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Court of Appeals  
Division III  
State of Washington  
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**COURT OF APPEALS OF THE STATE OF WASHINGTON  
Division III**

Court of Appeals No. 362213

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**In re:**

**AMY O'CONNELL,**

**Respondent/Appellant,**

**and**

**KEVIN O'CONNELL,**

**Petitioner/Respondent.**

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**APPELLANT'S REPLY BRIEF**

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## I. OBJECTIONS

Respondent's *Statement of the Case* fails to comply with RAP 10.3(a)(5). In four pages of recitation of facts, Respondent only cites to the record twice.

*Specifically*, Appellant objects to Respondent's statement on page 1 of the *Responsive Brief* that "[t]he parties did not agree to Appellant providing care for the children when Respondent was unavailable." (*Responsive Brief*, pg. 1.) This is not cited to the record, and indeed, it cannot be, because at no time did Respondent provide any testimony that disputed this information in the underlying proceeding. Appellant asserted this agreement in the underlying proceeding, and Respondent never denied it. It is therefore undisputed on appeal.

Respondent's *Legal Argument* failed to comply with RAP 10.3(b). Respondent does not clearly address any of the legal issues raised by Appellant on appeal.

## II. ARGUMENT

### A. The trial court erred as a matter of law when it failed to properly interpret the statutory requirement for a 'substantial change of circumstances.'

Respondent does not address this argument in his brief other than to characterize Appellant's request as a request for a "right of first refusal," which he argues is a residential modification; however, it is unclear to what end he makes this point.

Regardless, Appellant did not request a right of first refusal. A right of first refusal determines a child's residential placement by indicating that when one parent is not available to directly provide care for a particular period of time (usually determined in hours), the other parent then has a right to exercise residential time. That is not what Appellant requested, as the trial court rightly recognized.

Appellant requested that she be permitted to provide specifically defined work-related daycare rather than a third-party provider as the parties had undisputedly agreed and historically done. This request reflected the longstanding agreement of the parties as performed before and after the entry of the agreed parenting plan. In this arrangement, Appellant would *not* be able to assert a right to residential time against Respondent's right to residential time, nor would any daycare provided be characterized as residential time for the purposes of determining primary placement of the children (a significant difference from the right of first refusal). Appellant would not have any right to provide care on weekends or evenings or at any other time than the pre-determined week day when she was available and had historically provided daycare while Respondent was working. Work-related daycare is routinely addressed in parenting plans as a nonresidential provision.

A first right of refusal, by contrast, applies generally, and it is a disfavored mechanism because it is unpredictable and encourages the parties to monitor each other, which this request would not do. Often a first right of refusal also

operates to prevent a party from sending the kids to their grandparents for the weekend or letting them go to sleepover parties, etc., which this request would also not do. This request was strictly about providing work-related *daycare* and sought to give the mother preference over a third-party non-parental provider because the parties had agreed to do so at the time the agreed parenting plan was entered, which remains entirely undisputed.

Beyond a reference to Appellant's request as being a request for a 'right of first refusal,' Respondent makes no further response. This Court need not address issues that a party does not meaningfully discuss with citation to authority. *Saviano v. Westport Amusements, Inc.*, 144 Wn.App. 72, 84, 180 P.3d 874 (2008); citing RAP 10.3(a)(6); see also *State v. Logan*, 102 Wn.App. 907, 911, n.1, 10 P.3d 504, (2000)("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.")(quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

**B. The trial court erred as a matter of law when it ruled on the merits of the petition for modification without first conducting an evidentiary hearing.**

Respondent mischaracterizes Appellant's argument and instead argues against a strawman, claiming that Appellant appeals the trial court's failure to provide an evidentiary hearing prior to determining adequate cause. This is not what Appellant argued.

Appellant argues that the Court erred by addressing the *merits* of the case at the *adequate cause* hearing; by statute, the merits (i.e., the best interests of the children) are to be addressed in an evidentiary hearing, which Appellant was not afforded. Because the Court indicated that it would ultimately expected to be asked to make a change that it did not believe to be in the children's best interests, it subsumed the 'best interests' analysis into the 'adequate cause' analysis and relied on what it theorized its future response would be in response to evidence that had not yet been presented in order to deny adequate cause and avoid further review. But these analyses are distinct and separate under Washington statute, and they do not occur simultaneously.

Respondent says that Appellant was obligated to request an evidentiary hearing, but this is not true. After establishing adequate cause, RCW 26.09.270 ensures an evidentiary hearing. Litigants are not required to request one.

**C. The trial court abused its discretion when it failed to find adequate cause for modification of a non-residential provision of the parenting plan.**

Respondent provided no response to this issue.

**D. Appellant should be awarded attorney's fees on appeal.**

Respondent responds to this issue only by saying that "[o]ne should not be able to produce litigation that has no merit and then seek to be financially compensated for such." He provides no authority for that statement, and he entirely fails to address RCW 26.09.140. As above, this Court need not address

issues that a party does not meaningfully discuss with citation to authority. Saviano, 144 Wn. App. at 84.

**E. Miscellaneous.**

In violation of RAP 10.3(a)(5) and (6) and RAP 10.3(b), Respondent includes an argument regarding the mandatory language for pleading a minor modification in his *Statement of the Case* section. He does not argue it at any other point in his brief or clearly identify it as an issue for review.

Regardless, he asserts: “Appellant went and removed the mandatory language regarding the modification,” and indicates that Appellant therefore failed to plead any actual statutory petition. (*Responsive Brief*, pgs. 2-3.)

Respondent claims that Appellant failed to plead any actual statutory petition, but he accomplishes this by completely ignoring Section 9. (CP 4.)

Further, pleadings are primarily intended to give “notice,” both to the Court and to the opposing party, of the general nature of the asserted claim or matter. See, e.g., Lightner v. Balow, 59 Wn.2d 856, 370 P.2d 982 (1962). This is often referred to as “notice pleading.” As such, pleadings are to be construed liberally so as to do substantial justice. Pearson v. Vandermay, 67 Wn.2d 222, 407 P.2d 143 (1965); CR 8(f). Appellant filled out the mandatory court form *and* provided a detailed declaration that laid out the nature of her request, and she also indicated the statutory basis for her request, so Respondent had more than sufficient notice.

### III. CONCLUSION

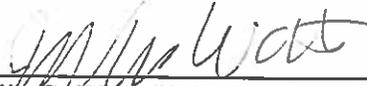
The trial court erred as a matter of law in its interpretation and application of the modification statutes. The trial court abused its discretion when it entered a finding that there was no adequate cause for modification of nonresidential provisions of the parenting plan. Appellant respectfully requests that this Court (1) reverse the trial court's ruling, (2) enter a finding of adequate cause, (3) remand the matter for an evidentiary hearing pursuant to RCW 26.09.270, and (4) award her attorney's fees pursuant to RCW 26.09.140.

RESPECTFULLY SUBMITTED this 14 day of May, 2019,

  
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JULIE C. WATTS/WSBA #43729  
Attorney for Appellant

**CERTIFICATE OF ATTORNEY**

I certify that on May 6, 2019, I arranged for hand-delivery of a copy of the foregoing *Appellant's Reply Brief* to Matthew Dudley, attorney for Respondent, at 104 S. Freya St., Suite #120, Spokane, WA 99202.



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**THE LAW OFFICE OF JULIE C. WATTS, PLLC**

**May 06, 2019 - 3:30 PM**

**Transmittal Information**

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