

No. 28919-2-III

**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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**TIA LINK,  
APPELLANT**

**V.**

**PAMELA LINK,  
RESPONDENT**

---

**OPENING BRIEF OF APPELLANT TIA LINK**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....v

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED.....1

    Assignments of Error.....1

        1. The trial court erred by requiring a showing of adequate cause prior to modification of the agreed nonparental custody order entered by Tia Link and her mother Pamela Link.....1

        2. The statutes requiring adequate cause prior to modification of a nonparental custody decree are unconstitutional as applied where the original decree was by consent and Tia Link, the biological parent, was never afforded the benefit of the constitutional presumption of fitness.....1

        3. The application of the modification statutes to parents such as Tia Link who consent to nonparental custody decrees is manifest error affecting a constitutional right.....2

        4. The application of the modification statutes to parents such as Tia Link who consent to nonparental custody decrees is structural error.....2

    Issues Pertaining to Assignments of Error.....2

        1. Whether Washington courts have the equitable power to implement custody decrees or parenting plans that may be reviewed in the future without a showing of adequate cause.....2

2. Whether adequate cause must be shown prior to modification of a custody decree or parenting plan entered into by consent.....	2
3. Whether the statutes governing modification of nonparty custody orders and parenting plans - RCW 26.09.260, -.270 and RCW 26.10.190, -.200 - are unconstitutional as applied to Tia Link where she entered into a nonparental custody order by consent and was never afforded the constitutional presumption of fitness.....	2
4. Whether Tia Link validly waived her right to application of the constitutionally required presumption of parental fitness and heightened detriment standard by consenting to a nonparental custody order.....	2
5. Whether requiring Tia Link to show adequate cause prior to modification of the nonparental custody order entered into by consent was manifest error affecting a constitutional right.....	2
6. Whether requiring Tia Link to show adequate cause prior to modification of the nonparental custody order entered into by consent was structural error.....	2
7. Whether the issues regarding modification of nonparental custody orders entered into by consent are properly before this Court.....	2
III. STATEMENT OF THE CASE.....	3
IV. ARGUMENT.....	9
Standard of Review.....	9
Constitutional and Statutory Scheme Governing Child Custody Orders and Parenting Plans.....	10

1. The trial court erred by requiring Tia Link to show adequate cause as a precondition to a hearing on modification of the agreed nonparental custody decree/parenting plan.....	14
a. Under Washington law, trial courts have inherent equitable powers to implement a custody decree or parenting plan that may be reviewed in the future without a showing of adequate cause.....	14
b. Washington law provides for modification of custody decrees and parenting plans entered by default or consent without a showing of changed circumstances.....	20
2. The statutes requiring adequate cause prior to modification of nonparental custody decrees are unconstitutional as applied where the original decree was by consent and the biological parent was never afforded the benefit of the constitutional presumption of fitness.....	23
a. There is no evidence Tia Link knowingly, intelligently, and voluntarily waived her constitutional rights by joining the nonparental custody petition.....	33
3. The application of the modification statutes to Tia Link is manifest error.....	36
4. The application of the modification statutes to Tia Link and others similarly situated is structural error.....	38
5. Tia Link’s arguments supporting modification without a showing of adequate cause are properly before this Court.....	40
a. This Court has authority under RAP 2.5 to consider cases cited by Tia Link in support of modification under <i>Adler</i> .....	43

b. This Court has authority under RAP 2.5 to consider Tia Link’s arguments regarding the application of the *Ranken/Timmons* rule to nonparental custody decrees entered by consent.....44

6. Tia Link has a statutory right to costs and attorneys fees at the trial court and on appeal.....44

V. CONCLUSION.....45

## TABLE OF AUTHORITIES

### Cases

<i>Aetna Ins. Co. v. Kennedy to Use of Bogash</i> , 301 U.S. 389, 57 S.Ct. 809 (1937).....	34
<i>Arizona v. Fulmanente</i> , 499 U.S. 279, 307 (1991).....	39
<i>Barker v. Wingo</i> , 407 U.S. 514, 92 S.Ct. 2182 (1972).....	34
<i>Bennett v. Hardy</i> , 113 Wn.2d 912, 784 P.2d 1258 (1990).....	37, 41, 42
<i>Brin v. Stutzman</i> , 89 Wn. App. 809, 951 P.2d 291 (1998).....	42
<i>City of Bishop</i> , 82 Wn. App. 850, 920 P.2d 214 (1996).....	35
<i>City of Redmond v. Moore</i> , 151 Wn. 2d 664, 91 P.3d 875 (2004).....	33
<i>City of Tacoma v. Luvене</i> , 118 Wn.2d 826, 827 P.2d 1374 (1992).....	43
<i>E.A.T.W.</i> , 168 Wn.2d 335, 227 P.3d 1284 (2010).....	11, 13
<i>Edelman v. Jordan</i> , 415 U.S. 651, 94 S.Ct. 1347, (1974).....	34
<i>Geroux v. Fleck</i> , 33 Wn. App. 424, 655 P.2d 254 (1982).....	41
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963).....	39

<i>In Carnley v. Cochran</i> , 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962).....	34
<i>In the Custody of Shields</i> , 157 Wn.2d 126, 136 P.3d 117 (2006).....	12, 23
<i>In re Bush</i> , 164 Wn.2d 697, 193 P.3d 103, 108 (2008).....	39
<i>In re. C.A.M.A.</i> , 154 Wn.2d 52, 109 P.3d 405 (2005).....	25, 26
<i>In re Custody of R.R.B.</i> , 108 Wn. App. 602, 31 P.3d 1212 (2001).....	23
<i>In re Custody of Smith</i> , 137 Wn.2d 1, 969 P.2d 21 (1998).....	25, 26
<i>In re Det. of Kistenmacher</i> , 163 Wn.2d 166, 178 P.3d 949 (2008).....	39
<i>In re Detention of Strand</i> , 167 Wn.2d 180, 218 P.3d 1159 (2009).....	10, 33
<i>In re Gibson</i> , 4 Wn. App. 372, 483 P.2d 131, 135 (1971).....	11
<i>In re Hudson</i> , 13 Wn.2d 673, 126 P.2d 765 (1942).....	11
<i>In re Lusicer</i> , 84 Wn.2d 135, 524 P.2d 906 (1974).....	11
<i>In re McDole</i> , 122 Wn.2d 604, 859 P.2d 1239 (1993).....	12
<i>In re Marriage of Adler</i> , 131 Wn. App. 717, 129 P.3d 293 (2006).....	8, 15, 17, 19, 36, 43
<i>In re Marriage of Allen</i> , 28 Wn. App. 637, 626 P.2d 16 (1981).....	23

<i>In re Marriage of Christel and Blanchard</i> , 101 Wn. App. 13, 1 P.3d 600 (2000).....	13
<i>In re Marriage of Kastanas</i> , 78 Wn. App. 193, 896 P.2d 726 (1995).....	10
<i>In re Marriage of Lemke</i> , 120 Wn. App. 536, 85 P.3d 966 (2004).....	14
<i>In re Marriage of McDole</i> , 122 Wn. 2d 604, 859 P.2d 1239 (1993).....	24
<i>In re Marriage of Possinger</i> , 105 Wn. App. 326, 19 P.3d 1109 (2001).....	14, 15, 16, 17, 18, 19
<i>In re Pers. Restrain of Benn</i> , 134 Wn.2d 868, 952 P.2d 116(1998).....	39
<i>In re Rankin</i> , 76 Wn.2d 533, 458 P.2d 176 (1969).....	20, 21, 22, 44
<i>In re Stell</i> , 56 Wn. App. 356, 783 P.2d 615 (1989) review denied, 151 Wn.2d 1017 (2004).....	23
<i>In re Sumey</i> , 94 Wn.2d 757, 621 P.2d 108 (1980).....	27, 29, 30
<i>In re Welfare of BRSH</i> , 14 Wn. App. 39, 169 P.3d 40 (2007).....	24
<i>In re Welfare of G.D.</i> , 116 Wn. App. 326, 65 P.3d 1219 (2003).....	35
<i>In re Welfare of Key</i> , 119 Wn.2d 600, 836 P.2d 200 (1992).....	26, 28, 29
<i>John Doe v. Puget Sound Blood Ctr.</i> , 117 Wn.2d 772, 819 P.2d 370 (1991).....	9

<i>Johnson v. Zerbst</i> , 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).....	33
<i>Jones v. Stebbins</i> , 122 Wn.2d 471, 860 P.2d 1009 (1993).....	41
<i>Krause v. Catholic Comm'ity Servs.</i> , 47 Wn. App. 734, 737 P.2d 280 (1987), <i>review denied</i> , 108 Wn.2d 1035 (1987).....	27
<i>Lahart v. Lahart</i> , 13 Wn. App. 452, 535 P.2d 145 (Ct. App. Division III 1975).....	21
<i>Little v. Little</i> , 96 Wn.2d 183, 634 P.2d 498 (1981).....	16
<i>Marshall v. Higginson</i> , 62 Wn. App. 212, 813 P.2d 1275 (Ct. App. 1991).....	43
<i>New Meadows Holding Co. by Raugust v. Wash. Water and Power Co.</i> , 102 Wn. 2d 495, 687 P.2d 212 (1984).....	42
<i>Obert v. Envtl. Research and Dev. Corp.</i> , 112 Wn. 2d 323, 771 P.2d 340 (1989).....	37, 42
<i>Ohio Bell Tel. Co. v. Public Util. Comm'n of Ohio</i> , 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093 (1937).....	34
<i>Osborn v. Public Hospital Dist. No. 1</i> , 80 Wn.2d 201, 492 P.2d 1025 (1972).....	41
<i>Parham v. J.R.</i> , 442 U.S. 584, 99 S.Ct. 2493, 2502-03, 61 L.Ed.2d 101 (1979).....	27
<i>Parrell-Sisters MHC, LLC v. Spokane County</i> , 147 Wn. App. 356, 195 P.3d 573 (2008).....	38
<i>Phillips v. Phillips</i> , 52 Wn.2d 879, 329 P.2d 833 (1958).....	16

<i>Potter v. Potter</i> , 46 Wn.2d 526, 282 P.2d 1052 (1955).....	16
<i>Progressive Animal Welfare Soc’y v. Univ. of Wn.</i> , 114 Wn.2d 677, 790 P.2d 604 (1990).....	9
<i>Roberson v. Perez</i> , 156 Wn.2d 33, 123 P.3d 844 (2005).....	41, 42
<i>Shoreline Cmty. Coll. Dist. No. 7 v. Employment Sec. Dep’t</i> , 120 Wn.2d 394, 842 P.2d 938 (1992).....	42
<i>State v. Card</i> , 48 Wn. App. 781, 741 P.2d 65 (Ct. App. 1987).....	37, 43
<i>State v. Eckblad</i> , 152 Wn.2d 515, 90 P.3d 1184 (2004).....	10
<i>State v. Fagalde</i> , 85 Wn.2d 730, 539 P.2d 86 (1975).....	43
<i>State v. Ferrier</i> , 136 Wn.2d 103, 960 P.2d 927 (1998).....	33
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	38
<i>State v. Pruitt</i> , 145 Wn. App. 784, 187 P.3d 326, 328 (2008).....	39
<i>State v. Rohrich</i> , 149 Wn.2d 647, 71 P.3d 638 (2003).....	10, 19, 23
<i>State v. Thomas</i> , 128 Wn.2d 553, 910 P.2d 475 (1996).....	33
<i>State Farm Mutual Auto. Ins. Co. v. Amirpanahi</i> , 50 Wn. App. 869, 751 P.2d 329 (Ct. App. 1988).....	41, 44
<i>Timmons v. Timmons</i> , 94 Wn.2d 594, 617 P.2d 1032 (1980).....	21, 22, 44

<i>Troxel v. Granville</i> , 87 Wn. App. 131, 940 P.2d 698 (1997).....	26
<i>Troxel v. Granville</i> , 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).....	10, 25, 26
<i>U.S. v. Gonzalez-Lopez</i> , 548 U.S. 140, 126 S.Ct. 2557 (2006).....	39
<i>United States v. King</i> , 395 U.S. 1, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969).....	34
<i>Walla Walla County Fire Prot. Dist. No. 5 v. Wn. Auto Carriage, Inc.</i> , 50 Wn. App. 355, 745 P.2d 1332 (Ct. App. 1987).....	37, 42
<i>Washburn v. Beatt Equip. Co.</i> , 120 Wn.2d 246, 840 P.2d 860 (1992).....	41
<i>White v. White</i> , 24 Wn.2d 52, 163 P.2d 137 (1945).....	21
<i>Wills v. Kirkpatrick</i> , 56 Wn. App. 757, 785 P.2d 834 (Ct. App. 1990).....	43

**Statutes**

RCW 26.09.....	13, 33
RCW 26.09.187.....	12, 14, 15, 18
RCW 26.09.260.....	8, 13, 14, 15, 18, 19, 24
RCW 26.09.260(1).....	13, 19
RCW 26.09.260(2).....	14
RCW 26.09.270 .....	9, 13
RCW 26.10.....	23, 31, 33
RCW 26.10.080.....	45, 46

RCW 26.10.100.....	23
RCW 26.10.160(3).....	25
RCW 26.10.190.....	13
RCW 26.10.190(1).....	13, 24
RCW 26.20.30.....	30
RCW 26.20.32.....	30
RCW 26.33.080(2).....	35
RCW 26.33.090(3).....	35
RCW 26.33.160.....	35

**Court Rules**

RAP 18.1(a) and 4).....	46
RAP 2.5.....	43, 44
RAP 2.5(a).....	37, 40
RAP 2.5(a)(3).....	37, 38

**Other Authorities**

<i>U.S. Const. amend. XIV, § 1</i> .....	10
<i>Washington State Const. art. I, § 3</i> .....	11
WAC 388-826-0040.....	28

## **I. INTRODUCTION**

Parents have a constitutionally protected right to the care, custody, and control of their children. This right requires courts to grant parents a presumption of fitness before awarding custody of their children to a third party. The right also requires third parties to show parental unfitness or detriment prior to such an award.

Tia Link, a single parent, recognizing that she needed some time to get her life in order, consented to her mother's custody of her son T.L. until she was stable. To that end, she joined her mother's nonparty custody petition agreeing to her son's placement on what she thought was a temporary basis. In so doing, she unknowingly entered into what was essentially a permanent custody arrangement thereby waiving important constitutional protections. Moreover, she is now statutorily barred from asking a court to return her child based on her own parental fitness.

## **II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED**

### **Assignments of Error**

1. The trial court erred by requiring a showing of adequate cause prior to modification of the agreed nonparental custody order entered by Tia Link and her mother Pamela Link.
2. The statutes requiring adequate cause prior to modification of a nonparental custody decree are unconstitutional as applied where the original decree was by consent and Tia Link, the biological parent, was never afforded the benefit of the constitutional presumption of fitness.

3. The application of the modification statutes to parents such as Tia Link who consent to nonparental custody decrees is manifest error affecting a constitutional right.
4. The application of the modification statutes to parents such as Tia Link who consent to nonparental custody decrees is structural error.

**Issues Pertaining to Assignments of Error:**

1. Whether Washington courts have the equitable power to implement custody decrees or parenting plans that may be reviewed in the future without a showing of adequate cause.
2. Whether adequate cause must be shown prior to modification of a custody decree or parenting plan entered into by consent.
3. Whether the statutes governing modification of nonparty custody orders and parenting plans - RCW 26.09.260, -.270 and RCW 26.10.190, -.200 - are unconstitutional as applied to Tia Link where she entered into a nonparental custody order by consent and was never afforded the constitutional presumption of fitness.
4. Whether Tia Link validly waived her right to application of the constitutionally required presumption of parental fitness and heightened detriment standard by consenting to a nonparental custody order.
5. Whether requiring Tia Link to show adequate cause prior to modification of the nonparental custody order entered into by consent was manifest error affecting a constitutional right.
6. Whether requiring Tia Link to show adequate cause prior to modification of the nonparental custody order entered into by consent was structural error.
7. Whether the issues regarding modification of nonparental custody orders entered into by consent are properly before this Court.

### III. STATEMENT OF THE CASE

On February 20, 2007, Pamela Link, the mother of Appellant Tia Link, filed a Petition for Nonparental Custody of T.L, Tia Link' son.<sup>1</sup> Over the ensuing months, Pamela and Tia Link came to an agreement regarding T.L.'s care and on December 4, 2007, Tia Link joined her mother in the petition. (CP 1-2.) The Joinder stated: "My mother and I have reconciled. I want my mother to have temporary custody. She has agreed to let me have [T.L.] when I'm stable." (CP 2.) At that time, both parties lived in Spokane, Washington. (CP 1.)

On February 19, 2008, Spokane County Superior Court Judge Cozza entered Findings of Fact and Conclusions of Law prepared by Pamela Link and signed by both parties. (CP 12-20.) To explain why T.L. was not in his mother's physical custody, Pamela Link wrote "Tia Link has not been stable or responsible enough at this time to meet T.L's needs." (CP15.) She also stated that Tia Link was not a suitable custodian because "Tia Link agrees that she is unable to care for T.L. at this time." (CP 16.)

On February 19, 2008, Judge Cozza also signed the parties' Final Residential Schedule. The schedule placed no limitations on Tia Link's

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<sup>1</sup> Petitioner herein uses the parties' first and last names for clarity and refers to the child as T.L. to preserve the child's privacy.

residential time with T. L. based on the factors in RCW 26.10.160 and gave her liberal visitation. (CP 4.) The schedule provided for visitation every other weekend, on holidays, and one month of each summer without restriction. (CP 5-7.) All final orders were reviewed and signed by Judge Cozza on February 19, 2008, at which time the agreed Nonparental Custody Decree Order was entered. (CP 21-26.) The decree was presented by Pamela Link and approved by Tia Link. The parties were not represented by counsel and no contested hearing was held.

On February 4, 2009, Tia Link filed a Motion and Order to Show Cause re: Contempt based on Pamela Link's behavior. (CP 27-29.) By that time, Pamela Link and T.L. had relocated to Aberdeen, WA. (CP 29.) Tia Link alleged that in July 2008, Pamela Link's Aberdeen telephone was disconnected yet her mother failed to provide her with alternate contact information making visitation arrangements impossible. *Id.* She also alleged that on or about September 2008, Pamela Link left Aberdeen and relocated at some point in Yakima, WA without providing notice or any contact information. *Id.* As a result, Tia Link was unable to exercise visitation for eight months. (CP 38.) At hearing, the court commissioner found Pamela Link 1) withheld contact information in contempt of the residential schedule, and 2) moved across the state thus denying Tia Link visitation for eight months in contempt of the residential schedule. (CP

38.) The commissioner found Pamela Link had the ability to comply with court orders and as such, found her in contempt. (CP 38-39.) Based on the contempt findings, the commissioner orally ruled that Tia Link, “may motion the Court for a modification.” (CP 53).

On January 15, 2010, Tia Link, through counsel, filed a petition to modify the custody decree/residential schedule. (CP 43-50.) In her declaration in support of the modification, Tia Link provided information showing she was now stable and able to care for T.L. (CP 54-55, 58-59). She averred that she had faithfully exercised her visitation with T.L. under the agreement (CP 52); had been clean and sober for nearly three years (CP 53); had maintained a stable home for the past sixteen months (CP 54); had been working full time for three years as a caregiver for vulnerable adults (CP 54); had a supportive network of friends helping her to remain clean and sober (CP 54); had recently reconnected with her father who was also proving to be a strong support (CP 55); and had changed her work schedule to ensure she could enroll her son in school and be there for him every day. (CP 55.)

She also provided information showing substantial changes regarding her son and Pamela Link that rendered continued placement with Pamela Link detrimental to T.L.’s mental, physical, and emotional health. (CP 55-

70.) She averred that T.L had recently made extreme sexual statements, (CP 55), exhibited excessive weight gain, (CP 55-56), had been withdrawn from school for two months (*Id.*), had been involved in physical incidents at school resulting in discipline from December 2008 through May 2009 (CP 56), was not current on his immunizations (*Id.*), had been homeless and living in a shelter in November 2008 (*Id.*), had below average grades and had been in five different schools during the two years he had been with his grandmother and was not currently enrolled in school, (CP 56-57), was exposed to second hand smoke by his grandmother despite his asthma, (CP 57), and appeared to be physically inactive and socially isolated from his peers. (CP 57-58.)

In addition, Tia Link provided eight declarations in support of her petition. (CP 181.) Aimee Dodd, a friend for the past fifteen years who had known T.L his entire life, averred that T.L.'s behavior had changed in the past six months and that his interactions with her son and other children were now marked by aggression and emotional outbursts. (CP 82.) Beverly Walter, Tia Link's employer from August 2007 through 2008 at the Prairie View Adult Family Home, averred Tia Link was a dedicated, caring, efficient, kind, conscientious, and compassionate employee. (CP 35-36.) Carla Graves, Tia Link's subsequent employer at another adult family home, tendered two declarations averring that Tia

Link had worked for her for three and one-half years and was an excellent employee, dependable, honest and hard working. (CP 31-32, 85.) She stated Tia Link had a very caring way with the elderly in her charge who in return love her. (CP 31.) “She is truly the best caregiver I have worked with in 10 years in the business.” (CP 31.)

LaTisha Post, Tia Link’s current landlord, and Roberta Walter, her previous landlord, supplied declarations averring to Ms. Link’s stable residency from October 2008 through the date of the hearing. (CP 88, CP 33, 34). Shernell Wilkens, the custodian of records at the Yakima, WA. YMCA averred that her records showed T.L. had not been involved in any activities despite his enrollment in basketball on October 21, 2009. (CP 162.) And Evon LaGrou, the Director of Central Registration for Yakima School District, averred that Pamela Link signed an intent to home school T.L. on December 10, 2009, three months late. He also stated that once the declaration is filed, the school does not monitor the child’s education. (CP 158-59.)

At hearing on February 9, 2010, the court commissioner found that adequate cause for modification had not been established and denied the petition. (CP 177-178.) Tia Link then filed a motion for revision by the superior court. (CP 180-182.) The hearing was de novo. (RP 4, Mar. 4, 2010.)

At hearing, Tia Link's Counsel, relying on *In re Marriage of Adler*, 131 Wn. App. 717, 129 P.3d 293 (2006), argued that Tia Link was not required to show adequate cause under RCW 26.09.260 because 1) the decree had been entered by consent wherein the parties agreed the arrangement was temporary and meant to last only until Tia Link was stable, 2) the court has "broad discretionary jurisdiction" to review residential schedules, "even those admitted as final orders," and 3) requiring adequate cause under these circumstances was inappropriate where no finding of parental unfitness was ever found and the party seeking custody was presumed to be a fit parent with the "constitutional right to the care, custody, and control of her child under the 14<sup>th</sup> Amendment." (RP 5-15, March 4, 2010.)<sup>2</sup>

Because the documents in their totality showed the parties intended "for this to be a temporary arrangement," and because Tia Link provided objective, third-party evidence that she was now stable, counsel also argued the trial court could have moved to hearing that day and "adopted [Tia Link's proposed reunification that provides for a phase [sic] reintegration . . .]" over several months. (*Id.* at 8-9; CP 71-75.) In the alternative, she argued the evidence supported a finding of adequate cause

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<sup>2</sup> Counsel also tendered a written memorandum in support of the petition to the trial judge. (RP 6, Mar. 4, 2010.) Unfortunately, the memorandum was never filed and thus is not included in the record herein.

based on a substantial change of circumstances of Pamela Link and T.L. causing detriment to the child and requiring a change of residence. (RP 15, March 4, 2010.)

Although the trial court recognized a “legislative gap” in this type of situation, it found that once placement is made, “it becomes essentially permanent, and the changes in the circumstances of the natural parent become irrelevant.” (RP 18, Mar. 4, 2010.) The trial court affirmed the commissioner’s rejection of the allegations regarding detriment in the home, found no adequate cause for revision, incorporated by reference therein its oral ruling in its entirety, and denied the revision. (RP 18-19, Mar. 4, 2010.) Tia Link timely filed for review by this Court. (Appellant’s Notice of Appeal to Court of Appeals Division III, *Pamela Link v. Pamela Link*, Spokane County Superior Court Case No. 07-3-00424-4 (Apr. 5, 2010).

#### **IV. ARGUMENT**

##### **Standard of Review**

An appellate court reviews a trial court's denial of adequate cause under RCW 26.09.270 for an abuse of discretion. *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 778, 819 P.2d 370 (1991). A court abuses its discretion when it bases its decision on untenable grounds or reasons. *Progressive Animal Welfare Soc’y v. Univ. of Wn.*, 114 Wn.2d

677, 688-89, 790 P.2d 604 (1990). A trial court's discretionary decision “is based ‘on untenable grounds’ or made ‘for untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). Review of questions of law is *de novo*. *In re Marriage of Kastanas*, 78 Wn. App. 193, 197, 896 P.2d 726 (1995). Questions involving allegations of constitutional violations are also reviewed *de novo*. *In re Detention of Strand*, 167 Wn.2d 180, 186, 218 P.3d 1159 (2009) (citing *State v. Eckblad*, 152 Wn.2d 515, 518, 90 P.3d 1184 (2004)).

### **Constitutional and Statutory Scheme Governing Child Custody Orders and Parenting Plans**

The Fourteenth Amendment of the United States Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” *U.S. Const. amend. XIV, § I*. Fundamental liberty interests include the right of parents to establish a home and bring up children, to control their education, to direct their upbringing, and to make decisions concerning their care, custody, and control. *Troxel v. Granville*, 530 U.S. 57, 65-66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (citations omitted.)

The Washington State Constitution also provides that “[n]o person shall be deprived of life, liberty, or property, without due process of law.” *Const. art. I, § 3*. Further, “[t]he courts of Washington have been no less zealous in their protection of familial relationships” than federal courts. *In re Lusicer*, 84 Wn.2d 135, 137, 524 P.2d 906 (1974). “Long ago, this court in *In re Hudson*, 13 Wn.2d 673, 678, 685, 126 P.2d 765 (1942), stated that a parent's interest in the custody and control of minor children was a ‘sacred’ right and recognized at common law. The Court of Appeals has characterized the right of a parent to their child as ‘more precious to many people than the right of life itself.’” *Id. quoting In re Gibson*, 4 Wn. App. 372, 379, 483 P.2d 131, 135 (1971). Thus “it can not be gainsaid” that the interest in the care, custody, and nurture of one’s child is a fundamental liberty interest protected by Washington’s State Constitution. *Luscier*, 84 Wn.2d at 139.

In recognition of this fundamental interest, courts afford a presumption that fit parents will act in the best interests of their child. Hence, as between a parent and nonparent, courts may only grant custody to a nonparent if that nonparent overcomes this presumption by clear and convincing evidence. *E.A.T.W.*, 168 Wn.2d 335, 344, 227 P.3d 1284 (2010). Thus prior to granting a hearing on a nonparental custody petition, petitioners must submit affidavits which, if true, establish a prima facie

case that the parent is unfit or that placement with the parent would result in actual detriment to the child's growth and development. *Id. citing In the Custody of Shields*, 157 Wn.2d 126, 142-143, 136 P.3d 117 (2006). "The nonparent has a heightened burden to establish that actual detriment to the child's growth and development will occur if the child is placed with the parent, consistent with the constitutional mandate of deference to parents in these circumstances." *Shields*, 157 Wn.2d at 128. "These requirements must be met before the courthouse doors will open to the third party petitioner." *Id.* By contrast, when determining custody matters between parents, both of whom benefit from the constitutional presumption, courts utilize the less stringent "best interest test" by applying the factors in RCW 26.09.187 and no adequate cause need be shown.

Once an order has been entered, however, a party seeking modification, whether as between parents or a parent and a third-party, are treated equally. At this point, courts view custodial changes as highly disruptive to children and engage in a strong presumption in favor of custodial continuity and against modification. *In re McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993). Thus, prior to being granted a modification hearing, parents as well as non-parents must show adequate cause by tendering affidavits based on facts arising after the decree or unknown to the court at the time of the decree or plan, that a substantial

change has occurred in the circumstances of the child or the nonmoving party and that modification is in the child's best interest. RCW 26.10.190(1); 26.09.260.

A modification of a custody decree "occurs when a party's rights are either extended beyond or reduced from those originally intended in the decree." *In re Marriage of Christel and Blanchard*, 101 Wn. App. 13, 22, 1 P.3d 600 (2000). The procedures for modification of nonparental custody decrees are prescribed by RCW 26.09.260 and .270. *See* RCW 26.10.190 (deferring "to chapter 26.09 RCW"). Ordinarily, a court may only contemplate a request for modification if the petitioner submits an affidavit showing "adequate cause" and "setting forth facts supporting the requested . . . modification." RCW 26.09.270.

In the context of a custody order modification, adequate cause is shown where new or previously unknown facts reveal "that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child." RCW 26.09.260(1). Therefore, "at the very minimum, adequate cause under RCW 26.09.270 means a showing 'sufficient to support a finding on each fact that the movant must prove in order to modify; otherwise, a movant could harass a nonmovant by obtaining a useless hearing.'" *E.A.T.W.*, 168 Wn.2d at 347,

(quoting *In re Marriage of Lemke*, 120 Wn. App. 536, 540, 85 P.3d 966 (2004)). Even where adequate cause is shown, a court may only grant a modification if:

(a) [t]he parents agree to the modification; (b) [t]he child has been integrated into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan; (c) [t]he child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child; or (d) [t]he court has found the nonmoving parent in contempt of court at least twice within three years because the parent failed to comply with the residential time provisions . . . .

RCW 26.09.260(2).

1. The trial court erred by requiring Tia Link to show adequate cause as a precondition to a hearing on modification of the agreed nonparental custody decree/parenting plan.

a. Under Washington law, trial courts have inherent equitable powers to implement a custody decree or parenting plan that may be reviewed in the future without a showing of adequate cause.

Although modification procedures are prescribed by the strict standards of RCW 26.09.260, the trial court still retains its equitable powers to implement a custody decree that can be reviewed and revised in the future under the lesser criteria of RCW 26.09.187. *See In re Marriage of Possinger*, 105 Wn. App. 326, 336-37, 19 P.3d 1109 (2001). A “review” of a custody decree “is different from a modification,” because it

“is not based on changed circumstances, and need not be subjected to [that] threshold determination.” *Adler*, 131 Wn. App. at 725.

In *Possinger*, the trial court found, after a three-day trial, that since the parents’ lives were in “somewhat of a transitional period,” it was not feasible at that time to determine “what should be done on a long-term basis for th[e] child.” *Id.* at 329. For this reason, the trial court issued a permanent parenting plan “containing a preschool residential schedule” but “reserving the decision on the school schedule” for one year, when a review hearing would be held “just prior to [the child’s] entry into first grade.” *Id.* at 328. The trial court did not require a showing of adequate cause before holding a review hearing because it considered the review itself to be governed by RCW 26.09.187 instead of -.260. *Id.* at 337-38. When the review hearing produced an unfavorable result for the father, he appealed, arguing that the trial court’s earlier parenting plan was “permanent” and “could only be changed by applying the standards contained in RCW 26.09.260,” including the threshold showing of adequate cause. *Id.* at 332.

Division I of the Washington Court of Appeals disagreed, holding that “where the best interests of the child requires it, the trial court is not precluded . . . from exercising its traditional equitable power derived from

common law to defer permanent decision[-]making with respect to parenting issues for a specified period of time following entry of the decree.” *Id.* at 336-37. In support of its holding, the appeals court cited three Washington Supreme Court cases in which the court deferred final custody decisions. *See id.* at 335-36 (citing *Little v. Little*, 96 Wn.2d 183, 194, 634 P.2d 498 (1981) (finding the trial court retained the authority to modify a custody order after a specified period of time during which the mother planned to relocate and establish a new home for the young children and the father planned to work full time while caring for the young children); *Phillips v. Phillips*, 52 Wn.2d 879, 884, 329 P.2d 833 (1958) (recognizing the authority of the trial court to defer final determinations on custody modifications until after a period of time designated for observing the effects of a temporary order); *Potter v. Potter*, 46 Wn.2d 526, 528, 282 P.2d 1052 (1955) (concluding that the trial court had the equitable power to postpone a final custody decision until it determined whether a mother with a history of mental illness could function as a custodial parent).

The *Possinger* appeals court reasoned further that, since one of the main purposes of child custody proceedings is to “serve the best interests of the children,” this purpose would be contravened if the statutes were construed “in such a manner as to require trial courts to rush to judgment

on insufficient evidence . . . , or to ignore the fact that the lives of parents are in such a state of transition.” 105 Wn. App. at 336. In some instances, the appeals court noted, “the children’s best interests w[ill] be served by deferring long-term parenting decisions for a reasonable period of time following entry of a decree.” *Id.*

In 2006, Division I also found that parties to a custody matter may advance immediately to modification proceedings by specifically agreeing to waive the threshold requirement that adequate cause be shown. *See Adler*, 131 Wn. App. at 724, 129 P.3d 293. In *Adler*, the parties’ final parenting plan provided for “review” at the request of either party “without the statutorily required showing of a change in circumstances.” 131 Wn. App. at 721. The parties entered into such an agreement because they “contemplated that a review might be necessary, to see if the plan was working.” *Id.* at 724, 129 P.3d 293. The appeals court held that “[i]f the party protected by the threshold requirement freely stipulates to adequate cause . . . [t]he parties may waive the threshold determination.” *Id.* In support of its holding, Division I reasoned that while “the primary purpose of the threshold adequate cause requirement is to prevent movants from harassing non-movants by obtaining a useless hearing . . . , this concern is not present” where the parties agree to future modification. *Id.* Importantly, even where the adequate cause requirement is waived, “[t]he

best interests of the child remain protected by the standards in RCW 26.09.260 as applied by the court in the modification proceeding” itself. *Id.*

The court also found the parties’ agreement to be permissible under *Possinger* because it “was essentially a contingency that left the terms of the plan open to review.” *Id.* at 725, 129 P.3d 293. The court explained that *Possinger* established two important points: (1) that “the trial court has the authority to build in a review of [a] parenting plan” regardless of “whether the plan is labeled as temporary or permanent;” and (2) that “in such a review the court may properly apply the criteria in RCW 26.09.187 rather than treating the review as a modification” under RCW 26.09.260. *Id.* In light of these points, the court found it appropriate to permit a built-in modification review of a custody decree that could be held without a threshold showing of adequate cause. *Id.*

Here, Tia Link’s joinder in her mother’s custody petition reveals that the parties intended the nonparental custody decree to be a “temporary” arrangement, subject to modification “when [*Tia Link became*] stable.” (CP 2 (italics added).) Indeed, Tia Link “reconciled” her dispute with her mother and joined in the petition *solely* on the grounds that T.L. would be returned to her care when she was stable. (CP 2.) Such intent was incorporated in the Findings of Fact and Conclusions of Law,

drafted by Pamela Link, where it reads “Tia Link agrees that she is unable to care for Tristan *at this time.*” (CP 16 (italics added).) Moreover, the final Residential Schedule granted Tia Link visitation for weeks at a time with no limitations. (CP 3-11.)

Thus, under the authority of *Adler* and *Possinger*, the parties contemplated a future modification of the custody decree under RCW 26.09.260 contingent upon Tia Link’s becoming stable. As such, the modification could be based on a change of circumstances of the movant rather than the child or non-movant as required by RCW 26.09.260(1). Moreover, the trial court had the authority to treat the original decree as temporary and to enter a final order applying the heightened standards applicable to nonparental custody petitions.

As the trial court failed to recognize that the evidence showed the parties’ contemplated a review outside the adequate cause requirements for modifications or that such review is permitted under Washington law, but instead required Tia Link to show adequate cause before considering her motion for modification, (RP 18-19, Mar. 4, 2010), the trial court abused its discretion by basing its decision on facts unsupported in the record and by applying the wrong legal standard. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

- b. Washington law provides for modification of custody decrees and parenting plans entered by default or consent without a showing of changed circumstances.

In 1969, the Washington Supreme Court held that “[w]here a custody decree is entered upon default,” the decree can be modified without a showing of changed circumstances, and the court can consider facts that existed at the time the original decree was entered. *See In re Rankin*, 76 Wn.2d 533, 536, 458 P.2d 176 (1969). There the court reasoned that, since the purpose behind the threshold showing of changed circumstances is “to discourage harassment of the parent who is awarded custody by the disgruntled parent who is denied it[,] and to assure as much stability as possible in the environment of the child,” such a purpose does not apply to “default decree[s].” *Id.* at 536-37.

The *Rankin* court also found it “unrealistic” that “the welfare of the child” could be advanced by a default decree, where the court “does not hear evidence and does not have an opportunity to observe both parents as it can by one in which the right of one parent to custody is contested by the other.” *Id.* at 537. This is especially true, noted the court, because in a default decree there can be no assumption “that all of the circumstances existing at that time were made known to the court and a sound discretion was exercised.” *Id.*

In light of these policy concerns, the court reaffirmed its prior rule “that a default custody decree can be modified without a showing of a change in circumstances.” *Id.* (citing *White v. White*, 24 Wn.2d 52, 57, 163 P.2d 137 (1945) (emphasizing that in default decrees, where “no finding [i]s made as to the fitness of either parent to have custody of the child . . . , a petition to modify will lie without allegations of change of conditions and circumstances, since it constitutes a court’s first opportunity to pass upon adequately presented evidence”)).

The Washington Supreme Court extended the *Rankin* rule to uncontested decrees in 1980. *Timmons v. Timmons*, 94 Wn.2d 594, 598, 617 P.2d 1032 (1980). In *Timmons*, the court held that “because of the continuing paramount concern for the best interests of the child, . . . the rationale for the *Rankin* rule equally applies when the parties join in a petition.” *Id.*; *cf. Lahart v. Lahart*, 13 Wn. App. 452, 456, 535 P.2d 145 (Ct. App. Division III 1975) (stating “the reasoning in the *Rankin* decision, that a change of circumstances is not a prerequisite to the modification of a decree of custody obtained upon default, is equally applicable to a provision as to visitation”). In so holding, the *Timmons* court stated, “[t]he *Rankin* rule assures true judicial consideration of all relevant facts concerning the welfare of the children.” *Id.*

The *Timmons* court found its extension of *Rankin* especially justified by practical considerations. “A couple should not be able to foreclose judicial inquiry into facts which may assist in making the critical determination of how a child’s interests would best be served by agreeing as to who should receive original custody.” *Timmons*, 94 Wn.2d at 599. As a result, the court made it a point to establish a rule whereby “the observations . . . in *Rankin* still apply,” “[w]hether the decree is entered by default, or whether the decree is entered upon an agreed petition after brief questioning of the petitioner.” *Id.*

Here, the Nonparental Custody Decree was based on consent and not on a “judicial inquiry into facts” necessary for a critical determination of how T.L.’s best interests would be served, much less in a hearing applying the higher detriment standard. (CP 1-2.) Thus, under *Rankin* and *Timmons*, Tia Link was not required to show a change in circumstances before she could obtain a hearing for modification. Application of the *Rankin* rule, as extended by *Timmons*, is even more critical in cases such as this where, in the absence of a contested hearing, the parent was not afforded the constitutional presumption of fitness and the petitioner not required to meet the heightened burden of showing parental unfitness.

As the trial court failed to recognize that the custody decree was uncontested, or that Washington law allows modification of an

uncontested custody decree without a showing of changed circumstances, (RP 18-19), the trial court abused its discretion by basing its decision on facts unsupported in the record and by applying the wrong legal standard. *Rohrich*, 149 Wn.2d at 654, 71 P.3d 638.

2. The statutes requiring adequate cause prior to modification of nonparental custody decrees are unconstitutional as applied where the original decree was by consent and the biological parent was never afforded the benefit of the constitutional presumption of fitness.

Chapter 26.10 RCW governs nonparental custody actions. Although RCW 26.10.100 provides “[t]he court shall determine custody in accordance with the best interests of the child,” Washington courts have consistently held that this standard implicitly recognizes a presumption that placement with the natural parent is in the child’s best interests and that this presumption is necessary to protect the parent’s rights and interests. *In re Custody of R.R.B.* 108 Wn. App. 602, 612,-615, 31 P.3d 1212 (2001) (discussing *In re Stell*, 56 Wn. App. 356, 356, 783 P.2d 615 (1989) *review denied*, 151 Wn.2d 1017 (2004); *In re Marriage of Allen*, 28 Wn. App. 637, 626 P.2d 16 (1981). As a result, “the non-parent seeking custody has a heightened burden to establish that actual detriment to the child’s growth and development will occur if the child is placed with the parent, consistent with the constitutional mandate of deference to parents in these circumstances.” *Shields*, 157 Wn.2d at 128.

As outlined above, in nonparental custody actions, the “fundamental right of a biological parent to the custody of his [or her] child is highly protected in [the] initial custody action brought by a nonparent” and it is through that court process that the parent’s constitutional rights are taken into account. *In re Welfare of BRSH*, 14 Wn. App. 39, 49, 169 P.3d 40 (2007) However, once the decree is entered, “that fundamental liberty interest is no longer at issue” and “the operating standard for modification [is] a determination based on the [child’s] best interests, including the presumption that a change of custody is detrimental to the child.” *Id.* at 49 *quoting with approval* Reply Br. at 14 (citing RCW 26.10.190(1); RCW 26.09.260; *In re Marriage of McDole*, 122 Wn. 2d 604, 859 P.2d 1239 (1993).

Tia Link never had the benefit of this protection. Rather, because the custody award was by consent, Tia Link’s constitutional rights were never taken into account nor were they protected by court process. The trial court’s order was not based on evidence tested at hearing and the non-party petitioner, Pamela Link, was never required to meet the heightened burden necessary to overcome the deference afforded T.L.’s biological parent.

Washington courts have previously invalidated statutes failing to accord this deference in custody actions between parents and third parties.

For example, in *In re Custody of Smith*, the Washington State Supreme Court considered whether the third party custody visitation statute (RCW 26.10.160(3)) was unconstitutional where it required no finding of harm or detriment before awarding visitation to third-parties over a fit parent's objection. 137 Wn.2d 1, 969 P.2d 21 (1998), *affirmed on narrower grounds by Troxille v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). *See also In re. C.A.M.A.*, 154 Wn.2d 52, 58, 109 P.3d 405 (2005) (Despite U.S. Supreme Court's affirmance on narrower grounds, *Smith* remains binding precedent). The court emphasized parents' constitutionally protected fundamental right to rear their children without state interference. *Smith* at 16. "Where a fundamental right is involved, state interference is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved." *Id.* at 15 (citations omitted). As the court explained, although the state has a compelling interest in the health and welfare of children, it has no compelling interest justifying intrusion on a family's integrity unless "parental actions or decisions seriously conflict with the physical or mental health of the child." *Id.* at 18 (citations omitted). Rather, a threshold requirement for state intervention is parental unfitness, harm or threatened harm. *Id.* at 16. Finding no such requirement under the statute and no deference granted a parent's decision

making, the court found the statute facially unconstitutional. *Id.* at 19-21. *Accord In re Parentage of C.A.M.A.*, 154 Wn. 2d 52.

On appeal to the U.S. Supreme Court, however, a plurality narrowed the issue as to *Smith*'s companion case, *Troxel v. Granville*, 87 Wn. App. 131, 940 P.2d 698 (1997). *Troxel*, 530 U.S. at 72-73. Rather than invalidating the statute on its face, the Court found instead that the trial court, in applying the statute to the case at hand, failed to accord weight to the fit parent's determination. *Id.* As such, the statute was "unconstitutional as applied." *Id.* at 73.

By contrast, in *In re Welfare of Key*, the Washington Supreme Court found state dependency statutes were not unconstitutional as applied despite no finding of parental unfitness before deeming a severely disabled child "dependent" and thus transferring legal custody to the state. 119 Wn.2d 600, 836 P.2d 200 (1992). In that case, Ms. Key, an otherwise fit parent, voluntarily placed her disabled child in the custody of the State because she lacked the ability to provide requisite care and the child was placed in an appropriate foster home. *Id.* at 603-04. No dependency petition was filed, however, until it became clear that the child would need to be deemed "dependent" in order to qualify for continued funding under federal law to maintain the placement. *Id.* at 608. Ms. Key's opposition to the dependency petition arose largely because she feared her child could

be moved from the current foster placement without her consent. *Id.* at 607.

In determining the constitutional issues presented, the *Key* court explained, “[I]n assessing the constitutionality of a procedure which infringes upon parents' rights to the care, custody, and companionship of their children, it is necessary to ascertain the proper balance between the parents' constitutional rights and the State's constitutionally protected *parens patriae* interest in protecting the best interests of the child.” *Id.* at 610 quoting *In re Sumey*, 94 Wn.2d 757, 762-63, 621 P.2d 108 (1980). To achieve that balance, courts consider: (1) the parents' interests; (2) the risk of error created by the State's chosen procedure; and (3) the State's interest. *Id.* at 611 citing *Krause v. Catholic Comm'ity Servs.*, 47 Wn. App. 734, 738, 737 P.2d 280 (1987), *review denied*, 108 Wn.2d 1035 (1987); see also *Parham v. J.R.*, 442 U.S. 584, 599-600, 99 S.Ct. 2493, 2502-03, 61 L.Ed.2d 101 (1979) (applying same 3-part test).

Under the circumstances in *Key*, the court found no constitutional violation. As the court noted, while a finding of parental fitness is required before the State terminates a parent's rights, it is not required in dependencies. Dependencies and terminations have “different objectives, statutory requirements and safeguards.” *Key* at 609. They are “preliminary, remedial, and nonadversarial” and do not turn on a parent's

unfitness. *Id.* Rather a child may be deemed “dependent” where, as in that case, the parent is unable to respond to a child’s special needs. *Id.* Under those circumstances, it is unnecessary to find parental misconduct. *Id.* Moreover, under the circumstances in *Key*, the state had a strong fiscal interest as well given the cost of care for Ms. Key’s child and the need for the child to be deemed “dependent” to qualify for federal funding at that time. *Id.* at 608.

The court further found the procedures constitutional as applied where Ms. Key had the right to notice, to be heard, and to counsel. It also found her rights adequately protected where she originally consented to placement under a voluntary placement agreement with the State. A voluntary placement agreement is defined as:

A voluntary and written document between the parent and the department. It must be signed by the child's parent and the DSHS/DDD representative to be in effect. . . . Any party to the voluntary placement agreement may terminate the agreement at any time. When one party ends the agreement, per the VPA, the voluntary agreement is ended. The agreement authorizes DSHS/DDD to facilitate a placement for the child who is under eighteen years of age in a licensed facility. Under the term of the agreement, the parent retains legal custody. DSHS/DDD is responsible for the child's placement and care. The agreement shall at a minimum specify the legal status of the child and the rights and obligations of the parent or legal guardian, the child, and the department while the child is in placement.

WAC 388-826-0040.

Not only could Ms. Key terminate the voluntary placement agreement at any time, once the dependency was established, the statutes granted her the right to “maintain parental authority where appropriate” and to veto any proposed change in placement unless the state could show adequate cause by clear, cogent and convincing evidence that the move was in the child’s best interests. *Id.* at 607, 620. The court also found the risk of erroneous deprivation in dependencies minimal where they are reviewed by the trial court every six months, the decisions are reversible, and dependencies cannot ripen into terminations absent clear and convincing evidence. *Id.* at 612..

In another case, the state supreme court found statutes (since repealed) constitutional which provided for a child’s alternative residential placement without a finding of parental unfitness. *In re Sumey*, 94 Wn.2d at 763-65. The *Sumey* court based its decision on the fact that out-of-home placement must be based on finding that severe parent-child conflict had not been remedied despite crisis intervention services, placement was temporary, legal custody was not transferred nor could the placement ripen into termination, the intrusion on parental rights was minor, and the primary state goal was to safeguard the child’s mental and emotional health while providing services to family with the goal of family

reunification. Further, the placement was reviewed by the court every six-months. *Id.*

This case is distinguishable. Although parents are entitled to notice and the right to be heard in nonparental custody actions (RCW 26.20.30; -32), they have no right to counsel and indeed, here neither party was represented when the custody decree was granted. Parents subject to nonparty custody agreements cannot unilaterally terminate the agreement nor do they have the “right” to maintain parental authority where appropriate or to veto a custodian’s choices. Unlike dependencies and alternative placements, the goal is not a return home once the conditions necessitating the change are effected. Just the opposite - there is a presumption against family reunification and no services are offered to ameliorate the need for out-of-home placement. There are no scheduled review hearings and the decree has the effect of a “permanent order divesting the parent of custody unless the parent meets the statutory requirements for modification.

More importantly, unlike dependencies and the former alternative placement statutes at issue in *Sumey*, Washington law requires application of the stringent detrimental standard and a showing of unfitness prior to and during a hearing on nonparty custody petitions. It is at that point that parents’ fundamental rights are protected, not at a later modification

hearing. Yet there is no requirement that the record reflect that a parent agreeing to transfer has validly waived these constitutional protections.

Parents' interests at stake in nonparental custody proceedings are fundamental. The State's interest is primarily to ensure the child's welfare. However, without a showing of unfitness or detriment and little to no evidence as to the child's circumstances, the state's interest in such proceedings is minimal. Under the current statutory procedures, the risk of erroneous deprivation is high for parents, largely unrepresented, who consent to the transfer of custody to a third party and in so doing, unknowingly agree to what is essentially a permanent transfer and waiver of their constitutional rights.

Indeed, both the trial court and the commissioner recognized the inherent legal problems with these procedures for parents such as Tia Link who allow a trusted friend or family member to care a child under a chapter 26.10 agreement. After hearing argument, the commissioner stated:

The difficulty with the legal structure in a situation like this is the statutes seem to indicate that once the placement is made it becomes essentially permanent. And the – the changes in the circumstances of the natural parent irrelevant. The modification provisions for a [26.10] decree refer us back to the standards in [26.09], which would require that the petitioning parent show a detrimental environment or an agreement between the parties or integration. . . . There seems to be a bit of ambivalence at

the Court of Appeals level where there's some thought that a [26.10] decree is perhaps more of a temporary placement. And then a natural parent can petition to recover custody of the child once their parenting disability has resolved itself. There's some language to that effect in the Court of Appeals decision. It's really unclear where the law is headed with respect to that. So potentially any one of these cases is going to be a good case to appeal.

(RP Feb. 9 at 12-13.)

Similarly, citing the commissioner's ruling, the trial judge stated:

[T]here's a clash between the statute and equitable considerations. . . . It would appear to me that this type of situation falls in a gap that properly should be addressed by the legislature. Some of the language the commissioner used is apt when he said, quote, The statutes seem to indicate that once placement is made, it becomes essentially permanent, and the changes in the circumstances of the natural parent become irrelevant. The modification provision for 26.10 decree, which is third-party custody, refers back to the standards in 26.09 which would require that the petitioning party show a detrimental environment or an agreement between the parties for an integration, unquote.

(RP 18, Mar. 4, 2010.)

As both the commissioner and trial judge noted, the failure to consider these agreements temporary raises troubling equitable and legal questions. Indeed, Tia Link had no reason to believe the agreement was anything but temporary and would allow the return of her son based on her future fitness. Now, she is subject to an order which is essentially

permanent and barred from presenting evidence as to her fitness which was the basis for the agreement.

Consequently, the statutory framework for modification under Chapters 26.09 and 26.10 RCW are constitutionally deficient as applied to Tia Link and others similarly situated who enter into nonparental custody decrees by consent.<sup>3</sup>

- a. There is no evidence Tia Link knowingly, intelligently, and voluntarily waived her constitutional rights by joining the nonparental custody petition.

To waive a constitutional right, the waiver must be intentional and the right must be known. *In re Detention Strand*, 167 Wn.2d 180, 202, 217 P.3d 1159 (2009) citing *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). To be valid, the waiver must be made knowingly, intelligently, and voluntarily. *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996). Moreover, to be knowing, intelligent, and voluntary, the evidence must show the individual understood he or she had the ability to refuse consent without repercussion. See *State v. Ferrier*, 136 Wn.2d 103, 116, 960 P.2d 927 (1998).

“Courts indulge every reasonable presumption against waiver” of

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<sup>3</sup> “An as applied challenge is characterized by a party’s allegation that the application of a statute in the specific context of the party’s actions is unconstitutional.” *City of Redmond v. Moore*, 151 Wn. 2d 664, 668-69, 91 P.3d 875 (2004). “Holding a statute unconstitutional as-applied prohibits future application of the statute in a similar context, but the statute is not totally invalidated.” *Moore*, 151 Wn.2d at 669.

fundamental constitutional rights. *Aetna Ins. Co. v. Kennedy to Use of Bogash*, 301 U.S. 389, 393, 57 S.Ct. 809 (1937)(citations omitted). See also *Ohio Bell Tel. Co. v. Public Util. Comm'n of Ohio*, 301 U.S. 292, 307, 57 S.Ct. 724, 81 L.Ed. 1093 (1937) (holding that a telephone company did not waive its right to have the value of its property determined upon evidence presented in open proceedings by not opposing consolidation of two proceedings, and noting that "[w]e do not presume acquiescence in the loss of fundamental rights"). Further, "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights." *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347 (1974). Waiver cannot be implied but must be "unequivocally expressed." *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969) "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show" an intelligent and understanding waiver. *Barker v. Wingo*, 407 U.S. 514, 526, 92 S.Ct. 2182 (1972) quoting *In Carnley v. Cochran*, 369 U.S. 506, 516, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962).

Although it appears there is no state case law on waiver of the constitutional presumption of fitness in nonparental custody cases, the Washington Supreme Court has stated that, in dependencies and terminations, a valid waiver of counsel must be expressed on the record

and knowingly and voluntarily made. *In re Welfare of G.D.*, 116 Wn. App. 326, 333-334, 65 P.3d 1219 (2003). “Relinquishment is ‘usually indicated by an affirmative, verbal request,’” and to be valid, the court must ensure the defendant is aware of the associated risks. *Id. citing City of Bishop*, 82 Wn. App. 850, 858, 920 P.2d 214 (1996).

As such, in the context of adoptions, parental consent to the loss of a child must be in writing, contain language that clearly outlines the consequences of the consent, witnessed, and subject to the approval of the court. RCW 26.33.160. Similarly in relinquishments, a parent must file a written consent with the petition. RCW 26.33.080(2). At hearing, the court must determine whether consent was validly executed and may require the parent to appear personally and enter his or her consent on the record. RCW 26.33.090(3).

Under the statutory framework for adoptions and relinquishments, then, courts attempt to ensure that the record shows a parent’s consent is intelligent, knowing and voluntary. By contrast, there are no statutory protections for parents consenting to custodial transfer to ensure they understand the ramifications of waiving their right to a hearing. Although Tia Link consented to the decree, she cannot be said to have waived her right by this conduct nor can it be inferred she understood her consent waived her right to application of constitutionally required standards and

that the transfer would essentially be permanent. Rather, the evidence shows she consented to her mother's custody of her child believing it was temporary and that it would be changed based on her future fitness. She would never have joined the petition had she known that by consenting to her mother's custody of T.L. her fitness would not only be insufficient to get a hearing on her son's return, it would be essentially irrelevant from that point on. On this record, her consent to custody cannot be seen as a valid waiver of constitutional rights.

For these reasons, the modification statutes are unconstitutional as applied in this case and to all agreed nonparental custody orders where there is no evidence of valid waiver.

3. The application of the modification statutes to Tia Link is manifest error.

Counsel for Tia Link argued at hearing that the adequate cause requirement for modification in nonparental custody actions raised constitutional issues. (RP 6, 13, Mar. 4, 2010.) In distinguishing this case from *Adler*, she argued, "Here we have a nonparent and parent, and I would suggest, the threshold would be even lower. We did not brief in its detail the constitutionality of how that – the provisions would be applied in this case. But I have reason to believe that there's a likely issue there." (RP 6, Mar. 4, 2010.)

Generally, an issue may not be raised for the first time on appeal. RAP 2.5(a). However, as argued in more detail below, (infra at subsection 7), the rule is discretionary and courts will reach an issue not specifically argued below where the basic arguments were made at trial, the issue provides an independent basis for maintaining the action, or the issue is necessary to a proper and just resolution. *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990) (application of *RAP 2.5(a)* is “ultimately a matter of the reviewing court’s discretion”); *Walla Walla County Fire Prot. Dist. No. 5 v. Wn. Auto Carriage, Inc.*, 50 Wn. App. 355, 358 n.1, 745 P.2d 1332 (Ct. App. 1987) (justifying the decision to consider new case law “not presented at the trial court level” on the basis that the basic “request [for] prejudgment interest” on damages was argued at trial); *Obert v. Envtl. Research and Dev. Corp.*, 112 Wn. 2d 323, 333, 771 P.2d 340 (1989) (reviewing court considered whether statute supplies an independent basis for plaintiff’s cause of action for first time on appeal); *State v. Card*, 48 Wn. App. 781, 784 n.4, 741 P.2d 65 (Ct. App. 1987) (fundamental justice required review of insurance clause for first time on appeal to determine if clause violated public policy)(citations omitted).

Whether the modification statutes are unconstitutional under the circumstances presented here falls squarely within these exceptions. But more importantly, RAP 2.5(a)(3) expressly provides for consideration of a

manifest error affecting a constitutional right. RAP 2.5(a)(3).

To be “manifest,” a constitutional error must cause actual prejudice to the litigant. *Parrell-Sisters MHC, LLC v. Spokane County*, 147 Wn. App. 356, 195 P.3d 573 (2008). Actual prejudice requires a plausible showing that the asserted error had practical and identifiable consequences in the case. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).

Tia Link has a substantive due process right under the state and federal constitutions to the care, custody and management of her children. This fundamental liberty interest requires a finding of unfitness before a court grants a third party custody of her child. This right is inadequately protected where a non-party custody decree is entered by consent, no finding of unfitness or detriment is made, and the parent is subsequently statutorily prohibited from seeking a return of the child based on the parent’s fitness. The practical and identifiable consequences in this case are clear. The court house doors are shut to Tia Link on the very basis for which she agreed to the custody decree – her fitness. She is forever barred from asking a court for the return of her child on this basis. As such, the trial court’s failure to grant her a hearing without requiring a showing of adequate cause was manifest error.

4. The application of the modification statutes to Tia Link and others similarly situated is structural error.

Tia Link also argues that the failure of the statutory framework to protect her constitutional liberty interest is structural error. Generally, when a trial error is of constitutional magnitude, the decision will be upheld only if it is harmless. *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 921, 952 P.2d 116 (1998); *State v. Pruitt*, 145 Wn. App. 784, 788, 187 P.3d 326, 328 (2008.) However, where the error is structural such that the entire trial mechanism is affected, it is not subject to harmless error analysis. *In re Bush*, 164 Wn.2d 697, 193 P.3d 103, 108 (2008) (citation omitted).

“Structural errors are those which create ‘defects affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.’ ” *In re Det. of Kistenmacher*, 163 Wn.2d 166, 185, 178 P.3d 949 (2008.) For example, according to the United States Supreme Court, the total deprivation of the right to counsel in a criminal trial can never constitute harmless error because the entire trial is affected from beginning to end. *Arizona v. Fulmanente*, 499 U.S. 279, 307 (1991) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). In *U.S. v. Gonzalez-Lopez*, the Court also found the deprivation of the choice of particular counsel (arguably a lesser deprivation than complete deprivation) was also a structural error defying analysis under harmless error. 548 U.S. 140, 126 S.Ct. 2557 (2006). Justice Scalia explained such a deprivation was distinct

from ineffective assistance of counsel, and subject to harmless error analysis, because for the latter “we can assess how those mistakes affected the outcome.” *Id.* at 150-51. To attempt harmless error analysis in this scenario, Justice Scalia concluded, was to engage in “a speculative inquiry into what might have occurred in an alternate universe.” *Id.* at 150.

Similarly here, the statutory framework prevents a parent who consented to nonparty custody without a finding of unfitness from proceeding on this issue at a later date, no matter how strong the evidence regarding parental fitness. It is speculative to inquire into what would have happened had Tia Link initially been informed of the consequences of her consent or if a contested hearing had been held applying the heightened standards required in initial custody decrees. This creates a defect in the non-party custody proceedings under which the fundamental interests of parents who agree to nonparental custody orders are ignored. Such a defect in the process presents structural and not reversible error.

5. Tia Link’s arguments supporting modification without a showing of adequate cause are properly before this Court.

The Washington Rules of Appellate Procedure provide that an “appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a). “By its own terms, however, the rule is permissive and does not automatically preclude the introduction of an

issue at the appellate level.” *Jones v. Stebbins*, 122 Wn.2d 471, 479, 860 P.2d 1009 (1993); *See also Roberson v. Perez*, 156 Wn.2d 33, 37, 123 P.3d 844 (2005); *Osborn v. Public Hospital Dist. No. 1*, 80 Wn.2d 201, 492 P.2d 1025 (1972) (holding that the applicability of a statute could be raised for the first time on appeal because “[t]he issue of the hospital’s duty for the safety of its patients was squarely before the trial court and the statutes of this state in regard thereto are therefore pertinent to our consideration”); *Geroux v. Fleck*, 33 Wn. App. 424, 655 P.2d 254 (1982) (citing the court’s “discretion . . . depending on the circumstances of the case” as justification for considering an issue of indispensable parties for the first time on appeal); *Bennett v. Hardy*, 113 Wn.2d at 918.

Appellate courts have generally interpreted “claims of errors” to include “issue[s],” “arguments and theories.” *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 290, 840 P.2d 860 (1992). Newly-discovered legal authority may ordinarily be considered for the first time on appeal so long as the basic premise underlying the authority was advanced at the trial court. *See State Farm Mutual Auto. Ins. Co. v. Amirpanahi*, 50 Wn. App. 869, 751 P.2d 329 (Ct. App. 1988) (choosing to review all issues “despite lack of citation to the crucial case law” because the appellants “did argue the basic reasoning that the parties to the arbitration determined the scope of the arbitration which corresponded to the policy limits and that the

arbitrator exceeded his authority”); *Walla Walla County Fire Prot. Dist. No. 5*, 50 Wn. App. at 358 n.1.

For this reason, the Washington Supreme Court has also “consistently stated that a new issue can be raised on appeal ‘when the question raised affects the right to maintain the action.’” *Roberson*, 156 Wn.2d at 40, 123 P.3d 844 (quoting *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990)). See also *Brin v. Stutzman*, 89 Wn. App. 809, 829, 951 P.2d 291 (1998) (considering the statutory definition of the term “seller” to be an “issue affect[ing] [a party’s] right to maintain her action”); *New Meadows Holding Co. by Raugust v. Wash. Water and Power Co.*, 102 Wn. 2d 495, 498-99, 687 P.2d 212 (1984) (considering arguments in opposition to summary judgment for first time on appeal as issues raised affected right to maintain action); *Obert v. Envtl. Research and Dev. Corp.*, 112 Wn.2d at 333.

The Washington Supreme Court has also considered issues for the first time on appeal when such issues were “necessary to reach a proper decision.” *Shoreline Cmty. Coll. Dist. No. 7 v. Employment Sec. Dep’t*, 120 Wn.2d 394, 402, 842 P.2d 938 (1992) (in unemployment benefits case, court considered potential waiver of benefits in contradiction to statutes for first time on appeal where issue was necessary to a proper decision); *Obert*, 112 Wn.2d at 333 (consideration of statute necessary to

proper decision for first time on appeal); *Wills v. Kirkpatrick*, 56 Wn. App. 757, 758, 785 P.2d 834 (Ct. App. 1990) (although it was questionable whether appellant argued below that general rather than specific statute of limitations applied, court considered issue under inherent authority as necessary to a proper decision); *State v. Fagalde*, 85 Wn.2d 730, 732, 539 P.2d 86 (1975) (statute not addressed below but pertinent to the substantive issues may be considered for first time on appeal).

Washington courts will also consider issues not raised below where fundamental justice requires. See *State v. Card*, 48 Wn. App. at 784 n.4; *Marshall v. Higginson*, 62 Wn. App. 212, 216 n.3, 813 P.2d 1275 (Ct. App. 1991) (considering for first time on appeal whether a release agreement violated public policy); *City of Tacoma v. Luvene*, 118 Wn.2d 826, 833, 827 P.2d 1374 (1992) (considering preemption for first time on appeal because the issue was one that might frequently come before the court).

- a. This Court has authority under RAP 2.5 to consider cases cited by Tia Link in support of modification under *Adler*.

Although Counsel for Tia Link argued *Adler* before the trial court, she did not argue *Possinger* and the other cases on which *Adler* relied. (RP 6-8, Mar. 4, 2010.) Nevertheless, because she argued the basic premise on which the *Adler* court granted review without a showing of adequate

cause, these cases and the arguments flowing therefrom are properly before this court. *See State Farm Mutual Auto. Ins. Co. v. Amirpanahi*, 50 Wn. App. 869, 751 P.2d 329 (1988).

- b.* This Court has authority under RAP 2.5 to consider Tia Link's arguments regarding the application of the *Ranken/Timmons* rule to nonparental custody decrees entered by consent.

Tia Link argues for the first time herein that she had the right to proceed without a showing of adequate cause based on the *Rankins/Timmons* rule. She requests this Court to exercise its discretion to consider this issue as it not only provides an independent basis in law for her action to proceed, but is necessary to a proper decision and in line with the strong public policy in Washington that requires family law courts to inquire into facts necessary for their exercise of discretion in determining the best interests of children. Allowing parents to enter into what are essentially permanent custody agreements with trusted friends or family members without the information necessary to determine whether such arrangements are in children's best interests and without a determination that the parent is cognizant of and validly waiving his or her constitutional rights works a manifest injustice on this subset of parents and is contrary to law and sound public policy.

6. Tia Link has a statutory right to costs and attorneys fees at the trial court and on appeal.

Revised Code of Washington 26.10.080 provides trial courts discretionary authority to award costs and attorneys fees to a party maintaining or defending any proceeding under this chapter, including sums for legal services and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings. It additionally provides for a discretionary award of costs and attorney's fees on appeal.

#### V. CONCLUSION

For the reasons stated above, Tia Link respectfully requests this Court to: 1) find the nonparental custody modification statutes under chapters 26.09 and 26.10 RCW unconstitutional as applied to Tia Link and those similarly situated; 2) reverse the trial court and remand with an order granting Tia Link leave to proceed to hearing on modification of the custody order/parenting plan without a showing of adequate cause and in which the heightened detriment standard is applied, 3) award costs and

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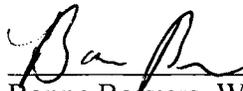
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attorney's fees on appeal to Tia Link as allowed under RCW 26.10.080  
and RAP 18.1(a) and 4) remand with an order for an award of attorney's  
fees and costs below as allowed under RCW 26.10.080.

Respectfully submitted this 20<sup>th</sup> day of August, 2010.



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Center for Justice  
Terri Sloyer WSBA # 34571  
Gaia House  
Attorneys for Petitioner Tia Link

**CERTIFICATE OF SERVICE**

I declare under penalty of perjury and the laws of the State of Washington that the following statements are true:

On August 20, 2010, I cause to be served a true and correct corrected copy of the Opening Brief of Appellant Tia Link to the following via overnight shipping with Fed Ex:

Pamela Link  
315 S. Naches Avenue #3  
Yakima, WA 98901

On August 20, 2010, I caused to be filed a true and correct corrected copy of the Opening Brief of Appellant Tia Link in the Court of Appeals, Division III, Spokane, WA.

  
Cathy Johnson, Paralegal  
Center for Justice  
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Spokane, WA 99201

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

TIA R. LINK, )  
 )  
 Appellant, ) No. 28919-2-III  
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 )  
 v. ) Certificate of Mailing  
 )  
 PAMELA LINK, )  
 )  
 Respondent. )  
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**ORIGINAL**

STATE OF WASHINGTON )  
 ) ss.  
 County of Spokane )

I, TRISHA DENBRODER, Legal Assistant at Gaia Law, LLC being first duly sworn, on oath, deposes and says that: At all times herein mentioned I was and am a citizen of the United States and a resident of the State of Washington, over the age of eighteen (18) years, not a party to or interested in the above-entitled action and competent to be a witness therein.

That on August 18, 2010, I mailed the signature page of the OPENING BRIEF OF APPELLANT TIA LINK including the dated signature page in the above entitled action by first class U.S. mail to:

PAMELA LINK  
315 S. Naches, #3  
Yakima, WA 99169

*Trisha Denbroder*  
TRISHA DENBRODER, Legal Assistant

SUBSCRIBED AND SWORN to before me this 20th day of August 2010.

*Janie L. Martin*  
Notary Public in and for the State of  
Washington, Residing at Spokane  
My Commission Expires: 10/20/2011

