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Division III
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**COURT OF APPEALS OF THE STATE OF WASHINGTON
Division III**

Court of Appeals No. 362213

In re:

AMY O'CONNELL,

Respondent/Appellant,

and

KEVIN O'CONNELL,

Petitioner/Respondent.

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

I. SUMMARY OF ARGUMENT	1
II. ASSIGNMENTS OF ERROR	1
III. ISSUES PRESENTED	2
IV. STATEMENT OF THE CASE	2
V. ARGUMENT	7
A. <i>The trial court erred as a matter of law when it failed to properly interpret the statutory requirement for a 'substantial change of circumstances.'</i>	7
B. <i>The trial court erred as a matter of law when it ruled on the merits of the petition for modification without conducting an evidentiary hearing.</i>	11
C. <i>The trial court abused its discretion when it failed to find adequate cause for modification of a non-residential provision of the parenting plan.</i>	13
D. <i>Appellant should be awarded attorney's fees on appeal.</i>	21
VI. CONCLUSION	22

TABLE OF AUTHORITIES

Cases

<i>Bower v. Reich</i> , 89 Wn.App. 9, 946 P.2d 1216 (1997)	7, 11
<i>In re Hansen</i> , 81 Wn.App 494, 914 P.2d 799 (1996)	7, 11
<i>In re Marriage of Flynn</i> , 94 Wn.App. 185, 972 P.2d 500 (1999)	8, 12, 14
<i>In re Marriage of Hoseth</i> , 115 Wn.App. 563, 63 P.3d 164 (2003)	13
<i>In re Marriage of Parker</i> , 135 Wn.App. 465, 145 P.3d 383 (2006)	8, 12, 14, 16
<i>In re Marriage of Stenshoel</i> , 72 Wn.App. 800, 866 P.2d 635 (1993) . . .	21
<i>In re Marriage of Timmons</i> , 94 Wn.2d 594, 617 P.2d 1032 (1980)	14
<i>In re Marriage of Tomsovic</i> , 118 Wn.App. 96, 74 P.3d 692 (2003)	8, 14
<i>In re Marriage of Van Camp</i> , 82 Wn.App. 339, 918 P.2d 509 (1996)	21
<i>In re Parentage of C.M.F.</i> , 179 Wn.2d 411, 214 P.3d 1109 (2013)	17
<i>In re Parentage of Jannot</i> , 149 Wn.2d 123, 65 P.3d 664 (2003) . . . 13,	18
<i>In re Shyrock</i> , 76 Wn.App. 848, 888 P.2d 750 (1995)	11, 13
<i>State v. Van Guilder</i> , 137 Wn.App. 423, 154 P.3d 243 (2007)	8
<i>Zigler v. Sidwell</i> , 154 Wn.App. 803, 226 P.3d 202 (2010) . . . 8,	13, 14

Statutes

RCW 26.09.002 17

RCW 26.09.140 1, 21, 22

RCW 26.09.187 18

RCW 26.09.260 8, 11, 13, 14, 16

RCW 26.09.260(10) 8, 14, 16

RCW 26.09.260 and .270 8, 14

RCW 26.09.270 1, 12, 13, 19, 22

RCW 26.19.001 18

Rules

RAP 18.1 21

RAP 18.1 (b) and (c) 21

I. SUMMARY OF ARGUMENT

The trial court erred as a matter of law when it failed to properly interpret the statutory requirement for a ‘substantial change of circumstances’ by conflating that inquiry with the ‘best interests of the child.’ The trial court further erred when it ruled on the merits of the petition for modification without first finding adequate cause or conducting an evidentiary hearing pursuant to RCW 26.09.270. The trial court abused its discretion when it failed to find adequate cause because the record confirms that Appellant met her burden to demonstrate a substantial change of circumstances and to show that her proposed parenting plan plausibly represents the best interests of the children.

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.

II. ASSIGNMENTS OF ERROR

- 1. The trial court erred when it failed to properly interpret the statutory meaning of a “substantial change of circumstances.”*
- 2. The trial court erred when it failed to properly determine whether there had been a substantial change of circumstances.*
- 3. The trial court erred when it failed to find adequate cause.*
- 4. The trial court erred when it dismissed the petition for modification based on the merits without first determining adequate cause and conducting an evidentiary hearing.*

5. *The trial court erred when it determined the best interest of the children in violation of well-established Washington case law and public policy.*
6. *The trial court erred when it determined that the children seem to be "doing well" without substantial evidence in the record and without an evidentiary hearing.*

III. ISSUES PRESENTED

- A. **Whether the trial court erred as a matter of law when it failed to properly interpret the statutory requirement for a 'substantial change of circumstances.'**
- B. **Whether the trial court erred as a matter of law when it ruled on the merits of the petition for modification without conducting an evidentiary hearing.**
- C. **Whether the trial court abused its discretion when it failed to find adequate cause for modification of a non-residential provision of the parenting plan.**
- D. **Whether Appellant is entitled to an award of attorney's fees on appeal.**

IV. STATEMENT OF THE CASE

The parties divorced in July of 2016. (CP 7.) The parties drafted the relevant paperwork themselves without the assistance of an attorney and entered the documents by agreement without any hearing by the trial court. (CP 7.) The parties agreed to a shared schedule that equally allocates overnights between the parents. (CP 7.) The parties agreed that Amy,¹ who had always been a stay-at-home mom prior to the dissolution, would provide care for the parties' children when Kevin was not available to do so during his

¹ For the sake of clarity, this brief refers to the parties by first names because they share the same last name; no disrespect is intended.

regular work schedule. (CP 8.) The parties subsequently followed this arrangement for a year and a half following entry of the parenting plan. (CP 8.) Amy testified that her agreement to the 50/50 parenting plan was predicated on this arrangement. (CP 8.) She had stayed home with the children since they were born. (CP 8.) She quit her job and gave up her investment license because the parties had agreed that it was important to keep their kids out of daycare and home with a parent whenever possible. (CP 8.) She arranged her current life, including limiting her employment opportunities, to accommodate their agreement. (CP 9.) Amy testified that she obtained relatively low-paying employment at a local café because it allowed her to work extremely early in the morning or late at night so that she could be available to provide care during the day for the parties' children. (CP 9.)

In September of 2017, Kevin abruptly changed the daily care arrangement without warning to Amy. (CP 8.) He put their daughter, Hallie, in daycare on Thursdays without telling Amy, claiming that he was entitled to do whatever he wanted during his time. (CP 8.) Prior to Kevin's unilateral decision, Hallie had never been in daycare before. (CP 8.) Kevin did not provide Amy with any contact information about where Hallie was attending daycare. (CP 8.) Kevin also hired a high-school student to babysit the parties' children after school on Thursdays even though Amy was available and had always previously provided care at that time. (CP 9.)

The parties mediated, but they could not come to an agreement. (CP 9, 46.) They attempted to work things out without litigation for several months, to no avail, when finally, before the end of the school year, Amy filed a *Petition for Modification of the Parenting Plan* and, alternatively, a *Motion to Clarify*; in doing so, she hoped that the trial court would facilitate a natural transition back to the previous arrangement and prevent any further unnecessary trauma to the children resulting from abrupt changes in their schedule. (CP 1-6 ; 33-38.)

In her filings, Amy detailed the previous practice of the parties as cited above. In his testimony to the trial court, Kevin did not dispute that Amy had always been a stay-at-home mom with the children by agreement. He did not dispute that the parties had agreed she would quit her job and give up her investment license to provide care. He did not dispute that the parties agreed that they would keep the children out of daycare so that care could be provided by a parent wherever possible or that he had previously indicated that he believed doing so was in the children's best interests.

In his testimony, Kevin did not dispute that he had obtained Amy's agreement to the 50/50 parenting schedule by promising her that she would be entitled to provide care for the children during his work day; instead, he carefully testifies to the limited statements that "there is nothing in the parenting plan that contains that language..." (CP 43.) Kevin did not dispute that Amy provided care for the children during the day for over a year and a half since the parties separated. (CP 44.) Kevin did not dispute that he

unilaterally changed the children's schedule without notice to Amy. (CP 44-45.) He confirmed that he hired a high-school student to provide care for the children during times that Amy was available to provide care during times that he knew Amy was available to provide care. (CP 45.)

Perhaps most shockingly, Kevin indicated that he had enlisted Amy's father to facilitate extra-curricular activities for the children instead of allowing Amy to continue the facilitation she had always provided; he did so despite knowing that "her lack of relationship with her father makes it very uncomfortable for the kids," and his testimony demonstrates that his intent to exclude Amy from activities by engineering unnecessary conflict. (CP 45.)

In her reply declaration, Amy noted that Kevin had not disputed any of the material facts at hand, and that he also had admitted to cultivating an environment of unnecessary conflict by his own testimony. (CP 55-60.) Amy reiterated to the trial court that her request was simply to continue providing care for the children during the day when Kevin was unavailable because of work (as she had always done prior to Kevin's unilateral action). *Id.* She was not asking to provide care outside of regular work hours (in the evenings or on weekends). *Id.* She was not asking for right of first refusal. *Id.* She was not asking for a change in the residential schedule. *Id.* She merely requested to modify the parenting plan to reflect the parties' actual agreement and to reflect the parties' actual practice for over a year and a half— an agreement on which Amy had relied to her detriment with respect to employment opportunities. *Id.*

The matter was heard by Commissioner Jacqueline High-Edward. (CP 111.) The commissioner determined that Amy had failed to demonstrate adequate cause for a non-residential modification to the parenting plan. (CP 111-112.) In her oral ruling, the commissioner stated: “I recognize that there was a pattern of behavior where mom was providing some care on Thursdays for Hallie; and that continued for a period of time.” (CP 138.) She went on to conclude:

If this had come to us after mediation had failed at the end of September, there might have been an ability to find a substantial change of circumstance given that there was a change in the agreement of the parties between mom providing care and dad providing care. I don’t know that that – how that would have played out. But given the amount of time she spent almost a whole nine months in this setting; I don’t find that that’s a substantial change of circumstance, so I am going to deny adequate cause for a minor modification. Deny the motion for clarification.

At this point, [counsel], I am also going to deny your request for attorney’s fees. I think the petition was odd but given what had happened, what their pattern of behavior had been until September it – I think it could have been a substantial change if it had come earlier.

(CP 140.)

Amy moved for revision. (CP 113.)

The trial court denied the motion to clarify based on the absence of any indication about how daycare would be handled in the agreed parenting plan. (CP 138.) The trial court also entered a finding that there was no adequate cause for a non-residential modification of the parenting plan. (CP 143.) There

is no indication in the written order as to the basis for the trial court's finding.

(CP 143-144.) In its oral ruling, the trial court stated:

It's really (10) that I'm looking at. Ten talks about a substantial change of circumstances. Well, what we had here as a parenting plan was put in effect. My position has always been that the parties can agree to make changes in that plan, act differently, do things differently, but at the point where they can no longer agree then the order controls.

And that's exactly what happened here. They agreed for a while. Then the father no longer agrees, said we'll go back to the parenting plan, and that's what they did. He withdrew his agreement. Now, that has been in place since September. The plan as written has been in place since September. **I understand the commissioner's comments that time has passed, you have the change of circumstances, time has moved on, it's hard to go back and ask to change things from where they were nine months ago.**

The other thing the statute talks about is the best interests of the child. Here, the kids had a routine for a while and they had this change in the routine when dad withdrew his agreement. And that's where they are now. The indications seem to be that they're doing well. And I'm being asked to change that yet again. I don't think that's in the children's best interests.

(RP 22-23.)

Amy appealed.

V. 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.'**

STANDARD OF REVIEW: The construction of a statute is a matter of law, and the construction or interpretation given a statute by a trial court is reviewed de novo. *In re Hansen*, 81 Wn.App 494, 498, 914 P.2d 799 (1996);

see also, Bower v. Reich, 89 Wn.App. 9, 16, 946 P.2d 1216 (1997); In re Tomsovic, 118 Wn.App. 96, 105, 74 P.3d 692 (2003).

AUTHORITY: Pursuant to RCW 26.09.260(10), the moving party must demonstrate *a substantial change of circumstances* of either parent or of the children before a court can adjust the parenting plan.

“Parenting plan modifications require a two-step process set out in RCW 26.09.260 and .270.” Zigler v. Sidwell, 154 Wn.App. 803, 809, 226 P.3d 202 (2010). A moving party must *first* show a substantial change of circumstances as needed for a minor modification, and, *second*, demonstrate that the proposed residential schedule is within the scope of the modification pursuant to statute. In re Marriage of Parker, 135 Wn.App. 465, 472, 145 P.3d 383 (2006); Tomsovic, 118 Wn.App. at 104; In re Marriage of Flynn, 94 Wn.App. 185, 191, 972 P.2d 500 (1999); Zigler, 154 Wn.App. at 809.

ANALYSIS: In this case, the trial court addressed the issue of a substantial change of circumstances on Amy’s motion to revise the commissioner’s ruling, which it denied. Generally, this Court reviews the superior court’s ruling, not the commissioner’s, but “when the superior court denies a motion for revision, it adopts the commissioner’s findings, conclusions, and rulings as its own.” State v. Van Guilder, 137 Wn.App. 423, 423, 154 P.3d 243 (2007).

Both the commissioner and the trial court improperly skipped the two-step process required by statute (first, determining adequate cause and then, if adequate cause exists, holding an evidentiary hearing on the merits). Both

failed to properly determine whether there had been a substantial change of circumstances in the life of the parents or the children. Both speculated, without basis, that any potential modification would be contrary to the best interests of the children, and both summarily dismissed Amy's petition without first determining adequate cause or holding an evidentiary hearing.

Troublingly, the commissioner recognized in her oral ruling that there had likely been a substantial change of circumstances as a result of "a change in the agreement of the parties between mom providing care and dad providing care." (CP 140.) Despite that admission, however, she improperly speculated that any modification would be inherently contrary to the best interests of the children solely because Amy waited 'too long' to litigate. She then arrived at the puzzling conclusion that even though Kevin's unilateral deviation had resulted in a substantial change of circumstances *at the time it occurred*, Amy's subsequent failure to timely litigate the matter had the effect of *retroactively transforming* the past into an alternative version of reality that *was not* a substantial change of circumstances. This boggling reasoning defies a common sense understanding of cause and effect. Events that occur in the present do not retroactively change the facts of the past. If an event represented a substantial change from previous circumstances *at the time it occurred*, it remains a substantial change of circumstances thereafter. No *subsequent* occurrence can retroactively render a previously substantial change insubstantial.

The absurdity of this reasoning becomes apparent when applied to a simple, concrete illustration: Consider that Person A has painted a room orange. Person B then paints the room purple. If a court determines that Person B substantially changed the circumstances of the room when he changed the color from orange to purple, there is no amount of *time* that the room subsequently remains purple that could alter the determination that a purple room is a substantial change of circumstances from an orange room. A purple room is either substantially different from an orange room, or it is not. The length of time the room subsequently continues to be purple after it was initially painted is irrelevant. Continuing with the illustration, the issue of ‘whether being purple is a substantial change of circumstances from being orange,’ is an entirely distinct and independent inquiry from ‘whether it is in the best interest of the room to be purple or orange.’ The logic of this is apparent: if there is no meaningful difference between two alternatives, one cannot meaningfully reach the question of whether one is better than the other.

In this case, both the commissioner and the trial court failed to properly interpret the statutory meaning of ‘substantial change of circumstances.’ The question of whether any given situation constitutes a ‘substantial change of circumstances’ is a distinct and independent inquiry from the question of whether a particular proposed change is ultimately proven to serve the children’s best interests after an evidentiary hearing. Conflating these issues resulted in absurdity and constitutes an error as a matter of law. If Kevin’s

unilateral change to the parties' arrangement for child care was a substantial change of circumstances at the time it occurred, it remains one for the subsequent determination of adequate cause.

CONCLUSION: The trial court erred as a matter of law when it failed to properly determine whether Amy had proven a substantial change of circumstances pursuant to Washington state statute. Appellant respectfully requests that this Court reverse the trial court's ruling. Normally, the request at this stage would be for this Court to remand the issue to the trial court with instructions to properly evaluate the matter pursuant to a correct interpretation of the statute; however, further argument below will provide the basis for Appellant's request that this Court reverse the trial court's ruling and enter a finding of a substantial change of circumstances.

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

STANDARD OF REVIEW: The construction or interpretation given a statute by a trial court is reviewed de novo. *Hansen*, 81 Wn.App at 498; see also, *Bower*, 89 Wn.App. at 16.

AUTHORITY: Procedures relating to the modification of a prior custody decree or parenting plan are statutorily prescribed, and compliance with the criteria set forth in RCW 26.09.260 is mandatory. *In re Shyrock*, 76 Wn.App. 848, 852, 888 P.2d 750 (1995).

Without a proper finding of adequate cause, the trial court shall not proceed to evaluate a petition for modification on the merits. RCW 26.09.270.

“A party is entitled to a full evidentiary hearing when adequate cause is shown.” *Flynn*, 94 Wn.App. at 191. The children’s interest and needs are considered at an evidentiary hearing if adequate cause for a minor adjustment is shown. *Id.* It is sufficient for adequate cause that the moving party plausibly represent that her proposed plan is in the best interest of the children; she is entitled to prove her case at the subsequent evidentiary hearing. *Parker*, 135 Wn.App. at 473.

ANALYSIS: Here, the trial court struggled with the question of adequate cause; rather than carefully considering the issue on the record, it avoided the analysis by simply concluding that the petition should ultimately be dismissed on the merits:

The other thing the statute talks about is the best interests of the child. Here, the kids had a routine for a while and they had this change in the routine when dad withdrew his agreement. And that’s where they are now. The indications seem to be that they’re doing well. And I’m being asked to change that yet again. I don’t think that’s in the children’s best interests.

(RP 23.)

The trial court erred as a matter of law by dismissing Amy’s petition on the merits without an evidentiary hearing as required by RCW 26.09.270. The trial court is not entitled to proceed with the petition on the merits without a finding

of adequate cause, and it is not entitled to rule on the merits without an evidentiary hearing.

CONCLUSION: The trial court erred as a matter of law when it dismissed Amy's petition on the merits without finding adequate cause or holding an evidentiary hearing pursuant to RCW 26.09.270. Appellant respectfully requests that this Court reverse the trial court's ruling.

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.

STANDARD OF REVIEW: A superior court's rulings with respect to a parenting plan are reviewed for an abuse of discretion. *In re Parentage of Jannot*, 149 Wn.2d 123, 126, 65 P.3d 664 (2003). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; [and] it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." *Zigler*, 154 Wn.App. at 808-809.

"With respect to modification of parenting plans, the procedures and criteria set forth in RCW 26.09.260 limit the superior court's range of discretion." *In re Marriage of Hoseth*, 115 Wn.App. 563, 569, 63 P.3d 164 (2003)(citing *Shyroch*, 76 Wn.App. at 852). A superior court abuses its discretion if it fails to base its modification ruling on the statutory criteria. *Id.*

AUTHORITY: “Parenting plan modifications require a two-step process set out in RCW 26.09.260 and .270.” Zigler, 154 Wn.App. at 809. A moving party must first show a substantial change of circumstances as needed for a minor modification, and, second, demonstrate that the proposed residential schedule is within the scope of the modification pursuant to statute. Parker, 135 Wn.App. at 472; Tomsovic, 118 Wn.App. at 104; Flynn, 94 Wn.App. at 191; Zigler, 154 Wn.App. at 809. Information considered in deciding whether a hearing is warranted includes “those facts that existed *before* an agreed parenting plan was entered.” Zigler, 154 Wn.App. at 809-11 (emphasis added)(quoting In re Marriage of Timmons, 94 Wn.2d 594, 598-99, 617 P.2d 1032 (1980)).

1. Amy demonstrated a substantial change of circumstances sufficient to support a finding of adequate cause.

Pursuant to RCW 26.09.260(10), the moving party must demonstrate a substantial change of circumstances of either parent or of the children before a court can adjust the parenting plan.

It is undisputed that the parties agreed that Amy would provide care for the children when Kevin was at work. It is undisputed that Amy’s agreement to a 50/50 parenting plan was predicated on that arrangement. It is undisputed that the parties performed in accordance with that agreement for over a year and a half after separation. It is undisputed that Kevin unilaterally changed the care arrangements for the children and put the children in the care of a high school

student and a daycare provider. It is undisputed that the parties had previously agreed that it was not in the best interest of their children to be in daycare or supervised by a third party; rather, they wanted them to be in the care of a parent whenever possible. These undisputed facts support a finding that the children's current circumstances (where they are provided care by a high-school aged babysitter and a daycare provider rather than their mother) are meaningfully and substantially different from those that existed when the parenting plan was entered. The record reflects that trial court and the commissioner both acknowledged a meaningful change in circumstances, but both failed to properly interpret the statute's requirements with respect to making a finding.

The record confirms that Amy provided a preponderance of undisputed evidence that demonstrates a substantial change of circumstances in the lives of the parties' children. The trial court's conclusion that there was no substantial change of circumstances was based on untenable grounds because the factual findings were unsupported by the record, and it was based on untenable reasons because it failed to apply the correct standard. The trial court therefore abused its discretion.

Appellant respectfully requests that this Court reverse the trial court's ruling and enter a finding that there has been a substantial change of circumstances in the lives of the parties' children.

2. *Amy plausibly represented that her proposed parenting plan is in the best interest of the children sufficient to prove adequate cause.*

Once a party has demonstrated a substantial change in circumstances, RCW 26.09.260(10) requires that the requested adjustment be “in the best interest of the child.” RCW 26.09.260(10).

Amy is not required to *prove* that her proposal is in the best interests of the children to demonstrate adequate cause; it is sufficient that she “plausibly represent” that her proposed plan is in the best interest of the children. *Parker*, 135 Wn.App. at 473. She is entitled to prove her case at the subsequent evidentiary hearing. *Id.*

It is undisputed in the record that the parties *agreed* that the best interests of their children are served by being in the care of a parent when possible and not in the care of a daycare provider or other babysitter. Amy testified to that agreement before the trial court, and Kevin did not dispute it. Further, the parties adhered to that agreement for over a year and a half after separation, which further confirms Amy’s allegation that the parties’ agreed that the best interests of the children are served by being in the care of a parent wherever possible.

Amy’s proposed parenting plan (which merely formalizes what the parties had both previously agreed and subsequently performed) puts the children in the care of a parent wherever possible. Amy’s request is merely that she be permitted to provide care for the children whenever Kevin is unavailable to do

so because of his regular work schedule. Therefore, her proposal is plausibly in the best interests of the children.

Further, the legislative purpose of the modification statutes is to “protect stability by making it more difficult to challenge the status quo.” *In re Parentage of C.M.F.*, 179 Wn.2d 411, 419-420, 214 P.3d 1109 (2013). The legislature has also recognized that the best interest of a child is ordinarily served when the existing pattern of interaction between a parent and child is not altered unnecessarily. RCW 26.09.002.

Here, the trial court improperly focused on the children’s pattern of interaction over the last nine months since Kevin unilaterally disrupted the agreed parenting arrangement, rather than the preceding eighteen months that immediately followed separation. Not only does this approach fail to properly address the actual status quo of the children whose best interests are to be considered, but it has the effect of rewarding parties for seeking forgiveness instead of permission; in stark contradiction to public policy. If a party can make a unilateral change and then delay litigation by pretending to engage in good faith negotiations toward resolution, he will automatically benefit from bad behavior based on the manufactured “status quo” of mere months. It is undisputed in the record that prior to Kevin’s unilateral action, the children had *always* been provided care by Amy during Kevin’s work day, by agreement of the parties. Therefore, it is Amy’s proposal, not the current circumstances

manufactured by Kevin, that plausibly reflects the status quo and the best interests of the children.

Not only does Amy's proposal further the best interests of the children based on the standards articulated in Washington law, but the ruling of the trial court to the contrary was made in contradiction to public policy. The suggestion that a party should be automatically punished for not rushing to litigation contradicts Washington public policy. The Washington Supreme Court has recognized that litigation can be harmful to children. *Jannot*, 149 Wn.2d at 127. In general, the Legislature has indicated a preference for encouraging the agreement of the parties and discouraging litigation. See, e.g., RCW 26.09.187 and RCW 26.19.001. The trial court's ruling here encourages parents to eschew attempts to resolve matters by agreement, which is the preference of the court, and instead rush to litigate as quickly as possible for fear of being subject to some unknown deadline.

Further, the limited discussion by the commissioner and the trial court demonstrates a troubling lack of careful consideration or even the application of common sense. Both rulings reflect the cursory conclusion that *any change* in the child's care arrangements during Kevin's work hours is *necessarily* contrary to the child's best interests. This conclusion has no basis in fact or law. It ignores the fact that children routinely change their daily care arrangements when they shift from the school year to summer or when they graduate to a new grade and start school with a new teacher. (In fact, in this

case, Amy timed her request to coincide with the end of the school year in order to avoid any abrupt, unexpected transition.) By the trial court's logic, however, if a parent were to hire a babysitter for even one day, the child should thereafter remain with that babysitter indefinitely rather than return to the care of the parent because any further "change" to the child's schedule would be inherently contrary to the child's best interests. This defies common sense.

The trial court cannot reasonably conclude that *any change* in care arrangements, regardless of the consequences, is necessarily and inherently contrary to the best interests of the children (which is, in fact, what the trial court concluded here). The question is not whether *change* in an abstract sense is generally in the best interests of the children, but whether a specific change would result in *circumstances* that further the best interests of the children. It is true that any kind of change in schedule may be disruptive, but the minimal disruption in this case is clearly outweighed by the benefit to the children of being in the care of a parent and by returning to the longstanding status quo.

To conclude, the record confirms that the trial court failed to properly consider the best interests of the children with respect to adequate cause in this case. The trial court's conclusion was based on untenable grounds because the factual findings were unsupported by the record, and it was based on untenable reasons because it failed to apply the correct standard. The trial court therefore abused its discretion.

Appellant respectfully requests that this Court reverse the trial court's ruling and enter a finding that she plausibly represented that her proposal was in the best interests of the children and that she met the standard for a finding of adequate cause. She requests that the matter be remanded for an evidentiary hearing pursuant to RCW 26.09.270.

3. The trial court erred by basing its decision on a finding that the children were "doing well."

The trial court denied adequate cause at hearing in part based on its factual finding that "[t]he indications seem to be that [the children are] doing well." This was error for several reasons. First, the parties had not yet had the opportunity to provide evidence with respect to the merits of the case because no evidentiary hearing had been held. Second, the trial court's use of the phrase "doing well" does not clearly indicate which standard was being applied. A minor modification does not require a showing of detriment in order to modify the plan; the trial court's suggestion that a modification is not in the best interests of the children because they appear to be "doing well" in the current environment suggests it applied the wrong standard. In this case, the standard was "the best interests of the children" which contemplates the comparison of two alternative scenarios wherein neither situation may be a detriment to the children, and wherein one could reasonably expect the children to be "doing well" in both. To say the children are currently "doing well" without more information is not a proper consideration of the "best interests" of the children.

Therefore, the trial court's conclusions were based on untenable grounds because the factual findings were unsupported by the record and on untenable reasons because it failed to apply the correct standards. The trial court therefore abused its discretion in denying adequate cause.

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

Pursuant to RAP 18.1, Appellant moves for and requests an award of attorney's fees on appeal. Under RCW 26.09.140, this Court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs. In making its determination, a court balances the needs of the spouse requesting the fee award against the ability of the other spouse to pay. *In re Marriage of Stenshoel*, 72 Wn.App. 800, 813, 866 P.2d 635 (1993). Need, ability to pay, and equity are the primary considerations for the award of attorney's fees in a dissolution action. *In re Marriage of Van Camp*, 82 Wn.App. 339, 342, 918 P.2d 509 (1996). Here, Amy has need and Kevin has the ability to pay. Further, Amy's financial need is directly related to her limited employment which is a consequence of the parenting agreement that Kevin does not dispute but is now refusing to honor, thereby necessitating this appeal. Appellant will file a financial declaration with this Court, pursuant to RAP 18.1 (b) and (c). She asks that this Court determine that she has financial need as compared to Kevin and award her attorney's fees.

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 27th day of DECEMBER, 2018,



JULIE C. WATTS/WSBA #43729
Attorney for Appellant

CERTIFICATE OF ATTORNEY

I certify that on December 27, 2018, I arranged for hand-delivery of a copy of the foregoing *Appellant's Opening Brief* to Matthew Dudley, attorney for Respondent, at 104 S. Freya St., Suite #120, Spokane, WA 99202.



Julie C. Watts/WSBA #43729
Attorney for Appellant

THE LAW OFFICE OF JULIE C. WATTS, PLLC

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