**Supreme Court No. 101648-4**
**(Court of Appeals No. 38428-4-III)**

---

**WASHINGTON SUPREME COURT**

---

Brittanie Shaw
Appellant,
vs.

Hunter Shaw,
Respondent

---

# Hunter Shaw's Answer to Petition for Discretionary Review

---

Jonathan Baner, WSBA #43612
BANER AND BANER LAW FIRM
4007 Bridgeport Way W. Ste D
University Place, WA 98466
Telephone: (253) 212-0353
Facsimile: (253) 237-1859
Attorneys for Respondent

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

## CASES



## STATUTES



## RULES

## I. IDENTITY OF RESPONDENT

Hunter Shaw ("Hunter") is a noncommissioned officer in the United States Air Force and father of two children at issue E.S. and R.S..

## II. IDENTIFICATION OF COURT OF APPEALS DECISION PETITIONER SEEKS REVIEW OF

Petitioner Brittanie Shaw ("Brittanie")[1] Petition for Review ("the Petition") seeks review of *In re Hunter A. Shaw and Brittanie N. Shaw*, No. 38428-4-III (Wash. Ct. App. Div. 3 December 20, 2022) (unpublished).[2] (herein "The COA Decision").

Respondent Hunter does not seek review of any part of The COA Decision.

## III. ISSUES PRESENTED FOR REVIEW

Hunter presents no issues for review.[3]

[1] As a convenience the parties are identified by their first names. No disrespect is intended by this convention.

[2] Hunter provides this information as Brittanie's petition does not follow the content requirements of RAP 13.4 (c).

[3] The Petition does not include a statement of issues section but addresses the "two rulings" she "seeks review of "in section I.

## IV. STATEMENT OF THE CASE

### A. Factual background

Hunter does not substantially disagree with the facts or procedural history of this matter as presented by the Court of Appeals in The COA Decision.

The only significant factual point potentially requiring elaboration concerns where The COA Decision referenced that the parties' son, RS, has a "congenital heart condition." *Id.* at 3. Specifically, it is an "incidentally discovered anomalous right and left coronary artery origins . . . as well as a left anterior descending artery myocardial bridge." CP 285. The evidence presented is that there is "no indication for surgery, ongoing cardiac evaluation or activity restrictions. CP 285. In short, the boy's heart happens to have some different structural features to it. The features were present at birth, always known of, and continued to exist without issue before and after the entry of the parenting plan. See CP 217:15-19, CP 284.

### B. Specific factual disputes

Notwithstanding Hunter's acceptance of the facts as outlined by The COA Decision the petition for review attempts to relitigate those facts and it is thus prudent to address that attempt.

As outlined *infra,* this Court, like the Court of Appeals, should defer to the factual determinations made by the trial court. This deference is misunderstood by Brittanie in her Petition as she continues to attempt to debate the trial courts findings on appeal. Unfortunately, the debate frequently misstates the record or fails to provide any citations to the record as required by RAP 13.4 (c)(6).

Brittanie consistently references that RS has a heart "problem." See e.g. Petition at 6-8, 12, 16, 18. Brittanie disagrees with the cardiologist, Hunter, the trial court, and the court of appeals that determined there is "no worsening in the heart." The COA Decision at 3. See also CP 285 ("history and exam are reassuring, with no significant symptoms from a cardiac perspective with exercise . . . We are unaware of cases

[like RS] …associated with an adverse outcome . . . no indication for surgery, ongoing cardiac evaluation or activity restrictions. . . do not recommend any additional testing or specific precautions").[4]

Brittanie, while citing to trial counsel's oral argument and CP 217 (Declaration of Brittanie Shaw), claims that in the summer of 2020 there were "chest pains, heart discomfort, blue lips and blue fingertips, that were suggested he has been having similar problems in the UK." Pet. at 3-4. CP 217, a declaration of Brittanie, contains a single paragraph that only indicates that RS "had an incident . . . where his lips and fingertips turned blue." CP 217:15-19. Brittanie's reference to "chest pains" and "heart discomfort" is not found in the factual record.

[4] Brittanie cites to CP 282-86 for the proposition that medical records "specifically warned that if he later developed persistent exercise-related symptoms the parents should have his heart re-evaluated." Pet. at 3. The specific provision recommendation is found at CP 285 and includes four recommendations. Brittanie misstates the fourth recommendation as "parents should have his heart re-evaluated" when it says that "we would be plead to re-evaluate him for the possible presence of a cardiac cause for his symptoms." CP 285. There is no allegation anywhere in any record that RS has developed "persistent exercise-related symptoms."

The Petition then goes on to make several statements of fact without any citation to the record. Pet. at 4-5. In the absence of such a citation the facts cannot be adequately evaluated. The Petition goes on to state, while referencing CP 217, "RS's doctor recommended both parents regularly monitor RS for cardiac symptoms." CP 217 makes no such claim.[5] RS's heart was healthy before the parenting plan was entered and has remained so since then. Still, Hunter is aware of and remains alert to the possibility of any heart issue. See CP 135:1-15.

The daughter involved in this matter is ES. E.S. is a predominately healthy young girl progressing in school. She had a moderate mental health illness diagnosed as an unspecified mood disorder and generalized social phobia. CP

[5] It is unequivocally plain that if cardiac related symptom appear that parents should be on alert. This applies to themselves, their children, their spouses, etc. Hunter does not submit ignoring cardiac symptoms is ever permissible. Brittanie apparently observed blue lips and fingertips, had RS evaluated, and he was thankfully without any cardiac problem. CP 217. That lone incident of her observation of a perceived symptom is not a substantial change in circumstances justifying a major modification.

363. She specifically does not have a major depressive disorder. *Id.*[6], see also the COA Decision at 2.

E.S. had some issues regarding anxiety. She is "nervous around new people" and "anxious" with strangers. CP 360. Specifically, she reported feeling "worried something bad will happen to her around strangers." CP 360. She is also "fearful of her new stepfamily including both children and the adults." CP 360. The stepfamily is a reference to the, at the time, mother's new husband and stepchildren. See CP 40 (declaration of Brittanie's husband "I hold full custody of all three of my biological children"), CP 361 ("fearful of her new stepfamily" in San Antonio).

[6] "Rule out MDD" appears to be a reference to ruling out of major depressive disorder as the DSM-5 diagnostic term. It is unclear why Brittanie makes repeated references to E.S. having depression in her briefing considering there is no such diagnosis in the record and it has apparently been ruled out. See App. Br. 24 ("soon after the mother received her . . . she was diagnosed with a long case of severe depression and suicidal ideation;" id. at 27 ("he did nothing substantive for his daughter about her depression and suicidal ideation;") *id.* at 2 ("daughter's depression was far worse than she had thought" (citing to CP 80, which is a notice of hearing containing no information relevant to health records)); Br. App. 4 ("ES . . . developed a serious . . . depression" citing to CP 47, which describes "episodes of anxiousness and discomfort," and CP 355-65 that includes medical records expressly ruling out depression); Br. App. 22 ("depression problems"). Brittanie told Hunter that E.S. had "generalized anxiety." CP 135:8-10. Nothing in the medical records makes a diagnosis of depression. The clinical definition may be more exacting and Brittanie may be referencing the term "depression" in a broader sense, but the record does not show a diagnosis of depression.

Brittanie here claims that Hunter "again and again failed to have her evaluated for one reason or another." Petition at 6 (citing to CP 215). However, the record below provides evidence that Hunter noticed E.S. being anxious around other children and brought his concerns up with school faculty who had not noticed anything similar. CP 134-35. The school year was ending and a follow up was not possible. CP 135. Hunter and Brittanie discussed her issues and agreed to get ES evaluated in Texas over the summer break with Brittanie. CP 135.

E.S. has an apparently brief history of experiencing "fleeting thoughts of suicide that occur once a week." CP 360. She reported these thoughts occurred for about two months in May and June 2021 but denied such thoughts in July 2021. CP 360, 358. The trial court concluded that there is no apparent evidence as to how or why the thoughts or other emotional issues occurred. See RP 24:16-17.

**C. Procedural history**

Against this backdrop, the trial court found that Hunter is aware of E.S. emotional health and capable of attending to it. RP 24:14-15. The trial court found "in looking at the medical records and his declaration he has paid attention to these children's health." RP 24:8-10. With respect to RS's heart the trial court determined "after a physician reviewed his situation there was no restrictions placed on his activities. So I don't see where that is an issue in this case." RP 24:18-21. On August 12, 2021, the trial court dismissed Brittanie's petition for a major modification of the parenting plan without finding adequate cause to continue the matter. CP 261-62.

Brittanie appealed the trial court decision. CP 263. On appeal Brittanie "misquoted the evidentiary standard," "reargued the facts," and "asserted hearsay objections on appeal that she never forwarded before the superior court", The COA Decision at 11. Brittanie mistakenly asserted to the Court of Appeals that a major modification of a parenting plan requires that courts "must accept as verities the evidence presented in

her declarations when assessing adequate cause." *Id.* at 6. The COA Decision correctly recognized that under the appropriate standard of review the trial court's decision "fell within the range of evidence presented by the parties." Id. at 10. The trial court "reasonably concluded that Brittanie Shaw failed to establish a substantial change in circumstances." *Id.*

The COA Decision "carefully reviewed all of the arguments forwarded by Brittanie" and "conclude[d] that Brittanie did not raise any debatable issues on appeal" and found her appeal frivolous. *Id.* at 11.

## V. SUMMARY OF ARGUMENT

There are four potential grounds upon which this Court accepts review under RAP 13.4 (b). None of those grounds are present here. This petition for review stems from a frivolous appeal by Brittanie Shaw that sought to raise over a dozen evidentiary arguments for the first time on appeal, disregarded, and continues to disregard, the scope of review,

misstated, and continues to misstate, law and facts, and attempted to relitigate facts.

The decision of the Court of Appeals is consistent with Washington State precedent, does not involve any relevant constitutional issues, nor concerns a matter of substantial public interest.

## VI. ARGUMENT

### A. Grounds for discretionary review

*i. Legal framework*

Brittanie seeks review of The COA Decision affirming the trial court as well as The COA Decision imposing attorney fees for a finding of a frivolous appeal.

RAP 13.4 (b) governs whether a petition for discretionary review should be granted. The rule provides four potential basis:

> *(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or*
> *(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or*

*(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or*
*(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.*

*ii. RAP 13.4 (b) (4) does not provide for a blanket acceptance of discretionary review of decisions involving parenting plans*

Brittanie asserts, in a heading, that the "care and well-being of children is . . . a significant public policy issue, especially the concept of adequate cause determinations." Petition at 9. She cites to *State v Fairfax*, 179 Wash.2d 411 (2013) without a pincite for the propositions that "any improper or inappropriate finding regarding application of … RCW 26.09.260 and .270 runs contrary to the public policies of this state." Nothing in *Fairfax* appears to support that proposition, though in some sense it is simply axiomatic that not following a law is contrary to public policy.

Brittanie also argues, again without a pincite, that the proposition is "especially true where the parenting issue deals

with proper health issues." Petition at 9 (citing "e.g." *In Re BMH*, 179 Wash.2d 224 (2013)). In *Re BMH* was a third party custody petition not involving RCW 26.09. Furthermore, the only discussion of health in that case involved some examples of other matters with respect to evaluating "actual detriment" being highly fact specific. 315 P.3d at 476.

RAP 13.4 (b) has no "significant public policy issue" prong. As there are no constitutional issues involved in this matter it is assumed that Brittanie is attempting to argue that RAP 13.4 (b) (4) applies. Brittanie provides no argument as to how the limited issues of these two specific parents and their children creates "an issue of substantial public interest that should be determined by the Supreme Court" that will have any impact beyond the parties involved.[7] The only issue raised is the trial court denied adequate cause based on its decision of applicable facts.

[7] Indeed, section III-B of the Petition does not address any element of RAP 13.4 (b) and is instead wholly argument concerning alleged error.

### iii. *In re Maclaren, 8 Wn. App. 2d 751 (2019) is not in conflict with this matter*

RAP 13.4 (b) (2) provides for possible acceptance of review when a case is in conflict with a published opinion of the Washington State Courts of Appeal. Brittanie asserts that The COA Decision runs afoul of *In re Maclaren*, 8 Wn. App. 2d 751 (2019). The (unpublished) COA Decision cited approvingly to *MacLaren* at least four times. See The COA Decision at 5-7.

The uncontroverted affidavits put forward for the children in *Maclaren* demonstrated two children with significant and *worsening* mental health problems. *Id.* at 754-65. The uncontroverted evidence presented was that the children's mental health needs could be remediated to some extent but that the mother in the case denied any problems, refused to follow recommendations, and that her denials and refusal worsened the problems. *Id.* at 776-78.

Here, however, Hunter was the one that first noticed the possible need for E.S. to be evaluated and started the process.

See CP 134, 136:1-8. Hunter's involvement and care for his children are wholly distinct from the mother's denials and refusals found *Maclaren.* There is no evidence in the record that Hunter has refused medical advice for the children's care or that the children's mental or emotional needs are being detrimentally impacted by their environment.

Because the COA Decision expressly and repeatedly cited approvingly to *Maclaren* and because the facts of this case are radically different the two decisions are not in conflict.

iv. Brittanie makes no argument as to why review of the finding of a frivolous appeal should be granted

Although Brittanie devotes almost 3 pages of the Petition to the proposition that the underlying appeal to the court of appeals was not frivolous, she fails to make any argument as to why review of the decision should be granted under RAP 13.4

(b). For that reason alone, the Petition should be denied with respect to this issue.

The central argument proposed by Brittanie is that the court of appeals "did not take the facts presented by the mother as true" and from that strange presumption various facts would thereafter support a reversal of the trial court decision regarding adequate cause because of the new facts. Petition at 16-17. Oddly, Brittanie also then recognizes that "an appellate court is not to substitute its findings over the findings of the trial judges (*sic*)." Petition at 17-18.

It is well established that A trial court's denial of adequate cause for a proposed parenting plan is reviewed for abuse of discretion. *In re Parentage of Jannot,* 149 Wn.2d 123, 128, 65 P.3d 664 (2003). The denial of adequate cause for a proposed parenting plan will only be reversed on appeal in those circumstances where the trial court's decision is "is manifestly unreasonable or based upon untenable grounds or reasons." *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47,

940 P.2d 1362, 1366 (Wash. 1997). This Court has recognized that trial courts "decide factual domestic relations questions on a regular basis and the adequate cause determinations at issue here often involve facts that are very much in dispute." *Jannot,* 149 Wn.2d at 126. The deferential standard on review is important "[b]ecause adequate cause determinations are fact intensive" and "a trial judge generally evaluates fact based domestic relations issues more frequently than an appellate judge and a trial judge's day-to-day experience warrants deference upon review." *Id.* at 127.

Brittanie's appeal[8], like her Petition to this Court, was an attempt to relitigate facts. See The COA Decision at 11. As the appellate court must appropriately defer to the trial court, Brittanie's appeal could not be granted.

[8] Brittanie argued to the trial court several additional complaints including an alleged agreement to modify, Hunter's health, Hunter's alcohol use, Hunter's video game use, RS's mental health, and issues concerning RS's education. See The COA Decision 2-4. These issues appear abandoned. Brittanie also raised numerous hearsay objections for the first time on appeal (now abandoned) and sought to have a summary judgment standard adopted for adequate cause proceedings. See *id.* at 6, 11.

The trial court determined "I don't think the mother brought this in bad faith, so I'm not awarding attorney fees." RP 26:17-19. Brittanie confuses this finding regarding bad faith with "the trial judge did not find that the mother's petition for modification was at all frivolous." Petition at 18. "Bad faith" and "frivolous" are different concepts, but more importantly a frivolous appeal determination will take into consideration the standard on review.

### B. Attorney fees are appropriate for answering the Petition

RAP 18.1 (j) provides that a party who is awarded attorney fees in the Court of Appeals may also be awarded attorney fees incurred in answering a petition to this Court. Here, The COA Decision awarded attorney fees and Hunter should be awarded attorney fees incurred in answering the Petition.

## VII. CONCLUSION

The Petition fails to meet the requirements of RAP 13.4 (b). The Petition should be denied and attorney fees should be awarded.

**DATED** this March 31, 2023. I certify that this document was created using word processing software and contains 3,146 words in compliance RAP 18.17.

Jonathan Baner, WSBA #43612
Attorney for Respondent, Hunter Shaw

## CERTIFICATE OF SERVICE

I, Jonathan Baner, a person over 18 years of age, served: the Washington Supreme Court and **Mr. Gary R. Stenzel** a true and correct copy of the document to which this certification is affixed via the Court's electronic service website. I declare under penalty of perjury under the laws of the State of Washington that the forgoing is a true and correct statement. Signed at University Place, WA on March 31, 2023.

## BANER & BANER LAW FIRM

## March 31, 2023 - 10:37 AM

## Transmittal Information

| | |
|---|---|
| **Filed with Court:** | Supreme Court |
| **Appellate Court Case Number:** | 101,648-4 |
| **Appellate Court Case Title:** | In re: Hunter A. Shaw and Brittanie N. Shaw |
| **Superior Court Case Number:** | 19-3-01249-2 |

**The following documents have been uploaded:**

- 1016484_Answer_Reply_20230331103554SC394988_5521.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  *The Original File Name was answer to sc petition.pdf*

**A copy of the uploaded files will be sent to:**

- lscaranoparalegal@gmail.com
- miranda@banerbaner.com
- sejuoh@yahoo.com
- stenz2193@comcast.net

**Comments:**

---

Sender Name: Jonathan Baner - Email: jonathan@banerbaner.com
Address:
4007 BRIDGEPORT WAY W STE D
UNIVERSITY PLACE, WA, 98466-4330
Phone: 253-212-0353

**Note: The Filing Id is 20230331103554SC394988**