court disagreed with Ray's analysis that H would receive adequate education with only one parent conducting home-based instruction during their residential time. The court found it critical that Michael, separately or through Ray, failed to offer or cite studies "or any information presented for split households," where only one caregiver was providing home-based education. This is sufficient to support the court's rejection of Ray's opinion that home-based education could be successful for H even if instruction was only provided by Michael during his residential time with her.

Next, the trial court's finding that home-based instruction by Michael during his weeks with H would be insufficient and its finding that H's underperformance in public school was due to inadequate home education are both supported by substantial evidence. Ray admitted that comparing results from the Peabody assessment[2] to grades from a traditional public school setting "is ill-advised," and grounded his conclusion in his belief that results from a test like the Peabody are the result of a "nationally normed, standardized, valid and reliable instrument," as opposed to the assessment of an individual teacher, which he suggested may be more inherently subjective. The court further asked Ray if he could explain why H, if she had been performing at a first-grade level

[2] The Peabody assessment is a standardized test used to measure academic achievement for education.

according to the Peabody assessment, and had completed a year of kindergarten-level homeschooling, would perform "in the middle of the pack" in her subsequent public school kindergarten setting. Ray hypothesized that H may have been bored or was not as engaged in a public school setting. The court asked Ray about reading performance, specifically, and questioned whether reading is an "objective type of standard, if you read at a certain level, you would maintain that reading, whether you're bored or not?" Ray responded that, in theory, H "should at least maintain" her reading level, but stated only that it "really makes us question a lot of what's happening there," and that there was "a problem." Ray offered no further analysis or opinion on that issue. The court relied on reading performance as "a constant," objective standard in finding that H was not adequately educated at home. The testimony by Ray, H's grades from public school, and her Peabody assessment scores are sufficient to support the trial court's findings. As an appellate court, we do not reweigh such evidence or resolve conflicting evidence. DeVogel, 22 Wn. App. 2d at 48. The court's findings are supported by substantial evidence, and the court provided reasoning for rejecting portions of Ray's testimony. Accordingly, it did not abuse its discretion.

II. Trial Court's Dispute Resolution Authority

Michael also contends that, to the extent it was exercising its authority to resolve the dispute over H's education, the trial court abused its discretion by applying an incorrect legal standard. He argues the court failed to give

preference to the existing parenting plan, entered in 2020, and failed to consider which schooling option would best carry out that parenting plan.

Michael correctly concedes that the trial court had the authority to resolve the parties' dispute over H's schooling. A trial court has statutory authority to "clarify a decree by defining the parties' respective rights and obligations, if the parties cannot agree on the meaning of a particular provision." Christel, 101 Wn. App. at 22. A trial court also has authority to resolve disputes under RCW 26.09.184(4). Parenting plans must contain a "process for resolving disputes," outside of judicial proceedings. RCW 26.09.184(4). However, "parties have the right of review from the dispute resolution process to the superior court." RCW 26.09.184(4)(e). "The ultimate responsibility for overseeing the performance of the parenting plan remains with the court." In re Parentage of Smith-Bartlett, 95 Wn. App. 633, 640, 976 P.2d 173 (1999). In resolving disputes, either through a court action or in a process outside of a court action, "[p]reference shall be given to carrying out the parenting plan." RCW 26.09.184(4)(a).

In addition to its statutory authority, the trial court also had explicit authority to resolve the dispute about H's education under the parties' agreed July 2020 parenting plan. The plan specifically provides that, "[t]he child shall attend the school mutually agreed upon by the parents," and if "the parents cannot agree on the selection of a school, the child shall be maintained in the present school, pending mediation or court decision as specified above." Critically, this agreed plan was also based on a fundamental misunderstanding by the parties. The testimony at trial established that each parent had a genuine,

but incorrect belief about the intention of the agreed plan and corresponding actions of the other parent. Alexi agreed to enter the 2020 parenting plan based on the belief that Michael was going to relocate to King County once H reached school age. Michael entered into the plan based on the belief that Alexi concurred H should be homeschooled.

Michael contends the court failed to make any findings or conduct any analysis that demonstrated a preference for the current parenting plan and, thus, misapplied the law, an abuse of discretion. He alleges that there is no analysis in the record which demonstrates that the trial court considered which schooling option would best fit the existing parenting plan. This contention is not supported by the record. In its oral ruling, the court made numerous findings that homeschooling would not be feasible, would not adequately educate H, and would not be in H's best interests. The court was concerned that H was not performing as expected based on her homeschooling testing scores and subsequent grades in public school. The court also found that "the underpinning is consistency in home education-based models. It requires a buy-in of the people that are the caregivers for the child." The court further found that the father's approach to home-based education "did not result in the kinds of grades that this [c]ourt would have expected this child to have on an objective scale" and, as such, it was in H's best interests to attend public school as Alexi requested. This reasoning, unrelated to the parties' residential schedule, supports the court's finding that a public school environment was in H's best interest. The court properly understood, based on the procedural posture

presented by Alexi's petition after mediation had failed, that resolving this issue would determine the next step in the legal proceedings with regard to a ruling to grant or deny modification.

While RCW 26.09.184(4)(a) mandates that "[p]reference shall be given to carrying out the parenting plan," it does not require that the parenting plan be followed in all circumstances. This aligns with the "broad discretion" given to a trial court's decisions because of its "unique opportunity to observe the parties to determine their credibility and to sort out conflicting evidence." In re Marriage of Woffinden, 33 Wn. App. 326, 330, 654 P.2d 1219 (1982). Michael relies on Smith-Bartlett for the contention that, in resolving a dispute, "the trial court must 'listen to the parties and decide who should prevail in light of the parenting plan.'"[3] However, the court's schooling decision here was not contrary to the parenting plan: it found that a home-based education model would not be feasible based on the parents' respective professional obligations and that it would not provide adequate education for H. This is consistent with Smith-Bartlett and is contrary to Michael's assertion in his brief that the court based its decision on an "assumption that [H] should attend a brick-and-mortar school."

The court's findings establish that the court properly demonstrated a preference for the current parenting plan and followed the statutory procedure.

[3] Appellant's Br. at 32 (quoting Smith-Bartlett, 95 Wn. App. at 642). For the sake of clarity, it should be noted that the quoted language from Smith-Bartlett refers to the unique procedural posture of that case, which involved "a de novo review of [an] arbitration." 95 Wn. App. at 641. The full quote read, "The only way for the court to review the arbitrator's decision, therefore, is to listen to the parties and decide who should prevail in light of the parenting plan. This is a review de novo." Id. at 642.

The court did not abuse its discretion as to its resolution of the parties' dispute over H's education.

III. Modification of Residential Schedule

After addressing the dispute over education, the court acted within its discretion when it progressed to the next step and considered the residential schedule pursuant to Alexi's petition to modify the parenting plan. Again, we may affirm the trial court "on any basis supported by the record." Raskob, 183 Wn. App. at 514-15.

Michael assigns error to the court's decision to modify the parenting plan by changing the residential schedule. He argues that the trial court's modification was contrary to law because its decision does not meet the elements required by RCW 26.09.260. Specifically, he contends the trial court erred in finding that: there had been a substantial change in circumstances, the residential schedule set out in the 2020 plan was not feasible, and the child's present living situation was harmful. Finally, Michael avers that the trial court erred in failing to consider the RCW 26.09.187 factors in creating the modified residential schedule. We address each argument in turn.

Washington courts apply "'a strong presumption in favor of custodial continuity and against modification'" as changes in residential time are "'viewed as highly disruptive to children.'" In re Marriage of Taddeo-Smith, 127 Wn. App. 400, 404, 110 P.3d 1192 (2005) (quoting In re Marriage of Shryock, 76 Wn. App. 848, 850, 888 P.2d 750 (1995)). Under RCW 26.09.260(1), a court:

> shall not modify a prior custody decree or parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child.

A court may modify the residential schedule in a parenting plan if, in addition to finding there has been a substantial change in circumstances, "[t]he child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child." RCW 26.09.260(2)(c).

A. Substantial Change in Circumstances

After it resolved the question of H's education and ordered that she attend her local public elementary school pursuant to its dispute resolution authority, the court properly found that there was a substantial change in circumstances such that modification was warranted. As H was now required to attend public school, the court found the current residential schedule was not feasible[4] or in H's best interests, as it would either require her to make a significant commute from Michael's home to school and back during the weeks she would reside with him or it would require Michael's relocation. There is sufficient evidence to support the court's finding of a substantial change in circumstances and it did not abuse its discretion as to this determination.

[4] While Michael assigns error to the court's finding that the current residential schedule was "impractical and not workable" or "not feasible," he provides no substantive argument on this assignment of error. Accordingly, we decline to reach it. See RAP 10.3(a)(6) (party must provide argument on issues presented); Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011) ("We will not consider an inadequately briefed argument.").

B. Detrimental Present Environment

Michael further contends the trial court erred because there was no evidence that H's present environment was detrimental. A trial court may make a major modification to a parenting plan if "[t]he child's present environment is detrimental to the child's physical, mental, or emotional health." RCW 26.09.260(2)(c). In evaluating the child's environment, the court considers the present "custodial environment named in the original custody decree." George v. Helliar, 62 Wn. App. 378, 383, 814 P.2d 238 (1991). The court looks to "the circumstances of the parties as they exist at the time of trial." In re Marriage of Littlefield, 133 Wn.2d 39, 56, 940 P.2d 1362 (1997). "In a joint custody situation," courts consider the "'joint custodial environment' and whether changed circumstances have rendered joint custody unworkable and detrimental." In re Marriage of Stern, 57 Wn. App. 707, 715, 789 P.2d 807 (1990).

Michael avers that the trial court erred by looking to a hypothetical future situation rather than the present circumstances. However, as discussed herein, the trial court properly considered the substantial change stemming from the education dispute and the court-ordered resolution. At trial, Alexi testified that the distance between Michael's home in Kitsap County and King County was approximately 50 miles each way. Alexi also testified that in her prior experience commuting from Kitsap County to King County, it was "hard on your body. Hard on your car." In its oral ruling, the court found that "it was not feasible to have [H] commute from such long distances between these homes" in order to attend

school in north King County. There is sufficient evidence to support the court's finding that H's present environment, in light of her transition into public school, was detrimental; the court did not abuse its discretion under these facts.

C. Permanent Parenting Plan Factors

Michael next avers that the trial court failed to consider all required statutory factors in making its decision to modify the parenting plan. He asserts that because modification must be necessary to serve the best interests of the child, and because a parenting plan entered on a "decree of modification" is a permanent parenting plan, the trial court must consider the factors described in RCW 26.09.187(3)(a). However, in drilling down on Michael's argument, the only factor he alleges the court failed to analyze is H's connections with the Kitsap community and activities there. Michael is incorrect in that regard. Our state Supreme Court has held that:

> [a] trial court making an initial placement of the child considers many factors that impact the child's life in order to determine the best interests of the child. See RCW 26.09.187(3). A trial court hearing a modification action, on the other hand, presumes the best interests of the child require the primary placement remain intact.

In re Marriage of Pape, 139 Wn.2d 694, 715, 989 P.2d 1120 (1999). This clearly establishes a distinction between the statutory factors that must be considered when a court is fashioning an initial parenting plan, and the process for when a court is considering a petition for modification. This interpretation is further bolstered by the fact that several unpublished opinions by the Court of Appeals have concluded RCW 26.09.187 factors are inapplicable in an action to modify

an existing parenting plan.[5] See, e.g., In re Marriage of Carpenter, No. 36766-5-III, slip op. at 4-5 n.1 (Wash. Ct. App. July 23, 2020) (unpublished), https://www.courts.wa.gov/opinions/pdf/367665_unp.pdf ("Ms. Carpenter focuses on standards relevant to an initial parenting plan decision in RCW 26.09.187, not those for a motion to modify an existing plan."); In re Marriage of Hardin, No. 48987-2-II, slip op. at 19 (Wash. Ct. App. Apr. 17, 2018) (unpublished), courts.wa.gov/opinions/pdf/D2%2048987-2-II%20Unpublished%20Opinion.pdf (holding the court did not err because, although it "referenced the statutory factors under RCW 26.09.187 at the modification hearing, the court clarified that the case would be resolved under RCW 26.09.260"); In re Marriage of Monoskie, No. 35067-3-III, slip op. at 6 (Wash. Ct. App. Nov. 30, 2017) (unpublished), https://www.courts.wa.gov/opinions/pdf/350673_unp.pdf (establishing, where the youngest child did not have a primary residential parent, "the trial court's analysis fell under RCW 26.09.187(3) (governing initial placements) as opposed to RCW 26.09.260 (governing modifications)"). The trial court here properly found that the modification would be in H's best interests. It applied the correct statutory framework and, as such, did not abuse its discretion.

The trial court's findings of fact are supported by substantial evidence and it correctly applied the law to the parties' dispute which involved interconnected issues of education and residential time, within the layered framework of dispute

[5] Under GR 14.1(a), "[u]npublished opinions of the Court of Appeals have no precedential value and are not binding upon any court," though they "may be accorded such persuasive value as the court deems appropriate." We reference the subsequent unpublished opinions as examples of this court distinguishing the statutory framework of an initial parenting plan and a modification.

resolution and a petition for modification. It did not abuse its discretion in doing so and we affirm.[6]

Hazelrigg, ACJ

WE CONCUR:

Coburn, J.

Chung, J.

[6] Michael also assigns error to the adequate cause determination that preceded the trial on modification. Because we conclude the trial court did not abuse its discretion in modifying the parenting plan, the ruling on adequate cause is moot and we decline to reach this assignment of error. See In re Marriage of Horner, 151 Wn.2d 884, 891, 93 P.3d 124 (2004) (appellate courts will not review a moot case).

FILED
8/11/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of:

ALEXI MIKELE TURNER,

Respondent,

and

MICHAEL MATTHEW TURNER,

Appellant.

No. 84402-4-I

DIVISION ONE

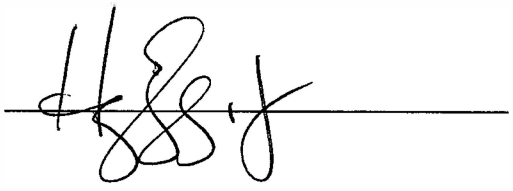
ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Michael Turner, filed a motion for reconsideration on August 7, 2023. After review of the motion, a panel of this court has determined that the motion for reconsideration should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:



LEA ENNIS
Court Administrator/Clerk

The Court of Appeals
of the
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November 30, 2023

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Case #: 844024
In re: Alexi Mikele Turner, Respondent and Michael Matthew Turner, Appellant
King County Superior Court No. 17-3-03767-6

Counsel:

The following notation ruling by Court Administrator/Clerk Lea Ennis of the Court was entered on November 30, 2023, regarding Appellant's Motion to Recall Mandate:

> Appellant's motion to recall mandate is granted. A copy of the order denying reconsideration will be provided to the parties along with this ruling and any petition for review shall be filed no later than December 29, 2023.

Sincerely,

Lea Ennis
Court Administrator/Clerk

khn

c: The Hon. Leonid Ponomarchuk
King County Superior Court Clerk

Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on December 29, 2023, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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December 29, 2023 - 2:20 PM

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Appellate Court Case Title:	In re: Alexi Mikele Turner, Respondent and Michael Matthew Turner, Appellant

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