FILED
Court of Appeals
Division II
State of Washington
1/12/2018 4:27 PM

No. 51067-7-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

In re the Marriage of:

ANDREW A. COOPER,

Respondent,

and

RENAE A. GRADY (f/k/a COOPER),

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE STANLEY J. RUMBAUGH

BRIEF OF RESPONDENT

LAW OFFICE OF
WENDY E. ZICHT

By: Wendy E. Zicht
WSBA No. 21219

2207 North 30th Street
Tacoma, WA 98403-3320
(253) 752-8889

SMITH GOODFRIEND, P.S.

By: Valerie A. Villacin
WSBA No. 34515
Duffy G. Romnor
WSBA No. 52822

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorneys for Respondent

TABLE OF CONTENTS

I. INTRODUCTION 1

II. RESTATEMENT OF ISSUES 3

III. RESTATEMENT OF THE CASE 4

A. The parties divorced in 2015 after the mother began a relationship with a man living in Australia and bore his child. The parties agreed to a 50-50 parenting plan for their school-age children. 4

B. The agreed parenting plan anticipated flexibility in the equal residential schedule to accommodate the mother's international travel, and by giving each parent the right to care for the children if the other was unavailable for at least six hours. 5

C. In May 2017, the mother petitioned to modify the parenting plan to allow her to immediately relocate the children to Australia. 6

D. The trial court found no adequate cause because there was no evidence of changed circumstances for father or children, no evidence that the father consented to a permanent change, and modification was not in the children's best interest. 8

IV. ARGUMENT 11

A. The trial court properly considered the record before the commissioner in revising the commissioner's orders 11

B. The trial court properly dismissed the petition for modification after finding that Renae failed to show adequate cause warranting a major modification of the 50-50 parenting plan. 13

1. It is within the trial court's discretion to determine whether a party has met the "high burden" of showing adequate cause. 13

2. The mother failed to present evidence on each of the necessary factors to establish adequate cause for a major modification of the parenting plan. 15

3. Adequate cause could not be shown when any changes to the residential schedule were anticipated and were not in substantial deviation of the parenting plan. 18

4. The mother presented no evidence that the father consented to a permanent change in the parenting plan or surrendered his right to equal residential time. 20

5. The mother failed to show that her requested modification was "necessary to serve the best interests of the children". 24

C. In the unlikely event of remand, this case should return to the same judge who considered the matter because the mother fails to present any evidence of bias. 25

D. This Court should award attorney fees to the father. 27

V. CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

Cases

Bus. Servs. of Am. II, Inc. v. WaferTech LLC,
159 Wn. App. 591, 246 P.3d 257 (2011),
aff'd, 174 Wn.2d 304, 274 P.3d 1025 (2012) 26

Clark v. Gunter,
112 Wn. App. 805, 51 P.3d 135 (2002)..... 18-19

Custody of Halls,
126 Wn. App. 599, 109 P.3d 15 (2005) 24

Dependency of B.S.S.,
56 Wn. App. 169, 782 P.2d 1100 (1989),
rev. denied, 114 Wn.2d 1018 (1990) 12-13

In re Jannot,
110 Wn. App. 16, 37 P.3d 1265 (2002), *aff'd sub nom. Parentage of Jannot*, 149 Wn.2d 123, 65 P.3d 664 (2003), *as amended* (Apr. 30, 2003).....16

Kane v. Smith,
56 Wn.2d 799, 355 P.2d 827 (1960) 12

Leslie v. Verhey,
90 Wn. App. 796, 954 P.2d 330 (1998),
rev. denied, 137 Wn.2d 1003 (1999)..... 27

Marriage of Brewer,
137 Wn.2d 756, 976 P.2d 102 (1999) 19

Marriage of Dodd,
120 Wn. App. 638, 86 P.3d 801 (2004).....13

Marriage of Lemke,
120 Wn. App. 536, 85 P.3d 966,
rev. denied, 152 Wn.2d 1025 (2004) 16, 26

Marriage of Lyle,
199 Wn. App. 629, 398 P.3d 1225 (2017) 13

Marriage of Meredith,
148 Wn. App. 887, 201 P.3d 1056,
rev. denied, 167 Wn.2d 1002 (2009) 25

Marriage of Ruff & Worthley,
198 Wn. App. 419, 393 P.3d 859 (2017) 14

Marriage of Shyrock,
76 Wn. App. 848, 888 P.2d 750 (1995) 17, 21, 23-24

Marriage of Taddeo-Smith & Smith,
127 Wn. App. 400, 110 P.3d 1192 (2005).....20-22

Marriage of Thompson,
32 Wn. App. 418, 647 P.2d 1049 (1982) 21-23

Marriage of Timmons,
94 Wn.2d 594, 617 P.2d 1032 (1980).....17, 23

Marriage of Tomsovic,
118 Wn. App. 96, 74 P.3d 692 (2003).....19

Owens v. Anderson,
58 Wn.2d 448, 364 P.2d 14 (1961).....12

Parentage of Jannot,
149 Wn.2d 123, 65 P.3d 664 (2003),
as amended (Apr. 30, 2003).....14-15

Parentage of Schroeder,
106 Wn. App. 343, 22 P.3d 1280 (2001).....14

State v. Trask,
91 Wn. App. 253, 957 P.2d 781 (1998), *as amended*
on denial of reconsideration (Aug. 21, 1998),
amended, 974 P.2d 1269 (Wash. Ct. App. 1999) 10

Welfare of Shope,
23 Wn. App. 567, 596 P.2d 1361 (1979) 12

Statutes

RCW 2.24.050.....11, 13

RCW 26.09.140 27

RCW 26.09.260 ..... *Passim*

RCW 26.09.270 14

Rules and Regulations

CR 54 10

RAP 2.2 10

RAP 18.1 28

I. INTRODUCTION

The trial court properly determined that the mother failed to meet the high burden of proving adequate cause for a major modification of the parties' parenting plan. In her appeal, the mother does not dispute that she was required to prove a basis for major modification under RCW 26.09.260 if she wished to modify the parties' 50-50 parenting plan to relocate the children to Australia where her new husband lives. Instead, the basis for her appeal is the meritless claim that the trial court "disregarded" her evidence that the children were "integrated into her family."

RCW 26.09.260 requires more than evidence that the children spend additional time with the petitioning parent. The trial court properly found that the mother failed to show adequate cause for her requested modification based on "integration" when she presented no evidence that the father consented to a permanent change in the parenting plan or waived his right to equal time, by accommodating the mother's requests for international travel with the children, and by complying with the first right of refusal provision of the parenting plan, which requires the parents to offer time to the other parent if that parent is unavailable for at least six hours during his or her residential time.

The trial court also properly found the mother's petition for modification lacked adequate cause when there was no "substantial change in circumstances" of the father or children as required by RCW 26.09.260(1). The parenting plan anticipated that deviations in the residential schedule might occur by allowing for the children's international travel, providing for the first right of refusal, and not requiring makeup time. Instead, as the trial court found, the only substantial change in circumstances was in the mother's own situation due to her desire to relocate to Australia.

The trial court properly dismissed the mother's petition for modification when she failed to present sufficient facts to support her claim that modification was warranted on the basis of integration. This is particularly true when the mother also failed to present facts that her proposed modification, which would disrupt the children's equal residential schedule with both parents by moving the children to Australia, was "necessary to serve the best interests of the children," as required by RCW 26.09.260(1). This Court should affirm the trial court's wholly discretionary decision, and award attorney fees to the father.

II. RESTATEMENT OF ISSUES

1. On revision, the trial court has full jurisdiction over the case considered by the commissioner and reviews the facts and issues before the commissioner de novo. Did the trial court err in finding that some pleadings presented on revision were irrelevant to its consideration of the issues that were before the commissioner?

2. Demonstrating adequate cause for a hearing on a petition to modify the parenting plan is a high burden, and the petitioner must present evidence on each fact that she must prove in order to modify. Did trial court abuse its discretion when it found that the mother had not shown adequate cause because she presented no evidence that the circumstances of the father or children had changed, offered no proof that the father had consented to a permanent change in the residential schedule, and presented no evidence that her proposed modification was necessary to serve the children's best interest?

3. Whether merely ruling against a party and making benign factual comments, including referring to Australia as a "foreign country" that is located in the "southern hemisphere," demonstrates that a trial court is prejudiced against that party?

III. RESTATEMENT OF THE CASE

A. The parties divorced in 2015 after the mother began a relationship with a man living in Australia and bore his child. The parties agreed to a 50-50 parenting plan for their school-age children.

Respondent Andrew Cooper and appellant Renae Grady are the parents of two children, born in 2006 and 2009. (CP 116) Renae, a flight attendant with Alaska Airlines, moved out of the family home in 2014 after beginning an intimate relationship with Rich Grady, an airline pilot living in Australia. (CP 64, 116-17) Renae's daughter with Mr. Grady was born later that year. (CP 116)

When Andrew and Renae divorced on August 18, 2015, they agreed to 50-50 parenting plan for their children. (CP 18-26, 41-45) The plan anticipated that the children would reside with each parent on rotating weekends, reside with Andrew on Mondays and Tuesdays, and reside with Renae on Wednesdays and Thursdays (a "2-2-5" schedule). (CP 19, 117) The agreed plan designated both parents as the children's custodians for purposes of state and federal statutes, gave them equal decision-making authority, and expressly established the U.S. as "the habitual residence of the children." (CP 22, 24, 28)

B. The agreed parenting plan anticipated flexibility in the equal residential schedule to accommodate the mother's international travel, and by giving each parent the right to care for the children if the other was unavailable for at least six hours.

Andrew and Renae worked "amicably" to co-parent their children after the divorce, often deviating from the residential schedule to accommodate each other. (CP 117; *see also* RP 7-8; CP 65) Renae "frequently" requested "last-minute changes to the [residential] schedule," when "more desirable Alaska flights and plans became available." (CP 118) Further, Andrew often cared for Renae's daughter with Mr. Grady during his residential time with the older children. (116-17)

The parties had anticipated flexibility in the residential schedule by including a provision in the parenting plan that allowed a parent to care for the children if the other parent was unavailable for at least 6 hours during his or her residential time. (CP 27) Because the father of Renae's youngest child lived in Australia, the parties also "envisioned that Renae would continue to travel to Australia." Thus, the parenting plan contained several travel provisions so that the older children could accompany their mother on international trips. (CP 28, 117)

Andrew also accommodated Renae's requests for other international travel because he believed these "unique experience[s]" would "benefit" the children even though they interfered with his residential time. (CP 121) In June-July 2016, Andrew agreed that Renae could take the children on a 25-day trip to Portugal. (CP 121) In January 2017, Andrew agreed that Renae could take the children to Japan. (CP 121)

Because the parenting plan did not provide for makeup time in the event of international trips or for a parent's exercise of the first right of refusal provision, the actual residential schedule may have differed from the exact equal residential schedule under the parenting plan. However, the parties intended to maintain the equal residential schedule, even trying a week-on/week-off schedule in Fall 2016 before agreeing to return to the 2-2-5 schedule under the parenting plan. (CP 118)

C. In May 2017, the mother petitioned to modify the parenting plan to allow her to immediately relocate the children to Australia.

In March 2017, Renae asked Andrew to allow the children to relocate to Australia because she planned to marry Rich Grady, her younger daughter's father, and "create a home and proper life" with

him. (CP 114, 130) Based in part on the international trips she had made with the children, Renae now claimed that "over the last 9 months, our residential time actually averages out to be 30/70" — although she admitted that "there are many factors for this, including [ ] my requests to travel with the kids and our right of refusal agreement." (CP 131)

On April 28, 2017, Renae and Rich Grady married. (CP 120) On May 16, 2017, Renae moved for a major modification of the parenting plan, claiming that the children had been integrated into her household in deviation of the 50-50 parenting plan and that she has now "remarried and intends to move to Australia [ ]. This will make the current parenting plan unworkable." (CP 52-54)

Renae's proposed parenting plan would require both the children and Andrew, who had also remarried, to travel frequently between the U.S. and Australia. (CP 68; *see also* 232) Renae proposed that the children travel to the U.S. "for all school breaks, from the day after school is released until the day before school resumes." (CP 98) This would require the children to fly from Australia to the U.S. and then make a return flight about 14 times a

year, with each leg of the trip being around 20 hours. (CP 125) Renae also proposed that Andrew (whose employer gives him just over two weeks of vacation a year) be given "up to 10 additional weeks [with the children] per year," but only if he exercised that residential time in Australia. (CP 98, 144-45)

On June 22, 2017, a court commissioner found adequate cause for Renae's petition and granted a temporary order allowing Renae to move the children to Australia by July 10. (CP 188, 192-93; *see also* 194-200) On June 29, 2017, Andrew moved to revise the commissioner's orders. (CP 217-18, 220-21) The parties agreed to stay the order that would have allowed Renae to move the children to Australia, pending a decision on revision. (CP 277-78)

D. The trial court found no adequate cause because there was no evidence of changed circumstances for father or children, no evidence that the father consented to a permanent change, and modification was not in the children's best interest.

On July 28, 2017, Pierce County Superior Court Judge Stanley Rumbaugh granted Andrew's motion for revision. (CP 297-98; RP 1) The trial court began the hearing by noting that it had reviewed "much of the material" submitted for the hearing, but that some materials were irrelevant to its consideration of Renae's motion for adequate cause based on integration. (RP 3) The trial court stated

the "premise from which [it] launched" its analysis was whether there was consent by Andrew to make a permanent change, stating, "leaving aside the issue of integration, [the statute] also requires consent." (RP 13)

The trial court found that the parenting plan reflected an agreement "to be flexible and to cooperate" (RP 7), and that any deviations from the residential schedule were due to Andrew's "willingness to follow [Renae]'s requests to take the children to Japan or wherever else she wanted to take them." (RP 33) The trial court found that Andrew's inability to "pick up the days he lost" under the plan (which did not require makeup days) was not evidence of his consent to make a permanent change to the parenting plan or to give up his time with the children. (RP 33-34; *see also* CP 297-98) The trial court further found that the change in circumstances, which precipitated Renae's petition for modification, was "created by [Renae's] desire to move to Australia," and was not due to any changes in the circumstances of Andrew or the children. (CP 297-98)

The trial court also found that modifying the parenting plan to allow Renae to relocate the children to Australia was not necessary to serve the best interests of the children. (CP 298) Instead, the trial

court found that "this evolution of circumstances is not driven by what the children need. It is driven by what [Renae] wants." (RP 28; *see also* CP 298) The trial court questioned the timing of Renae's petition for modification and request for a temporary parenting plan that would immediately relocate the children to another country in the middle of the school year there, which would be disruptive for the children and not in their best interests. (RP 46; CP 298) The trial court denied adequate cause, vacated the commissioner's temporary order which would have allowed the children's immediate relocation to Australia, and dismissed Renae's petition for modification based on her integration claim. (CP 297-98)

Renae appeals.[1] (CP 299)

---

[1]Renae sought to amend her petition to include an alternate request for a minor modification and to claim that the "children's current living situation is harmful" as an additional ground for a major modification. (CP 268-74) Although the father did not oppose her request to amend, the mother never filed an amended petition, and thus should be deemed to have abandoned those claims by filing a notice of appeal of the order dismissing the action based on the integration claim. (*See* CP 268-76, 298; RP 6) By appealing this order as a final judgment under RAP 2.2(a)(1), the mother recognized it as a "final determination of the rights of the parties in the action." CR 54(a)(1); *State v. Trask*, 91 Wn. App. 253, 265, 957 P.2d 781 (1998) ("As a general rule, however, a party may appeal only when the trial court has finally disposed of all claims and all parties."), *as amended on denial of reconsideration* (Aug. 21, 1998), *amended,* 974 P.2d 1269 (Wash. Ct. App. 1999).

IV. ARGUMENT

A. The trial court properly considered the record before the commissioner in revising the commissioner's orders.

The trial court properly granted revision based on the "records of the case, and the findings of fact and conclusions of law entered by the court commissioner," as required by RCW 2.24.050. Nevertheless, Renae complains that the trial court failed to consider the "entire record" before the commissioner. (App. Br. 6-7) This challenge is apparently based on the court's comment that after reviewing "much of the material" it found that "not all of [the pleadings provided] really mattered to the issue [of claimed integration] before the Court." (RP 3) But Renae does not identify which materials the trial court supposedly ignored that were before the commissioner. (App. Br. 6-7) In fact, it is not clear from the trial court's comment that the pleadings it found irrelevant had even been before the commissioner. For instance, the record before the commissioner consisted of 15 documents, whereas the record before the trial court on revision was nearly double, containing 29 documents. (*Compare* CP 309-10, *with* CP 311-13)

Renae does not claim that the trial court considered evidence that was not before the court commissioner. And as she did not ask the trial court which pleadings it considered irrelevant, Renae cannot show that those pleadings had been before the commissioner or that the trial court's alleged failure to consider them impacted the trial court's ruling. Thus, Renae cannot show there was in fact any error. *Kane v. Smith*, 56 Wn.2d 799, 806, 355 P.2d 827 (1960) ("Unless the error is obvious, the burden of demonstrating the error is on the appellant.").

In any event, the trial court had complete discretion to determine which evidence before the commissioner was relevant in deciding the motion for revision. *See Owens v. Anderson*, 58 Wn.2d 448, 450-51, 364 P.2d 14 (1961) ("The relevancy of an exhibit to the issues as joined by the pleadings is a determination within the discretion of the trial court."); *Welfare of Shope*, 23 Wn. App. 567, 569, 596 P.2d 1361 (1979) ("Questions of relevancy and the admissibility of evidence are within the discretion of the trial court subject to review for manifest abuse of discretion."). Once a superior court judge receives a case through a motion for revision, it "has full jurisdiction over the case and its power of review is essentially unlimited. It may conduct whatever proceedings it deems necessary

to resolve the matter." *Dependency of B.S.S.*, 56 Wn. App. 169, 171, 782 P.2d 1100 (1989) (citations omitted), *rev. denied*, 114 Wn.2d 1018 (1990).

"Although the superior court judge cannot accept new evidence, RCW 2.24.050, a motion on revision is in all other respects equal to any other matter on the court's docket. The judge reviews the law and evidence de novo." *Marriage of Lyle*, 199 Wn. App. 629, 632, ¶ 8, 398 P.3d 1225 (2017). With "full jurisdiction over the case," the trial court has authority to perform "an independent review of the record, [and] redetermine both the facts and legal conclusions drawn from the facts." *Marriage of Dodd,* 120 Wn. App. 638, 645, 86 P.3d 801 (2004). That is exactly what the trial court did here, it conducted its own review of the record, including determining which pleadings were relevant, and in doing so, it properly granted revision of the commissioner's ruling.

B. The trial court properly dismissed the petition for modification after finding that Renae failed to show adequate cause warranting a major modification of the 50-50 parenting plan.

1. It is within the trial court's discretion to determine whether a party has met the "high burden" of showing adequate cause.

The trial court properly dismissed Renae's petition for modification after finding that she failed to meet her burden of

showing adequate cause for her proposed modification. "There is a strong presumption *against* modification because changes in residences are highly disruptive to children." *Parentage of Schroeder*, 106 Wn. App. 343, 350, 22 P.3d 1280 (2001) (emphasis added). "[I]t is the moving party's burden to prove [that] a modification is appropriate." *Schroeder*, 106 Wn. App. at 350.

The party seeking a modification is not automatically entitled to a full hearing. RCW 26.09.270. First, a court must "find [ ] that adequate cause for hearing the motion is established by the affidavits." RCW 26.09.270. Demonstrating adequate cause is a "high burden," which "fulfils the policy to maintain the existing pattern of the parent-child relationship to protect the best interest of the child." *Marriage of Ruff & Worthley*, 198 Wn. App. 419, 429, ¶ 23, 393 P.3d 859 (2017).

This Court reviews a decision on adequate cause for abuse of discretion because a trial judge is "in a better position than an appellate judge to decide whether submitted affidavits establish adequate cause for a full hearing on a petition to modify a parenting plan." *Parentage of Jannot*, 149 Wn.2d 123, 126, 65 P.3d 664 (2003), *as amended* (Apr. 30, 2003). "Because adequate cause determinations are fact intensive, we recognize that 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." *Jannot,* 149 Wn.2d at 127.

2. The mother failed to present evidence on each of the necessary factors to establish adequate cause for a major modification of the parenting plan.

Renae challenges the trial court's decision finding that her petition lacked adequate cause, complaining that the trial court was focused on "whether deviations from the parenting plan changes the fact that it is a 50/50 plan." (App. Br 10) However, the trial court's comment that the parties indeed had a "joint plan" based on "what the actual document says" was directed to Renae's argument that the parties had never intended to actually follow the parenting plan. (*See* CP 166-67; RP 7 (the trial court "had already determined that there wasn't a precast agreement not to conform with the plan"))

On appeal, Renae does not claim that she was entitled to modify the parenting plan because the parties agreed in advance to not follow the 50-50 parenting plan, and concedes on appeal that "the mother had never argued that the parenting plan was anything other than a 50/50 designation." (App. Br. 10) Renae also does not dispute that in order to modify the parties' 50-50 parenting plan to

allow the children to relocate with her to Australia, she had to prove a basis for a major modification under RCW 26.09.260(1), (2).

Renae's petition was based on her claim that "the child[ren] had been integrated into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan." RCW 26.09.260(2)(b). The trial court properly found that the mother failed to meet her burden of establishing adequate cause based on her claim of "integration." (CP 298) "At the very minimum, 'adequate cause' means evidence sufficient to support a finding on each fact that the movant must prove in order to modify." *Marriage of Lemke*, 120 Wn. App. 536, 540, 85 P.3d 966, *rev. denied*, 152 Wn.2d 1025 (2004). The affidavits must contain "something more than prima facie allegations." *In re Jannot*, 110 Wn. App. 16, 23, 37 P.3d 1265 (2002), *aff'd sub nom. Parentage of Jannot*, 149 Wn.2d 123, 65 P.3d 664 (2003), *as amended* (Apr. 30, 2003).

In dismissing Renae's petition, the trial court did not "disregard the evidence of integration." (App. Br. 7) The trial court properly recognized that RCW 26.09.260 requires more than showing that the non-moving parent allowed the children to spend

time with the moving party during the non-moving parent's scheduled residential time. (*See* RP 13 ("[l]eaving aside the issue of integration, because that also requires consent"))

Even if the children spent more time with the mother than provided under the parenting plan, which the father does not concede,[3] that "does not alone establish integration" warranting a finding of adequate cause for modification of the parenting plan. *Marriage of Shyrock*, 76 Wn. App. 848, 851, 888 P.2d 750 (1995); *see also Marriage of Timmons*, 94 Wn.2d 594, 601, 617 P.2d 1032 (1980) (while it is a factor, "time spent with each parent is not determinative" on the issue of integration).

To show adequate cause based on integration, the moving party must show that any integration was "with the consent of the other parent in substantial deviation from the parenting plan." RCW 26.09.260(2)(b). Further, any request to modify the parenting plan due to integration must be based upon "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

---

[3] The father challenged the mother's assertions that the children were in her household for the amount of time that she claims. (*See, e.g.*, CP 176 (Renae admitted her original diagram was incorrect after taking a "second look"))

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." RCW 26.09.260(1). Because Renae failed to present evidence on each of the factors to warrant modifying the parenting plan in her motion for adequate cause, the trial court properly dismissed Renae's petition.

3. Adequate cause could not be shown when any changes to the residential schedule were anticipated and were not in substantial deviation of the parenting plan.

The trial court properly dismissed Renae's petition for modification because the facts underlying her petition had not "arisen since the prior decree or plan" and there was no showing "that a substantial change has occurred in the circumstances of the child or the nonmoving party." RCW 26.09.260(1). Renae asserts that "a finding of 'integration with consent' itself fulfills the 'substantial change' requirement under RCW 26.09.260(1)." (App. Br. 10, citing *Clark v. Gunter,* 112 Wn. App. 805, 809, 51 P.3d 135 (2002)) However, in *Clark v. Gunter,* this Court held that the trial court did not have to analyze whether there had been a substantial change before modifying the parenting plan, since it was unchallenged that the nonmoving party "consented to the child's integration" into the other parent's home, thus the parties

"stipulated to a substantial change." 112 Wn. App. at 809. Here, "integration with consent" was challenged, and the parties did not stipulate to a substantial change.

In any event, Renae does not challenge the trial court's finding that "any substantial change in circumstances were created by [her] desire to move to Australia." (CP 297-98) This finding is therefore a verity on appeal. *Marriage of Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999). Further, that the children might spend time with Renae during their scheduled residential time with Andrew was not "unanticipated by parties." *See Marriage of Tomsovic,* 118 Wn. App. 96, 102, 108, 74 P.3d 692 (2003) (any changes must be "unanticipated by the parties," otherwise modification is not warranted). Nor was it a "substantial deviation" from the parenting plan, warranting modification. The parenting plan anticipated deviations from the 2-2-5 residential schedule by allowing the children to travel internationally with the other parent, with no right to makeup time for the non-travelling parent, and granting the parents the right to provide care for the children during the other parent's residential time if that parent is unavailable for at least 6 hours. (*See* CP 27-28, ¶¶ G, K, O-R)

While the trial court found there was no "precast agreement not to conform with the [parenting] plan," it did find based on the terms of the parenting plan that the parents intended to be flexible and accommodating with each other. (RP 7; *see, e.g.*, CP 65, 118, 166) Under these circumstances, the trial court properly concluded that even if the mother could prove the children were in her household more than 50% of the time, which the father disputes, this would be neither a substantial change in circumstances nor a substantial deviation from the parenting plan, warranting a hearing on her petition to modify the parenting plan.

4. The mother presented no evidence that the father consented to a permanent change in the parenting plan or surrendered his right to equal residential time.

The trial court also properly dismissed Renae's petition for modification when she presented no evidence that Andrew consented to give up his right to equal residential time under the parenting plan. "'Consent' refers to a voluntary acquiescence to surrender of legal custody." *Marriage of Taddeo-Smith & Smith*, 127 Wn. App. 400, 402, ¶ 1, 110 P.3d 1192 (2005). Andrew "never asked for or agreed to a reduction in time with" his children. (CP 120)

The trial court properly recognized that evidence of a parent's acquiescence to a temporary change to the residential schedule as an

accommodation to the other parent is not "consent" to a permanent change in the parenting plan. (*See* RP 33 (acknowledging that any changes to the residential schedule was at the *mother's* request)) In fact, even if the requested changes were made on behalf of the non-moving party to accommodate his own schedule, our courts have regularly rejected this as evidence of "consent" to a permanent modification. *See Taddeo-Smith,* 127 Wn. App. at 402, ¶ 1 (reversing a finding that the mother consented to permanently place children in the father's primary care when she acquiesced to allow the children to reside with the father for an indefinite time after she was hospitalized after a car accident that left her quadriplegic); *Marriage of Thompson*, 32 Wn. App. 418, 421, 647 P.2d 1049 (1982) (reversing a finding that the mother consented to a change in legal custody simply because she asked the father to care for the children for five months due to a period of financial difficulty); *Shyrock,* 76 Wn. App. at 850-51 (holding that the mother did not consent to a permanent deviation of the parenting plan by agreeing to changes to the residential schedule while she relocated to a new residence).

In this case, the trial court properly concluded that the father did not consent to a permanent deviation in the equal residential schedule established by the parenting plan. (CP 297-98) Instead, as

the trial court acknowledged and the record supports, any changes were temporary and were due to the parties amicably and flexibly cooperating as they juggled their careers, personal lives, and the demands of joint parenting. (*See* RP 7 ("There was an agreement to be flexible and to cooperate. And the parties did that."); CP 64 (Renae acknowledged that the parties "deviated from the parenting plan by simply arranging visitation as it suited our schedules"); CP 65 ("Andrew and I were able to work together to accommodate both of our schedules"); CP 166 ("Andrew and I agreed to be flexible with our parenting arrangement."))

The trial court also properly rejected the mother's claims that the father consented to a permanent change when there was evidence that the father continued to assert his right to an equal residential schedule, even before the mother expressed her desire to move and before she filed her petition for modification. (CP 118-19, 293) *See Taddeo-Smith,* 127 Wn. App. at 406-07, ¶¶ 10-11 (mother did not consent to permanent change because there was evidence that the mother told the father of her intent to have the children returned to her home as soon as she was physically capable of caring for them); *Thomson,* 32 Wn. App. at 421 (mother did not consent to a permanent change when the parties had agreed that the children

would be returned to the mother by a certain date); *Shryock*, 76 Wn. App. at 851 (that the mother requested to resume the original residential schedule was substantial evidence that she had not consented to integration).

Although consent to integration may be shown "by the creation of an expectation in the other parent *and* in the children that a change in physical custody would be permanent," *Timmons,* 94 Wn.2d at 601, Renae offered no evidence that the children believed that there was a "permanent" change in their living arrangements. Renae also did not provide evidence that *she* believed that Andrew consented to a permanent change to the 50-50 residential schedule. Instead, the record reveals that Renae knew Andrew never consented to integration. If she had the "expectation" that the alleged 30/70 residential schedule was "permanent," there would have been no reason for her to ask Andrew to agree to "continue" that schedule. (CP 131)

Because there was no evidence that the father consented to give up his right to equal time under the parenting plan, the trial court properly dismissed Renae's petition for modification.

5. The mother failed to show that her requested modification was "necessary to serve the best interests of the children".

The trial court also properly dismissed Renae's petition for modification of the parenting plan when, regardless of her other assertions, she failed to show that "modification is in the best interest of the child[ren] and is necessary to serve the best interests of the child[ren]." RCW 26.09.260. Even if a parent is able to present sufficient facts on the other factors under RCW 26.09.260, "absent a finding that modification is in the best interests of a child," the court cannot modify the parenting plan. *Custody of Halls*, 126 Wn. App. 599, 607, ¶ 21, 109 P.3d 15 (2005) (despite the moving party presenting sufficient facts to support modification because the nonmoving party was held in contempt twice within three years, the trial court erred in modifying the parenting plan when there was no evidence that it was in the best interests of the children); *Shryock*, 76 Wn. App. at 851 (the burden is on the moving party to demonstrate that a modification is required "to protect the best interests of the child[ren]").

Here, the trial court properly determined that modification was not necessary to protect the best interests of the children, particularly since the proposed modification would have the children

relocate to Australia, thus destroying the continuity of the children's established relationship with their father and with the community they have lived in their entire lives. (RP 46; CP 124; *see also* CP 140-41)

Because Renae failed to meet her "high burden" of showing adequate cause under RCW 26.09.260 to modify the parenting plan, the trial court acted well within its discretion to revise the commissioner's ruling and dismiss Renae's petition for modification. This Court should affirm.

C. In the unlikely event of remand, this case should return to the same judge who considered the matter because the mother fails to present any evidence of bias.

As the trial court's decision dismissing Renae's petition for modification was well within its discretion, it is not necessary to determine whether remand to a different judge is warranted based on the trial court's alleged bias. But in any event, the trial court was not prejudiced or biased against Renae. "A trial court is presumed to perform its functions regularly and properly without bias or prejudice." *Marriage of Meredith*, 148 Wn. App. 887, 903, ¶ 29, 201 P.3d 1056, *rev. denied*, 167 Wn.2d 1002 (2009). Renae has the burden of producing evidence of prejudice. *Meredith*, 148 Wn. App. at 903, ¶ 30. That the trial court ruled against Renae does not

constitute prejudice. *See, e.g., Bus. Servs. of Am. II, Inc. v. WaferTech LLC*, 159 Wn. App. 591, 600, ¶ 15, 246 P.3d 257 (2011) (no evidence of bias even where the trial court committed a legal error when ruling against the appellant), *aff'd,* 174 Wn.2d 304, 274 P.3d 1025 (2012).

To allege prejudice, Renae takes snippets of the trial court's comments out of context and attempts to recast them as sinister. For example, Renae faults the trial court for observing that she wants to move the children to the "southern hemisphere" and to a "foreign country." (App. Br. 14, *citing* RP 31, 46). Her argument that these comments evidence prejudice is baffling considering that Australia *is* a foreign country located in the southern hemisphere.

Renae also takes issue with the court's finding that the change in circumstances is of her "own making" and that the change is being "driven by what [Renae] wants," not "what the children need." (*See* RP 28, 46; App. Br. 14). Renae seems to forget that at an adequate cause hearing, the judge must determine if the moving party has presented "evidence sufficient to support a finding on each fact that the movant must prove in order to modify." *Lemke*, 120 Wn. App. at 540. Among those "facts" are whether there has been a change in the

circumstances of the children or Andrew and whether modification is necessary to serve the best interests of the children. RCW 26.09.260(1).

Finally, Renae exaggerates the number of times the trial court commented on her extramarital pregnancy — Renae claims that the trial court made "repeated comments regarding [her] getting pregnant during the marriage." (App. Br. 14) This is not true. The trial court made one neutral comment regarding Renae's pregnancy and did not chastise or in any way indicate disapproval of Renae's life choices. (*See* RP 28) Renae has not carried her burden of proving any prejudice on the part of the trial court and this court should rule in Andrew's favor.

D. This Court should award attorney fees to the father.

This court should award Andrew his attorney fees on appeal based on his need, Renae's ability to pay, and the lack of merit to her appeal. RCW 26.09.140; *Leslie v. Verhey*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). Renae's household enjoys significantly greater income than Andrew's household and she has the ability to pay his attorney fees for having to respond to this meritless appeal of a fact-based discretionary

decision by the trial court. Andrew will comply with RAP 18.1 and submit a financial declaration.

V. CONCLUSION

Renae offered no evidence showing that either the circumstances of the children or Andrew had changed, provided no proof that Andrew had consented to integration, and proposed a parenting plan that is not in the children's best interest. The trial court appropriately exercised its discretion when it found that Renae had not satisfied the high burden of adequate cause and, thus, in granting Andrew's motion for revision. For the foregoing reasons, this Court should affirm the trial court's decision and award attorney fees to Andrew.

Dated this 12 day of January, 2018.

LAW OFFICE OF WENDY E. ZICHT

By: [signature] for:
Wendy E. Zicht
WSBA No. 21219

SMITH GOODFRIEND, P.S.

By: [signature]
Valerie A. Villacin,
WSBA No. 34515
Duffy G. Romnor
WSBA No. 52822

Attorneys for Respondent

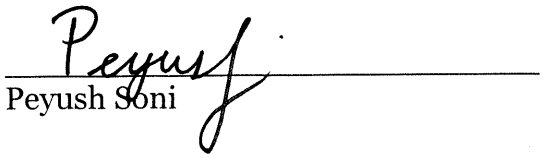
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on January 12, 2018, I arranged for service of the foregoing Brief of Respondent, to the Court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway #300 Tacoma, WA 98402	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-File
Wendy Zicht Law Office of Wendy Zicht 2207 North 30th Street Tacoma WA 98403 attyzicht@earthlink.net paralegal.zichtlaw@gmail.com	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Service
J. Alece Cox Counsell Murphy & Cox, PS 8849 Pacific Ave Tacoma, WA 98444-6474 alececox@gmail.com	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Service
Nicole Bolan Blado Kiger Bolan, PS 4717 S. 19th St. Ste 109 Tacoma WA 98405-1167 Nicole@bkb-law.com heather@bkb-law.com	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Service

DATED at Seattle, Washington this 12th day of January, 2018.



Peyush Soni

SMITH GOODFRIEND, PS

January 12, 2018 - 4:27 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51067-7
Appellate Court Case Title:	In re the Marriage of: Renae E. Grady, fka Cooper, Appellant v. Andrew Cooper, Respondent
Superior Court Case Number:	15-3-02992-3

The following documents have been uploaded:

- 510677_Briefs_Plus_20180112162522D2944913_7329.pdf
  This File Contains:
  Affidavit/Declaration - Service
  Briefs - Respondents
  The Original File Name was 2018 01 12 Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- Nicole@bkb-law.com
- alececox@gmail.com
- attyzicht@earthlink.net
- cate@washingtonappeals.com
- duffy@washingtonappeals.com
- heather@bkb-law.com
- paralegal.zichtlaw@gmail.com

Comments:

Brief of Respondent

Sender Name: Peyush Soni - Email: peyush@washingtonappeals.com
Filing on Behalf of: Valerie A Villacin - Email: valerie@washingtonappeals.com (Alternate Email:)

Address:
1619 8th Avenue N
Seattle, WA, 98109
Phone: (206) 624-0974

Note: The Filing Id is 20180112162522D2944913