SUPREME COURT No. 95485-2

No. 76260-5-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

In re:

JOHN PATRICK OSMAN,

Respondent

v.

TINA ANNELISE SCHMIDT,

Appellant.

ANSWER TO PETITION FOR REVIEW TO WASHINGTON STATE SUPREME COURT

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I. Identity of Respondent

John Patrick Osman is the Respondent in this matter.

II. Decision Below

In re E.G.S., John Patrick Osman, Respondent v. Tina Annelise Schmidt, Appellant, Case #76260-5-I, filed December 22, 2016.

III. Response to Issues Presented for Review

A. Regarding the modification of the Georgia parenting plan provision that John objected to at the time of entry of the modified Washington final Parenting Plan that requires each parent to make their child available to family members on a parent's residential time:

1. Is an order requiring a parent to make their child available to non biological parent family members of the other parent that is not agreed between the parties enforceable?

2. Is a parent who relocates across the country to be closer to their child who no longer agrees to a provision in the final parenting plan requiring each parent to provide access to the other parent's family members satisfy the substantial change of circumstance prong of RCW 26.09.260(10) ?

3. Does a trial court in a parenting plan modification proceeding have authority to eliminate a provision in a final parenting plan that requires each party to make the child available to non biological family members when one party does not agree to said provision?

4. Is a finding of fact required when the parties stipulated to adequate cause and the trial court eliminates a provision that is no longer agreed between the parents

requiring them to give residential time to a non biological parent?

B. Regarding modification of the Georgia custody decree's provisions for education and non emergency health care decisions:

1. Did the trial court properly hear evidence in support of modifying the non residential provisions of the parenting plan upon the parties stipulation to Adequate Cause pursuant to RCW 26.09.270?

2. Can facts that would satisfy the substantial change of circumstances prong of RCW 26.09.260(5) regarding residential provisions also contemporaneously satisfy the change of circumstances prong of RCW 26.09.260(10)?

3. Does a trial court act within its discretion when pursuant to a modification of parenting plan proceeding it provides its factual basis and reasons for modification of residential provisions (RCW 26.09.260(5)) as well as non residential provisions (RCW 26.09.260(10)) that are in the best interests of the child?

IV. Statement of the Case

John Osman asks this court to deny Tina Schmidt's request to accept review of this case. John and Tina have a 6 year old child, Ella, born in June of 2011. (RP 146). The parties were never married. In 2014, the parties went through an entire establishment of a custody order proceeding in Georgia, including a parenting evaluation performed by forensic psychologist, Dr. Howard Drutman. (RP 172). (Trial exhibits 1 and 2).

After testimony was provided by Dr. Drutman and John at a trial, the parties entered into an Agreed Final Custody Order. (RP 311). (Trial exhibit 3).

In the custody order, John agreed to allow Tina to relocate to Washington and the residential schedule contained in the custody order contemplated this long distance relationship. Also, while Tina was residing in Washington and John was residing in Georgia, the custody order provided Tina with sole decision making authority for non emergency health care and education, assuming she utilized the specific protocol about notice and discussion outlined in the order. (Trial exhibit 3). Also, the final Georgia custody decree contained an agreed provision that provided each parent would allow the other parent's family to see the child if that parent's family was in that parents' city of residence (and Chicago for the father):

> **"In the event that the Father's family is in the Mother's city of residence, the Mother shall accommodate the Father's family so that they can see the Child so long as the Child is in town.**
>
> **In the event that the Mother's family is in the Father's city of residence or in Chicago with the minor child, the Father shall accommodate the Mother's family so that they can see the Child so long as the child is in town"**

In May of 2014, Tina relocated from Georgia to Federal Way, Washington. (RP 164). John followed the parenting plan regarding his

time with Ella but realized the long distance relationship was taking its toll on her and was not in her best interest. (RP 170). Therefore, in November of 2015, John uprooted his entire life after living in Georgia for 21 years and relocated to Seattle to be closer to Ella. (RP 177). After John relocated to Seattle while Tina was residing in Federal Way, in May of 2016, Tina decided to relocate to Port Orchard, WA, further away from John. (RP 195).

John filed a Petition for Modification of Parenting Plan in December of 2015 asking that the residential and non residential provisions of the Georgia custody order be modified due to his relocation to Seattle. (Trial exhibit 24). Specifically, John petitioned the court to allow him to have a modified residential schedule and joint decision making for medical and education decisions. John also asked to modify the dispute resolution provisions in the order. The parties stipulated there was Adequate Cause pursuant to RCW 26.09.270 to proceed with John's petition. (Trial exhibit 27).

Prior to Tina relocating from Federal Way to Port Orchard, the parties engaged in mediation in an attempted to settle the Parenting Plan issues rather than litigating those issues. (RP 232-233). After approximately 3 mediation sessions, the parties agreed on a temporary

schedule with John and Ella. However, the agreement required John to undergo drug testing for his use of alcohol and marijuana. (Trial exhibit 28). There was a misunderstanding regarding when John was supposed to go for testing (he did not believe the agreement required mid week testing) and therefore, pursuant to the CR 2A, John was relegated to supervised visitation with Ella. (RP 184). (RP 228). At Tina's insistence, John had to spend supervised visitation despite the fact there has never been a nexus between his use of marijuana and any contention that he cannot take proper care of Ella. (RP 228).

Also as part of the CR 2A Agreement, Dr. Wendy Hutchins-Cook was appointed to perform a Parenting Evaluation. (Trial exhibit 28). The parties agreed for Dr. Hutchins-Cook to have access to Dr. Drutman's file, including his reports and other information. (RP 71).

Dr. Hutchins-Cook provided her Evaluation Report to the parties on September 19, 2016. (Trial exhibit 1). Dr. Hutchins-Cook recommended a specific residential schedule and that John and Tina have joint decision making for non emergency health care and education with an arbitration provision based in part on the fact that John had relocated to Seattle to be closer to Ella and Tina failed to follow the protocol for decision making outlined in the Georgia custody order. (Trial exhibit 1,

pages 36-40). The reasons Dr. Hutchins Cook recommended joint decision making for medical and education decisions were: (1) Tina failed to comply with the terms and process of the Georgia order regarding John's involvement; and (2) John moved from Georgia to Seattle to be close to Ella and therefore, geographic proximity did not limit John's decision making authority. RP (136). (Trial exhibit 24, page 5). Specifically, Dr. Hutchins-Cook states in her report:

> **The information I have gathered leads me to the conclusion that Ella would benefit from a change in the joint decision-making provision of the Georgia Parenting Plan. It is not being implemented as described in the Parenting Plan. A review of the email threads provided earlier in this report demonstrates non-compliance by Tina.**
>
> **It is not unusual for the parent having more time with the child to be the one initiating the decision-making process. Tina typically comes forward with a declaration of what she is going to do; sometimes with a good description of logistics. John is to respond within 48 hours or her decision holds. When John was in Atlanta, he typically did not respond, and Tina rightfully moved ahead.**
>
> **John has been in Washington since November 2015, approximately 10 months. His perspective, which is fairly accurate, is that Tina bypasses the discussion part of the decision- making, or when he objects or makes a suggestion or proposal that is different than what she wants, her response is that she is not in agreement. The Georgia Plan specifies joint decision-making with Tina making the final decision when there is disagreement. Tina does in fact, in my opinion, bypass the first important step in the decision-making process as it is presented.**

> **Ella has two loving parents, both of whom want to be involved in her life. This involvement includes participation in decision-making about her life. This is not happening. This report includes recommendations to address this problem area.**

(Trial exhibit 1, page 34).

As John testified at the time of trial regarding medical decision making, Tina refuses to vaccinate or providing any immunizations to Ella.[1] (RP 157). [redacted]

Also of concern as John testified at trial is the fact that if Ella is not vaccinated, she may not be able to attend mainstream public school as pursuant to RCW 28A210.120, children are required to receive vaccinations to attend public school. (RP 203). (Trial exhibit 23).

John's proposed Parenting Plan asked the Court to eliminate the formerly agreed upon provision that either parent make Ella available to the other parents' family.

The trial court adopted the recommendations of Dr. Hutchins-Cook regarding the residential schedule for both parents and joint decision

[1] John finds it troubling that Tina smoked cigarettes over his objection during her entire pregnancy but then she claims that having children immunized is bad for their health. (RP 147).

making authority regarding medical and educational decisions using the Round Robin process. (CP 32). The trial court specifically found that the father's moving from Georgia to Seattle and desire to be more involved with the child was a substantial change of circumstances and it was in the best interests of the child for the parties to have joint decision making now that John had relocated to Seattle to be closer and more involved in Ella's life. (CP 36-37).

Subsequent to the Court's Findings and Conclusions and Final Parenting Plan being entered, Tina filed a Motion for Reconsideration asking the Court to include the provision that required each parent to allow the other parents' family to see the child under specific circumstances. In response to Tina's motion, John responded in pertinent part as follows:

> **Mr. Osman objects to Respondent's request that either party be required to provide third party non biological parents access to Ella if either party is in the Chicago area. There is no justification for this provision and it would be a violation of each party's constitutional rights. See Troxel v. Granville, 530 U.S. 57, 137 Wash. 2d 1 (2000). The reason Mr. Osman objects to this provision is that it will specifically interfere with his extremely limited vacation time with Ella and will subject Ella to additional/unnecessary time transportation by car during his vacations. Each party can coordinate their own trips to Illinois during their own residential time so it does not impinge on the other parent's vacation time. There is**

absolutely no need for this provision that will be once sided as Respondent never travels to Illinois.[2]

(CP 94-95).

The trial court denied Tina's reconsideration request to include the non agreed upon provision as John clearly objected to including it in the modified parenting plan. Specifically, John's objection is based on Tina's request to mandate a third party having custodial rights in the parenting plan. John also objected based on the limited vacation time he spends with Ella pursuant to the modified parenting plan. John also points out that including that provision will also work to Ella's detriment as it may require unnecessary time in the car for transportation during his vacations. The trial court properly omitted the provision from the modified parenting plan as it was no longer agreed between the parties.

Tina appealed to Division I of the Court of Appeals who affirmed the trial court's rulings. Tina filed this Petition for Review.

V. Argument

A. Elimination of the Non Agreed Extended Family Provision.

[2] Mr. Osman signed a subjoined declaration under penalty of perjury incorporating this objection and all facts therein into his sworn declaration.

1. The Decision Is Not In Direct Conflict With: Kinnan v. Jordan, 131 Wn.App 738 (2006); Marriage of Stern, 57 Wn.App. 171, rev denied, 115 Wn.2d 1013, or Marriage of Shyrock, 76 Wn.App 848 (1995).

John disagrees that the agreed provision contained in the Georgia decree is a "restriction" requiring modification pursuant to RCW 26.09.260(10). In Kinnan v. Jordan, *supra*, the trial court imposed an RCW 26.09.191 restriction on the mother prohibiting her from allowing her then boyfriend, who had plead guilty to communication with a minor for immoral purposes, from having unsupervised contact with her children. The trial court modified the parenting plan by striking the restriction without finding adequate cause pursuant to RCW 26.09.270. The Court of Appeals reversed the trial court's ruling indicating that to remove the restriction that as imposed pursuant to RCW 26.09.191, an determination of adequate cause was necessary.

The instant case is distinguishable from Kinnan, supra. Specifically, John agreed *while living in Georgia* to the provision that each parent would permit the other parents' family to see the child if the other parents' family were in the city of residence or in Chicago for the father and the parties stipulated to adequate cause to modify. There was no restriction mandated by the Court on John's residential time pursuant to RCW 26.09.191 as there was with the mother in Kinnan, *supra.*

However, once John relocated to Washington, he no longer agreed to that provision. John filed a Petition to Modify the Parenting Plan and the parties stipulated to adequate cause to proceed with the modification. A trial court may rely upon stipulations of the parties and does not err in failing to independently evaluate whether modification was appropriate. See Marriage of Naval, 43 Wn.App. 839, 719 P.2d 1349 (1986). John's proposed Parenting Plan asked the court to remove the provision regarding extended family as he no longer agreed to this provision in the modified parenting plan. As the Court of Appeals concluded, the modification statute does not require a particularized finding that a change of circumstance must be found as to any individual provision of a parenting plan which a parent wishes to be modified. RCW 26.09.260(1), (10). Once the necessary threshold determination is made, the entire order is before the court for modification.

Contrary to Tina's contention, the decision is not in conflict with any other Court of Appeals decision and this Court should deny review.

2. This Case Does Not Present A Significant Issue of Law Under The United States Constitution.

Contrary to Tina's contention, this case does not present a significant issue of law under the United States Constitution. The Court of Appeals decision cited Troxel v. Granville, 530 U.S. 57, 120 S. Ct.

2054 (2000) for the proposition that the court recognizes the fundamental rights of parents to decide their children's visitation with third parties. In Troxel, *supra*, it was the grandparents who were petitioning the court for rights to see their grandchildren and the US Supreme Court held Washington's third party visitation statute (RCW 26.09.240) unconstitutional.

In the instant case, the court determined that pursuant to John's objection to the formerly agreed provision in the Georgia custody decree that it would be err to include said provision in the modified final Parenting Plan. Specifically, because the court recognized John's fundamental right to decide who will spend time with his daughter during his time, it would be inappropriate to include a court ordered and mandated provision requiring John to give his time to Tina's relatives. Application or extending the holding or rule of law in Troxel, *supra*, to the facts of this case does not rise to the level of a significant issue of law under the US Constitution. Therefore, John asks the court to deny Tina's request to accept review.

3. The Decision Is Not In Direct Conflict With The Supreme Court Decision, State v. MacDonald, 183 Wn.2d 1, (2015); RAP 13.4(b)(1), Marriage of Glass, 67 Wn.App 378 (1992) and Marriage of Kennard, 176 Wn.App 678 (2013).

Contrary to Tina's contention, the Court of Appeals decision is not in direct conflict with MacDonald, *supra*, Glass, *supra* or Kennard, *supra,* or any other Supreme Court or other Court of Appeals decisions. In this case, John and Tina had agreed to the provision at issue while they were in Georgia working under the final Georgia custody decree. After Tina decided to relocate to Washington, John followed to Washington so he could be closer to his daughter and have a greater impact on her life. John initially attempted to work out an agreement with Tina, but she refused, requiring him to file a Petition for Modification of Parenting Plan. It is John's petition for modification of the parenting plan and the modification trial that occurred that distinguishes this case from Tina's argument regarding the holdings in MacDonald, *supra*, Glass, *supra* or Kennard, *supra.*

After John filed his Petition for Modification, the parties stipulated to adequate cause for the matter to proceed to trial. John's proposed parenting plan asked the court to strike the provision requiring each parent to give residential time to the other parent's relatives. In John's response to Tina's request for reconsideration, John pointed out he has limited vacation time with Ella and that including said provision would also work to Ella's detriment as it may require unnecessary time in

the car for transportation during his vacations when explaining why the provision is not in Ella's best interest.

Under the circumstances described above, the court properly eliminated the provision requiring each parent to provide residential time to the other parents' family pursuant to John's petition to modify the Parenting Plan. John asks this Court to deny Tina's request to accept review.

4. The Decision Does Not Involve An Issue Of Significant Public Interest As Claimed By Tina.

Contrary to Tina's contention, the Court of Appeals decision does not hold that agreements between parents regarding issues which the court is not able to impose upon parents due to statutory constraints are void ab initio. In her effort to try and convince this court to accept review, she has grossly misstated the holding of the decision. The decision in this case provides that it would be inappropriate, to include a provision in a final parenting plan that grants visitation to third parties over the objection of one of the parents in a parenting plan modification proceeding. The decision does not state that agreements among parents which are contrary to the trial court's ability to fashion a parenting plan that is in the best interests of a child are void ab initio. Because the

decision does not involve an issue of significant public interest, Tina's request for this court to accept review should be denied.

B. The Trial Court Properly Rendered Findings As To A Substantial Change Of Circumstances Related To Decision-Making Authority Over Health Care and Education.

1. The Court Of Appeals Decision Does Not Hold That Stipulating To Adequate Cause Absolves The Trial Court of Rendering Findings of Fact and Conclusions of Law pursuant to RCW 26.09.260 And Therefore Is Not Contrary To The Holdings In Marriage of Jefferson, 154 Wn.App. 1038 (2010) Or Kinnan v. Jordan, 131 Wn.App. 738 (2006).

Contrary to Tina's contention, the Court of Appeals decision does not hold that parties who stipulate to adequate cause are not required to meet their burden of proof of substantially changed circumstances and the best interests of the child pursuant to RCW 26.09.260. The decision in this case merely acknowledges that the parties stipulated to adequate cause that the Georgia parenting plan needed to be modified and that once that determination was made, the court was within its discretion to modify any provision of the parenting plan. The court's citation to Marriage of Naval, 43 Wn.App. 839 (1986) was to establish that the trial court may rely on agreements of the parties (adequate cause) without evaluating whether the facts independently meet the requirement to modify. In this case, John and Tina stipulated to adequate cause meaning

that they both agreed that there were facts that constituted a substantial change of circumstances which is the necessary criteria for modifying the parenting plan in the child's best interests. The decision does not reflect a misreading of Naval, *supra*, as claimed by Tina because the decision does not equate the stipulation for adequate cause to the equivalent of meeting the statutory criteria to modify set forth in RCW 26.09.260. Otherwise, what would be the purpose of presenting evidence at a trial. The court properly applied the requirements of RCW 26.09.260 after concluding that the parties had stipulated to adequate cause pursuant to RCW 26.09.270 when rendering findings of fact and conclusions of law in the best interests of the child.

2. The Decision to Affirm Was Proper In Light Of The Findings of Fact and Conclusions of Law regarding Decision Making Authority And Dr. Hutchins-Cook's Findings As Adopted By The Court And Is Not In Conflict With Kinnan v. Jordan, *supra*, or Marriage of Shyrock, *supra*.

The trial court found there was a substantial change of circumstances regarding John's decision to relocate from Georgia to Washington to modify both the residential provisions in the parenting plan pursuant to RCW 26.09.260(5) and the non residential provisions including the decision making authority enumerated in RCW 26.09.260(10). Contrary to Tina's contention, the appellate court did not

hold that evidence fulfilling the modification of the residential provisions in the parenting plan relieved the trial court of the obligation to make findings to modify the non residential provisions. The appellate court rightfully indicated that after an adequate cause determination, the trial court does not commit error when addressing any provision in the parenting plan without making a change of circumstance finding particular to each provision. The appellate court focused on the non residential provisions in the parenting plan because the residential provisions were not contested at trial. Specifically, the trial court found that the act of John relocating to Washington from Georgia was a substantial change of circumstances that satisfied both modification of the residential provisions (which the court modified from the Georgia decree), as well as satisfying the non residential provisions, i.e., decision making authority for non emergency health care and education.

For example, Paragraph 3 of the Findings specifically address RCW 26.09.260(5) regarding the minor modification to the residential schedule. Regarding RCW 26.09.260(5), the trial court found in part:

> **... To be closer to his daughter, the Petitioner relocated to the state of Washington in November of 2015. The Petitioner's relocation to Washington is a substantial change of circumstances justifying modification of the Georgia Parenting Plan which only contains provisions for both**

parties either residing in Georgia or the Respondent residing in Washington that he Petitioner residing in Georgia. ...

Regarding RCW 26.09.260(10), the non residential provisions in the parenting plan, the trial court found in Paragraph 6:

6. Other Changes *(RCW 26.09.260(10))*

☒ **Because of a substantial change in one parent's/child's situation, the court approves changes to the following parts of the *Parenting Plan* or *Residential Schedule* that are in the children's best interest *(check all that apply):***

☒ **dispute resolution**

☒ **decision-making**

☒ **transportation arrangements**

☒ **other *(specify):* educational decisions**

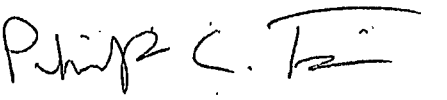
Tina has equated the appellate court's decision that no error is committed by the trial court by addressing any provision in the parenting plan without making a particularized change of circumstance finding to her contention that the trial court is absolved from making a finding of changed circumstances whatsoever. That is not the ruling of the appellate court. It is clear from the trial court's findings as well as the appellate court's decision that John's moving from Georgia to Washington satisfied both the substantial change of circumstances prong of subsection (5) and subsection (10) of RCW 26.09.260. Therefore, Tina's comparisons of this case to the holdings in Marriage of Caven, 136 Wn.2d 800 (1998),

Marriage of Shyrock, 76 Wn.App 848 (1995) and Kinnan v. Jordan, 131 Wn.App 738 (2006) are not persuasive.

VI. Conclusion

In sum, because there are no reasons pursuant to RAP 13.4(b) to accept review, John asks this court to deny Tina's request to accept review.

Respectfully submitted this 16th day of February, 2018 by:



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From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, February 21, 2018 4:57 PM
To: 'Philip C. Tsai'; les@a-f-m-law.com
Subject: RE: 95485-2 In the Matter of the parentage and Support of Ella Schmidt

Received 2-16-18.

Supreme Court Clerk's Office

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From: Philip C. Tsai [mailto:phil@tlclawco.com]
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To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; les@a-f-m-law.com
Subject: RE: 95485-2 In the Matter of the parentage and Support of Ella Schmidt

Dear Supreme Court Clerk,

I represent the respondent, John Osman, in the above referenced matter. Attached to this email is the Answer to the Petition for Review submitted by the Petitioner in the above referenced case. I am also copying my opposing counsel on this email. Thank you for your kind attention to this email.

Very truly yours,

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From: OFFICE RECEPTIONIST, CLERK [mailto:SUPREME@COURTS.WA.GOV]
Sent: Monday, February 12, 2018 4:34 PM

To: les@a-f-m-law.com; phil@TLClawco.com
Subject: 95485-2 In the Matter of the parentage and Support of Ella Schmidt

Counsel:

Attached is a copy of the letter issued by the Clerk or Deputy Clerk on this date in the above referenced case. Please consider this as the original for your files, a copy will not be sent by regular mail. When filing documents by email with this Court, please use the main email address at supreme@courts.wa.gov