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

**Court of Appeals No. 367665-III**

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**In re:**

**TIFFANY CARPENTER,**

**Respondent/Appellant,**

**and**

**CHRISTIAN CORREA,**

**Petitioner/Respondent.**

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**RESPONDENT'S BRIEF**

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## I. OBJECTION

Throughout her brief, Appellant makes repeated reference to items in the court record (such a previously filed declarations) that were not submitted into evidence at trial or considered by the trial court.<sup>1</sup>

There were only two documents admitted as exhibits at trial; both were illustrative. (RP 4.) One was an order to modify the parent-child relationship that had been entered in Texas on June 27, 2017, and the other was Ms. Carpenter's proposed parenting plan filed on November 9, 2017. *Id.* No other documents were presented at trial.

## II. ISSUES

- A. Whether there is substantial evidence in the record to support the trial court's ruling.
- B. Whether the trial court was required to award sole decision-making as a matter of law.

## III. ARGUMENT

### A. The trial court's ruling is supported by substantial evidence.

An appellate court is extremely reluctant to disturb parenting decisions because of the trial court's unique opportunity to observe the parties. *In re Parentage of Schroeder*, 106 Wn.App. 343, 349, 22 P.3d 1280 (2001). An

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<sup>1</sup> Had many of these documents been offered at trial, which they were not, they would not likely have been admitted as they do not meet the relevant evidentiary standards.

appellate court will uphold challenged findings of fact as long as they are supported by substantial evidence. *In re Marriage of Katare*, 175 Wn.2d 23, 35, 283 P.3d 546 (2012). Substantial evidence is “that which is sufficient to persuade a fair-minded person of the truth of the matter asserted.” *Katare*, 175 Wn.2d at 35. Where substantial evidence supports a finding, it is immaterial that other evidence may contradict the finding. *In re Marriage of Burrill*, 113 Wn.App. 863, 868, 56 P.3d 993 (2002).

The record reflects that Mr. Correa was not present at trial. The issues before the trial court in this case were determined solely on evidence presented by Ms. Carpenter, which included her own testimony and reference to the two exhibits identified in Section I, above.

Ms. Carpenter asked for sole decision-making with respect to school, health care, and extracurricular activities. (RP 16.) She indicated that sole decision-making was necessary because of “[her] inability to communicate with [Mr. Correa] in a meaningful manner [sic].” (RP 16.)

*EDUCATIONAL DECISIONS:* Ms. Carpenter provided no evidence of conflict surrounding educational decisions. She indicated that the parties “differ in where to send the girls for school,” but a difference of opinion on an issue is not conflict that prevents mutual decision-making. (RP 13.) At no time did Ms. Carpenter provide any further information about how the parties “differ” on the issue of school.

Not only was there no evidence of conflict, but Ms. Carpenter provided information of ongoing cooperation related to educational decisions in the face of difficult financial circumstances. (RP 25-26.) She specifically indicated that, historically, she has notified Mr. Correa of the children's school activities, and "he's been in attendance even when he lived in Kent." (RP 16.) She even testified that if Mr. Correa was not available for school activities, she would "show him their events to him over iPad." (RP 16.)

Therefore, the trial court did not abuse its discretion; the record confirms that the trial court would have abused its discretion if it *had* awarded sole decision-making to Ms. Carpenter on educational decisions without evidence to support that decision.

*HEALTH CARE DECISIONS:* Ms. Carpenter provided no evidence of conflict surrounding health care decisions; to the contrary, she indicated that she has historically notified Mr. Correa of the children's doctor appointments and confirmed that "he's been in attendance even when he lived in Kent." (RP 16.)

Therefore, the trial court did not abuse its discretion; the record confirms that the trial court would have abused its discretion if it *had* awarded sole decision-making to Ms. Carpenter on health care decisions without evidence to support that decision.

*EXTRA-CURRICULAR ACTIVITIES:* Ms. Carpenter only provided evidence of conflict surrounding extracurricular decisions. Here, the trial court asked quite a few questions in order to determine the nature of any conflict between the parties. (RP 21-27.) Ms. Carpenter testified that she had not received any resistance from Mr. Correa with respect to putting the children in gymnastics because she had not told him of her intention to do so. (RP 24.) She testified that Mr. Correa had taken the children to choir in the past but had recently refused to do so; upon questioning from the trial court, however, she confirmed that it was possible that Mr. Correa had not received information about the choir activities from the director because she herself did not receive information and “had to repeatedly ask the director to receive information about their performances.” (RP 24-25.) Tellingly, Ms. Carpenter did *not* testify that she herself had ever provided information to Mr. Correa about performances. She testified that the children were active in theater, and that Mr. Correa attended their plays. (RP 21-26.)

In its ruling, the trial court found that sole decision-making was unlikely to avoid conflict and was likely to create a situation that would encourage the parents to fight through their children. (RP 28.) Instead of ordering sole decision-making, the trial court entered a parenting plan that included guidelines governing extra-curricular activities, which reflects its reasonable conclusion that the difficulty identified by Ms. Carpenter

regarding that area was likely due to poor communication practices rather than an inability to engage in mutual decision-making. (RP 28-30.)

There is substantial evidence to support the trial court's ruling; the trial court did not abuse its discretion. Ms. Carpenter's appeal has no merit.

**B. The trial court was not required to award sole decision-making as a matter of law.**

Ms. Carpenter makes this argument for the first time on appeal. Pursuant to RAP 2.5(a), this Court need not consider it.

Ms. Carpenter claims that, pursuant to RCW 26.09.187(2)(b)(ii), the trial court was required, as a matter of law, to award sole decision-making because both parties were opposed to mutual decision-making.

As indicated above, Mr. Correa was not present for trial and did not testify or present documentary evidence. On appeal, Ms. Carpenter does not (and cannot) point to evidence in her testimony or in the documentary exhibits that made *any* mention of Mr. Correa's position related to the question of decision-making. Therefore, the trial court appropriately made *no finding* about Mr. Correa's position on decision-making.

RCW 26.09.187(2)(b)(ii) states that a trial court "shall order sole decision-making to one parent *when it finds* that both parents are opposed to mutual decision-making." (*Emphasis added.*) Here, the trial court *did not find* that both parents were opposed to mutual decision-making;

therefore, the trial court was not required to award sole decision-making to one parent as a matter of law.

The analysis need not go any further. Ms. Carpenter argues facts that were never presented to the trial court and makes arguments raised for the first time on appeal; further, it is easily ascertained by a cursory review of the governing statute that Ms. Carpenter's legal argument depends entirely on disregarding its plain language. Her appeal is frivolous, and it has no basis in fact and no basis in law.

Ms. Carpenter's attempts to engineer a legal basis by referring to an unpublished opinion from Division II, *In re Parentage and Support of Johnson*,<sup>2</sup> and claiming it provides persuasive reasoning applicable to this case; however, it does not for several reasons.

***1. In re Johnson does not support Ms. Carpenter's assertions.***

Ms. Carpenter claims that the *Johnson* court ruled that in cases where both parties sought sole decision-making authority in their proposed parenting plans, a trial court has no discretion to award mutual decision-making and is *required*, as a matter of law, to award sole decision-making to one parent. (*Appellant's Brief*, pgs. 12-13.) The language as quoted by Ms. Carpenter in her own brief, however, confirms that the *Johnson* opinion

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<sup>2</sup> *In re Parentage and Support of Johnson*, 48414-5-II (Div. II, July 25, 2017)(unpublished).

does not actually support this assertion.

*Proposed Parenting Plans vs. Evidence at Trial:* The *Johnson* opinion clearly indicates that, in that case, both parties had requested sole decision-making *at trial*. (*Appellant's Brief*, pgs. 12-13.) This is an important distinction. A request at trial is based on *testimony* that would enable a trial court to ascertain a party's understanding of the request that he/she is making as well as the underlying basis for that request and whether any alternatives are acceptable. A checked box in a mandatory proposed parenting plan form does not provide that kind of information, which is apparent from a cursory review of the form itself, which merely presents a series of options regarding decision-making and asks a party to check one of several boxes to indicate his/her request. Such instructions are clearly posing a question of preference. Crucially, the form does *not* ask a party to indicate whether he/she is *opposed* to any of the options. Ms. Carpenter's claim that a failure to affirmatively request mutual decision-making is evidence of a party's *opposition* to mutual decision-making is flawed reasoning. The absurd nature of this logic is apparent when applied to any other selection process. Someone who chooses to wear a particular shirt from his closet is not *opposed* to all his other shirts. Someone who chooses to purchase one type of candy is not *opposed* to all other candy or all other food. The selection of one item out of a series of options would be, at best,

evidence of a *preference* for that option over others. The statute, however, indicates that sole decision-making is only required where it is found that both parents are *opposed* to mutual decision-making, not where both parents have merely indicated a preference for sole decision-making. Whether a parent is opposed to mutual decision-making cannot be determined solely from a review of a proposed parenting plan, nor does the *Johnson* court suggest otherwise.

*Findings that Require a Conclusion vs. Evidence that Requires a Finding:* Ms. Carpenter interprets *Johnson* in a way that confuses ‘*findings* that require a *conclusion* as a matter of law’ and ‘*evidence* that requires a *finding* as a matter of law.’

Here, RCW 26.09.187(2)(b)(ii) indicates that where the trial court has made a particular *finding* (in this case, that both parties are opposed to mutual decision-making), it is required, as a matter of law, to make a particular *conclusion* (that sole decision-making is required). Ms. Carpenter misunderstands RCW 26.09.187(2)(b)(ii) and interprets it to mean that where there is *any evidence* to suggest a *finding*, the trial court is required, as a matter of law, to make that finding. That is not the standard here or in any civil case. The standard is ‘preponderance of the evidence,’ which permits a trial court to consider all of the evidence (which may be

conflicting) and make findings that are “more probably true than not true.” Mohr v. Grant, 153 Wn.2d 812, 822, 108 P.3d 768 (2005).

The trial court in *Johnson* made clear findings; it found that the parties were unable to “meaningfully communicate” and had “contrary positions” with respect to decision-making. Johnson, pgs. 18-19. The trial court then awarded sole decision-making to the mother, and the father appealed this decision and argued that sole decision-making should have been awarded to him; importantly, he *did not* argue on appeal that the trial court should have awarded mutual decision-making. *Id.* The question, therefore, that was addressed by the *Johnson* court was not whether sole decision-making was required but to whom it should have been awarded; as a result, the dicta in that unpublished opinion (which addressed an entirely different issue than the one Ms. Carpenter brings before this Court) was not as artful as it might have been in indicating that sole decision-making in that case was necessitated by the trial court’s *finding* that the parties were opposed to mutual decision-making, not by their mere *requests* for sole decision-making.

**2. Mr. Correa did not request sole decision-making in his proposed parenting plan.**

Finally, *even if* there were any authority that required a trial court to automatically award sole decision-making whenever it is requested by both

parents in their proposed parenting plans (which there clearly is not), there is *still* no relief available on appeal because Ms. Carpenter *admits* that Mr. Correa *did not actually request sole decision-making in his proposed parenting plan.* (*Appellant's Brief*, pg. 6.) Mr. Correa requested mutual decision-making in his proposed parenting plan. (*Appellant's Brief*, pg. 6.)

Every one of Ms. Carpenter's arguments fails on the merits.

#### IV. ATTORNEY'S FEES

An appeal is frivolous and an award of attorney fees may be appropriate when there are no debatable issues on which reasonable minds can differ, when the appeal is so devoid of merit that there is no reasonable possibility of reversal, or when the appellant fails to address the basis of the lower court's decision. *Matheson v. Gregoire*, 139 Wn.App. 624, 639, 161 P.3d 486 (2007). Mr. Correa is entitled to fees on each of these bases.

Here, Ms. Carpenter argues on appeal that there is no substantial evidence in the record to support the trial court's ruling, but she (1) entirely fails to demonstrate an absence of evidence to support the trial court's ruling, (2) she primarily argues *contradictory* evidence (which is not the appellate standard; see, *Burrill*, 113 Wn.App. at 868), and (3) the contradictory evidence she argues is primarily contained in documents *she never submitted at trial* and that were *never considered by the trial court.*

Ms. Carpenter also argues (for the first time on appeal) that the trial court was required, as a matter of law, to award sole decision-making, but she (1) disregards the plain language of the statute, (2) recognizes there is no published authority to support her argument, (3) misconstrues irrelevant unpublished dicta in *Johnson* to require sole decision-making where requested by both parties in their proposals and somehow asserts that sole decision-making was required despite *admitting* Mr. Correa *did not* request it in his proposal.

Ms. Carpenter's appeal contains **no debatable issues on which reasonable minds could differ**, which is confirmed by the fact that *no one* in the state of Washington has ever appealed RCW 26.09.187(2)(b)(ii) based on the interpretation Ms. Carpenter now argues.

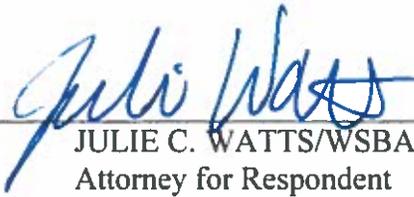
Ms. Carpenter's appeal is **so devoid of merit, there is no possibility of reversal**. Her legal argument is based solely on misinterpreting the clear language of a statute by using unpublished dicta out of context, and her factual argument relies on evidence that was never considered by the trial court combined with the absurd suggestion that Mr. Correa's request for limited mutual decision-making in his parenting plan is compelling evidence that he was *opposed* to mutual decision-making.

Ms. Carpenter's appeal **fails to address the basis of the lower court's ruling**. The trial court indicated that it had no basis to conclude that sole

decision-making in this case would avoid conflict, and Ms. Carpenter's appeal does not make any attempt to argue otherwise.

Mr. Correa requests attorney's fees pursuant to RAP 18.9 for having to respond to Ms. Carpenter's frivolous appeal.

RESPECTFULLY SUBMITTED this 20th day of November, 2019.

  
\_\_\_\_\_  
JULIE C. WATTS/WSBA #49015  
Attorney for Respondent

**CERTIFICATE OF ATTORNEY**

I certify that on November 20, 2019, I arranged for hand-delivery of a copy of the foregoing *Respondent's Brief* to Robert Cossey, attorney for Petitioner, at 902 N. Monroe St, Spokane, WA 99201.

  
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