101648-4

THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRITTANIE SHAW, APPELLANT

V.

HUNTER SHAW, RESPONDENT

COURT OF APPEALS
DIVISION III
No. 384284

APPELLANT'S PETITION FOR REVIEW

Stenzel Law Office
Gary R. Stenzel, WSBA # 16974
Attorney for Appellant
1325 W. Mallon Ave.
Spokane, Washington 99201
Stenz2193@comcast.net
(509) 327-2000

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I. BASIS FOR GRANTING A PETITION FOR REVIEW

The basis for granting a Petition for review can be found preliminarily at RAP 13.4(b), which states:

"(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court."

In this case the Appellant seeks review of two rulings in this matter, first, the decision to deny the appeal of her request to find Adequate Cause to change the parties' final agreed parenting plan; and second, and in the alternative if the Supreme Court does not accept review of the adequate cause issue, to overturn the finding of a "frivolous appeal".

II. RELEVANT FACTS

The parties entered into an agreed parenting plan in Lincoln County Superior Court, Washington. The father was and is in the military full time and was stationed in the United Kingdom with the US Air Force at the time of this case, and the mother is a resident of the state of Texas. Because of the UCCJEA, the Uniform Child

Custody Jurisdiction Enforcement Act, Lincoln County, Washington courts have had general jurisdiction over the parties and their children. RCW 26.27 et. seq.

The parties' plan gave the father primary care of their children. The children are named RS and ES who were 6 and 9 years of age respectively at the time of this case when the mother requested an RCW 26.09.270 adequate cause finding to modify their plan. With regard to the parties' plan, it gave the father primary care and all the time in the year in the UK, except the children's summer and winter breaks in which they went to live with their mother in Texas. CP 3. The parties had joint decision-making regarding school/education, health care (non-emergency) and religious upbringing. CP 2.

As indicated, the children were primarily placed with the father in their parenting plan that gave him the school year and the mother the summer and winter breaks. This meant that each parent had complete control of the children for a lengthy period of time without interruption of having any time with the other parent. This then meant that the only person responsible for their care

was either Mr. Shaw or Ms. Shaw given that the parties live 5,000 miles away in completely different time zones.

The primary issue in this case revolved around the children's special medical and educational needs, according to the mother's declarations. See CP 45-68, 208-245. For example, RS has a heart problem called "anomalous coronary artery origins and myocardial bridge" (herein after "*heart bridge*"). CP 282-286. His medical records indicated that a heart bridge was found at birth and even though the records indicated that this condition may not be a problem, it specifically warned that if he later develops persistent exercise-related symptoms the parents should have his heart re-evaluated. Id. With this warning, it would seem the majority parent, Mr. Shaw was on clear notice that such problems should be a focus of his attention for RS. Given the condition of their son's heart bridge problem, it is inconceivable that either parent would not have been on the lookout for any signs of heart problems as was suggested by his first attending cardiologist.

Approximately 3 days after RS came to live with his mother in Texas in the summer of 2020, RS had a rather serious episode where there were signs that his blood flow was affected. He had

chest pains, heart discomfort, blue lips and blue fingertips, that were suggested he has been having similar problems in the UK, as well as precursors of future heart problems. See RP 9 and CP 217. The mother was very frightened by this physical reaction by RS. She could not believe that this was just a one-time event, and that it was unbelievable that his father saw nothing in this regard while he was in his care. At the very least it meant that RS needed medical attention, and it was confusing why his father knew nothing about this kind of problem in RS. The mother felt it was not possible that Mr. Shaw had not seen this occur in his care of RS. Ms. Shaw stated that RS's doctor recommended both parents regularly monitor RS for cardiac symptoms. Id. This also seems reasonable given their son's pre-existing health problems and heart condition. CP 50-51. However, the father failed to see any problem. Ms. Shaw, although frustrated, immediately set up an appointment for RS's checkup of his heart problems in Texas, however, such things take time. CP 217.

Again, the importance of this discovery in Texas by the mother seemed obvious, since any reasonable parent of a child born with a heart anomaly would have seen this kind of

symptomology and worried that there has been a problem, and it was hard to believe that it suddenly came on because he was now in Texas. What is it in Texas that was different than the UK? Nothing, other than a different parent and country. Both the UK and San Antonio are near the ocean where oxygen is replete, and there was nothing to suggest that there were any special precautions implemented by the father in the UK. The answer to these questions also seems to suggest that RS's primary parent was not paying attention to these kinds of things, that both parents were warned about. Any reasonably responsible parent would have noticed such problems if they were attentive, since children are active and it is unreasonable to assume that these problems again, just occurred in Texas. The only difference is who was parenting RS. This episode at least suggested that RS needed some medical evaluations immediately.

The next health issue involved the parties' daughter ES, which problems seemed potentially more severe than RS's problems and more obvious. While in the UK with her father ES developed problems with anxiety, depression, and some social fears. CP 49, 134, 135 and 215-216. Instead of getting right on

these problems to have ES evaluated in the UK for proper treatment, Mr. Shaw again and again failed to have her evaluated for one reason or the other. CP 215. Again frustrated but scared, the mother had ES evaluated in Texas when she got there for her summer parenting time, along with a full workup, with recommendations formulated by a medical professional who found that she had adjustment disorder, social phobia and needed to rule out depression. ES even had fleeting thoughts of suicide that occurred once a week. CP 355-364. Therapy by a child psychologist and forensic psychologist was recommended with weekly follow-up, a safety plan, and more testing, along with supportive therapy. All obtained by the mother, without much if any aid from their father, during her summer parenting time. Id.

The question then was, why didn't these evaluations occur in the UK under the primary care of the father? Why did it take the mother's actions all the way in Texas to have these evaluations occur rather than by her father, who had months to get them done, but for one excuse or the other were not completed.

These problems seemed to paint a picture of a father who was either too busy or distracted to do what he had to do for his

children medically. There were no clear answers to this by the father other than these things did not get done or he denied they existed. The father's excuses made little sense since the health issues above do not come up like measles or a broken arm. They are long-term problems that relate to what is going on with the children's lives, which needed to be addressed, but were not while in the father's care.

After receiving the children for her summer parenting time and having to take responsibility for their medical care and evaluations, since their father did not do much if anything about them, the mother filed a Petition to modify the parties parenting plan to have the court address these problems by a change in their plan. CP 11-16. The father replied, denying almost everything, even that he was potentially negligent in providing health services to his children since these things simply did not occur as Ms. Shaw described. CP 128-143. However, it was hard for the mother to believe that these problems were so faint or negligible that the father could not have somehow seen their signs. The father even admitted in his declaration that ES's problems were developed in the UK. CP 134-136. Even so, the trial court found that these facts

were insufficient to support a RCW 26.09.270 finding of adequate cause and even though the trial judge found that the mother's petition was in no way frivolous, he denied adequate cause and that decision was appealed. RP 26.

Because the trial court and the appellate court seem somehow disregard the facts as the mother described them, and showed with her medical exhibits, they still denied adequate cause. Such decisions, where the health and welfare of the children is at stake, undoubtedly would be detrimental to children who need a change in their parenting plan because of how they may have not been cared for properly. Ms. Shaw asks this court to provide some guidance on these issues for the sake of their children.

In addition, after the mother appealed the trial court's denial of Adequate Cause, Division III of the Court of Appeals not only denied her appeal, but somehow found that her appeal was frivolous, under RAP 18.9. They did this even though the trial judge found that the mother did not bring this action in bad faith. RP 26. For the reasons above, the mother asks this court to accept a review of this important case.

III. LEGAL DISCUSSION

A. The care and well-being of children is and has been a significant public policy issue, especially the concept of Adequate Cause determinations.

Washington State court have always placed the wellbeing of children at the forefront of this state's legal policy issues, and further that any improper or inappropriate finding regarding the application of the Adequate Cause statute at RCW 26.09.260 and .270 runs contrary to the public policies of this state to which is to protect the stability of a child's lifestyles. *State v. Fairfax (In re C.M.F.),* 179 Wash.2d 411, 314 P.3d 1109 (2013). This is especially true where the parenting issue deals with proper health issues. See e.g. *Of v. Holt*, 179 Wash.2d 224, 315 P.3d 470 (2013).

B. The fact that the non-primary parent provided evidence of medical issues for the parties' children after they had been with their father in the UK, is a significant fact that should not have been ignored in her request for a modification, as long as there were facts presented which corroborated these problems.

In this case, both parties have substantial impediments to their ability to observe their children for long periods of time because they live so far away, and do not see their children for many months at a time. However, this also sets up the parenting

scenario in which the only responsible parent is the parent who last had the children and if there were signs of maltreatment it cannot be blamed on the other parent who is 5,000 miles away. In this case, it was the discovery of medical and psychological problems by the mother, that could not have only occurred when the children were with her, that seemed to draw a picture of a father who failed to do his duty of care for their children, based on what the mother learned after she received them for her summer parenting time.

Because the mother could not observe long periods of time with their children while they were in the UK, that did not mean that she did not have the ability to observe the effects of the father's poor parenting, and medical attention after she received them in her care. In fact, that is what happened in this case. After the children had been in the care of their father for months, she observed serious health problems which were unlikely to have simply occurred because they were now with her in Texas. Their son had a concerning episode related to his heart condition, something both parents were warned about from his birth, and their daughter showed clear signs of depression, anxiety and

social phobia developed in the UK. Eventually, the mother took her daughter to be evaluated in Texas, and it was found that she suffered from adjustment disorder and social phobia. CP 355-364.

When the father confronted about this, he denied almost all allegations, except for his failure to have ES evaluated for her depression issues. CP 128-143. It was then very difficult for the mother to do more than tell the truth about what she learned about their children after they came to her care. Again, the father denied any alleged poor medical care of their children in the UK, however, he was solely responsible for their care while they lived with him in the UK and, for example admitted that he did not get ES evaluated. It then seemed axiomatic that the distance between these parents actually accentuated the fact that these problems were not addressed by the father, who had no one to blame but himself. Such is the case here, Ms. Shaw could only observe health problems when she received their children for her summer visits. As such, her observations should at least be considered as positive attempts to help her children, especially if the evaluation she obtained verified that there was reasonable cause for concern. Further, it clearly appeared that these problems were not

made up by the mother since she corroborated her daughter's health problems by professionals in Texas. The daughter's evaluation alone seemed to verify that something should have been done in the UK while the children were in the father's care but did not. It seems then that the mother's evidence at least was clear that something did not happen with the children when they were with their father even though he lived in a sophisticated country like the United Kingdom; which should not have had to be done by their non-primary parent.

Interestingly, although the father admitted in his declaration both children have access to excellent medical care in the UK, he failed provide complete care for the children. CP 138. (The father finally took the children to a doctor only after the mother filed a petition for parenting modification, which in and of itself was a "subsequent remedial measure, or admission that something should have been done. See CP 286-318).

All these events and the father's lack of action, should not have been ignored by the court, regardless of what the father said he did or did not do. The mother should have at least had a chance to have an evidentiary hearing to address her concerns following

the adequate cause hearing. The court decision ignoring these concerns regarding the children seemed to not in the children's best interest. The fact was proven by the mother that concerning issues had occurred regarding their children's health and education while under the care of their father, but was not addressed timely. The mother could not have done any more than she did, and that was have her daughter immediately evaluated psychologically, and set up some medical evaluation for her son regarding his symptoms and heart problems from birth.

C. Division I of the Court of Appeals took a different course of action in a case where the trial court denied adequate cause, even though the facts were very similar to this case, where the custodial parent denied that their child needed treatment for a serious health problem, seemingly leaving treatment up to the noncustodial parent or school, and they overturned the trial court's denial of "adequate cause".

In the case of *In re MacLaren* at 8 Wn. App.2d 751, 440 P.3d 1055 (2019) the mother was the primary caretaker and she failed to have the parties' child assessed for autism, and although many tests were run by the school and other professionals, she indicated that she did what she could but also denied there was a problem. The father filed a petition for modification and a finding

of adequate cause. The trial judge denied adequate cause stating that there was nothing that showed that there was a problem with the mother's care and that the father had not proven his case. The Court of Appeals found that the trial judge was in error for denying adequate cause because of the mother's denial and resistance to the testing, and the father had established sufficient facts to have the case move on to the next step of a final hearing on his Petition for Modification. They said,

> In addition to establishing facts that support finding a substantial change in circumstances, Travis also presented facts that would support finding the present environment is detrimental to the "physical, mental, or emotional health" of the children. RCW 26.09.260(2)(c). The uncontroverted record shows untreated autism and that H.M. expressed suicidal ideation. The record shows that Catherine acknowledges H.M. and his older half-brother require "special attention" and the older half-brother also frequently expresses thoughts about committing suicide. Nonetheless, Catherine insists her daughter O.M. does not need any emotional support or counseling.
>
> ¶ 66 We conclude that the trial court abused its discretion in ruling that Travis did not overcome his threshold burden to show adequate cause.
>
> ¶ 67 We conclude the trial court did not use an improper legal standard, but the court abused its discretion in finding there is not adequate cause to hold a hearing on the petition to modify the parenting plan. We reverse and remand.

In this case, although there was no autism, there was some suicidal ideation, and the mother showed that the father failed to have their daughter's depression and phobia evaluated, even though he knew there was a problem many months before she went to be with her mother for her parenting time. Here, although the mother had no ability to know what happened in the UK with their son and his blue lips/fingertips and other heart-related problems, the father knew about their son's heart problems from birth, and it seemed hard to believe that these problems simply occurred when he got to Texas with the mother. All in all, there was also a substantial difference, as in the *MacLaren* case regarding the primary caretaker's action and what he did with their children and their health needs, versus what the noncustodial parent did with them on her time. Just as the mother in the *MacLaren* case Mr. Shaw denied there were problems, yet later observations of their son, and an evaluation of their daughter's health issues showed significant problems that were not properly addressed by their father. In order to address all this, RCW 26.09.270 required the mother to supply an affidavit setting forth facts supporting her requested modification, and she did so in this

case. For the reasons above, the mother believes that adequate cause should have been found.

D. At a very minimum the Court of Appeals should not have found that Ms. Shaw's Appeal of the trial court's ruling on adequate cause was frivolous.

In order for an appeal to be found to be frivolous under RAP 18.9 the appellate court must use the following test: "An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal. *Tiffany Family Trust Corp. v. City of Kent*, 155 Wash.2d 225, 241, 119 P.3d 325 (2005). All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant. Id." *Advocates for Responsible Dev. v. Western Wash. Growth Mgmt. Hearings Bd.*, 245 P.3d 764, 170 Wash.2d 577 (2010).

In this case, Division III was required to find that there was no possibility of a successful appeal given the facts of this case as presented by the mother, and not the father's version. However, it appears that they did not take the facts presented by the mother as true, since had they done so they would have had

to find that the parties' children were not properly cared for by the father in the UK and she at least had a basis for filing what she filed. However, it seems that they took all the facts presented by the father at face value and completely ignored the mother's facts, which in the case of ES were corroborated by a medical evaluation. For example, they would have logically had to have found that the physical signs from RS would not have only shown up in Texas but would have been something that would be unlikely to have shown up in the UK too. Such was another example of the father's poor care. Further, Division III also would have to have to of found that the father's failure to get their daughter immediately evaluated in the UK was negligent parenting, thus establishing adequate case to look at substantial changes in the circumstances of the children, as well as in the primary caretaker. Further, given the facts in the *MacLaren* case and its ruling in a similar case, Division III should have found that it was so similar that adequate cause should have been found here.

Besides the standard presumptions under RAP 18.9, there is also the standard appellate court presumption that indicates that the appellate court is not to substitute its findings over the findings

of the trial judges. As they said in the case of *Gilmore v. Jefferson Cnty. Pub. Transp. Benefit Area* case at 415 P.3d 212, 190 Wash.2d 483 (Wash. 2018), ". . . the appellate court may not substitute its judgment for that of the trial court. See *Salgado-Mendoza*, 189 Wash.2d at 427, 403 P.3d 45..." Id. In this case, the trial judge did not find that the mother's petition for modification was at all frivolous. RP 26. Therefore, this rule, along with taking the appellant's facts in a light most favorable for the mother would strongly mitigate in favor of not finding that this appeal was frivolous.

The Appellant requests that this court accept review of both issues. I certify that this Petition is in compliance with the proper pica size 14 print with proper margins and there are 4,036 words.

Respectfully submitted this 19th day of January 2023 by

Gary R Stenzel, WSBA #16974

Seju Oh, WSBA #42921

STENZEL LAW OFFICE

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In the Matter of, HUNTER A. SHAW Respondent, and BRITTANIE N. SHAW, Appellant.	)	No. 38428-4-III UNPUBLISHED OPINION

FEARING, J. — Brittanie Shaw appeals the superior court's determination that she failed to present adequate cause to warrant a major modification of a parenting plan such that the superior court denied an evidentiary hearing on the petition for modification. Because the superior court applied the proper standard for addressing major modifications and because ample evidence supported the superior court's rejection of adequate cause, we hold that the court did not abuse its discretion. We affirm the dismissal of the petition for modification without any evidentiary hearing.

FACTS

On November 4, 2019, Brittanie and Hunter Shaw finalized their divorce and entered into an agreed parenting plan for their son and daughter. The parenting plan

placed the children with Hunter during the school year and with Brittanie during the children's summer and winter breaks. The United States military, with whom Hunter served, thereafter assigned him to the United Kingdom.

The son and daughter began attending school in the United Kingdom. Hunter enrolled the daughter for tutoring in math, but her teacher later unenrolled her from the program as unnecessary.

As part of Brittanie Shaw's 2021 petition requesting a major modification of the 2019 stipulated parenting plan, Brittanie alleged Hunter orally agreed to modify the parenting plan every two years. Hunter admitted to knowing that Brittanie sought such an agreement, but maintains that he never gave his consent.

In her petition for modification, Brittanie Shaw alleged that the son's physical and mental health deteriorated since living with Hunter in the United Kingdom. The undisputed facts establish that the son possesses a congenital heart condition. Brittanie alleges that, on one occasion when the children were under her care during the summer, she observed the son's lips and fingertips turn blue. Brittanie took the son to a cardiologist, who diagnosed no worsening in the heart.

Brittanie Shaw further argued that the son struggled with attention deficit hyperactivity disorder (ADHD) after the move to the United Kingdom. To the contrary, when Hunter took the son for an assessment, the psychologist diagnosed no ADHD. Despite reports of the son suffering bullying in school, his school progress report

established improvement in his academic performance and self-confidence while attending school in the United Kingdom.

As part of the 2021 petition to modify the 2019 parenting plan, Brittanie Shaw asserted that the daughter's mental health, social skills, and academic performance declined since living with Hunter in the United Kingdom. According to Brittanie, the daughter struggled with anxiety, social phobia disorder, adjustment disorder, depression, and suicidal thoughts while living under Hunter's care. The record shows that a professional diagnosed the daughter with adjustment disorder and social phobia disorder after living in the United Kingdom. But the professional ruled out depression and continuing suicidal thoughts.

Hunter Shaw unsuccessfully attempted to procure a mental health assessment for the daughter in the United Kingdom. Therefore, Brittanie assumed this task while the daughter was present in the United States under Brittanie's care in the summer of 2021. The daughter first visited a mental health professional at the end of June 2021. The professional diagnosed the daughter with social phobia disorder. At the second visit at the beginning of July 2021, another mental health professional diagnosed the daughter with both social phobia disorder and adjustment disorder. During the June 2021 visit, the daughter disclosed that she experienced suicidal thoughts during the two months leading to that visit. Nevertheless, the daughter reported the thoughts had ended.

On behalf of her petition for a parenting plan modification, Brittanie Shaw alleged that Hunter's health and lifestyle underwent substantial changes. She argued that, because of these changes, Hunter can no longer properly care for the children. Hunter replied that he struggles with a sleeping problem, for which he is seeking help. He admitted to visiting the emergency room twice in July 2020 because of chest pains. The testing done during both visits, however, revealed muscle spasms instead of pain related to a heart condition.

Brittanie Shaw complained about Hunter's use of alcohol and video game habits. Nevertheless, Brittanie knew Hunter drank alcohol during their marriage. Hunter denies having an alcohol problem, but he admits drinking an occasional beer. He drank beer and played video games during a visit to the United Kingdom by Brittanie. Hunter averred that Brittanie encouraged him to participate in this activity and treat her visit as a vacation from the care of the children.

PROCEDURE

In 2021, Brittanie Shaw petitioned for a major modification of the parenting plan on two independent grounds. She asserted that Hunter orally agreed to modify the parenting plan every two years. She asseverated that adequate cause supported her requested modification because of a substantial change in circumstances with respect to the lives of Hunter and the children. The superior court rejected both grounds and denied

the petition at the conclusion of an adequate cause hearing. The court denied Brittanie an evidentiary hearing on the petition.

LAW AND ANALYSIS

Adequate Cause

On appeal, Brittanie Shaw contends she presented sufficient evidence to support an adequate cause finding to allow an evidentiary hearing on her petition for a major parenting plan modification. She asks that we remand the case for the evidentiary hearing. In support of her appeal, she contends the superior court failed to apply the correct standard for a determination of adequate cause, erroneously found that the parties lacked an agreement to modify the plan every two years, relied on hearsay, and mistakenly found no substantial change in circumstances.

RCW 26.09.260 and RCW 26.09.270 govern modification of a parenting plan. *In re Marriage of MacLaren*, 8 Wn. App. 2d 751, 768, 400 P.3d 1055 (2019). RCW 26.09.260, the substantive statute, declares in relevant part:

> (1) . . . [T]he court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in 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. . . .
>
> (2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:
>
> (a) The parents agree to the modification;

> (b) The 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) The 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.

RCW 26.09.270, the procedural statute, reads:

> A party seeking a temporary custody order or a temporary parenting plan or modification of a custody decree or parenting plan shall submit together with his or her motion, an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his or her affidavit, to other parties to the proceedings, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.

Brittanie Shaw impliedly argues that the superior court must accept as verities the evidence presented in her declarations when assessing adequate cause. She in essence advocates for a summary judgment standard wherein the trial court accepts the facts and reasonable inferences from those facts in this instance presented by the moving party, not the nonmoving party. Brittanie cites *In re Marriage of Flynn*, 94 Wn. App. 185, 191, 972 P.2d 500(1999) for this proposition. We disagree. Such a standard only applies when the petitioner seeks a minor modification to the parenting plan.

To establish adequate cause for a hearing on a major parenting plan modification the moving party must "present facts and evidence to support findings under RCW 26.09.260(1) and (2)(c)." *In re Marriage of MacLaren*, 8 Wn. App. 2d 751, 774,

440 P.3d 1055 (2019). The burden of showing adequate cause requires more than allegations that, if proven true, would establish a prima facie case supporting modification. *In re Marriage of MacLaren*, 8 Wn. App. 2d 751, 774 (2019). The trial court considers and weighs the facts averred by the parties in the affidavits, the evidence, and other factors on a case-by-case basis. *In re Marriage of MacLaren*, 8 Wn. App. 2d 751, 774 (2019).

Brittanie Shaw argues, as she did before the superior court, that Hunter agreed to review the parenting plan every two years. Hunter denied, and still denies, any agreement. The superior court weighed the evidence and concluded no agreement existed. We review an adequate cause determination for an abuse of discretion. *In re Parentage of Jannot*, 110 Wn. App. 16, 18, 37 P.3d 1265(2002), *aff'd*, 149 Wn.2d 123, 65 P.3d 664 (2003). The superior court did not abuse its discretion when finding no agreement existed based on the testimony of Hunter.

Brittanie Shaw argues that, because the trial court did not apply the *Timmons* rule when rejecting her assertion that she and Hunter Shaw agreed to modify the parenting plan every two years prior to entering into the parenting plan, it failed to consider Washington's policies regarding parenting cases. Under the *Timmons* rule, pre-decree facts are unknown, within the meaning of RCW 26.09.260 and for the purposes of a petition to modify a parenting plan, when a dissolution was uncontested. *In re Marriage of Timmons*, 94 Wn.2d 594, 599-600, 617 P.2d 1032 (1980). Contrary to Brittanie's

assertion, however, the *Timmons* rule cannot apply to facts that never existed. Also, Brittanie never mentioned the *Timmons* rule before the superior court. We may refuse to review any claim of error not raised in the trial court. RAP 2.5(a).

On appeal, Brittanie Shaw contends the superior court impermissibly relied on hearsay evidence in denying her petition to modify the parenting plan. We decline to review this assignment of error because Brittanie never sought to exclude evidence before the superior court. To preserve error for an evidentiary ruling, the appellant must have timely objected or moved to strike the evidence before the superior court. ER 103(a)(1). In turn, we may refuse to review any claim of error not raised in the trial court. RAP 2.5(a).

Despite asserting evidentiary error for the first time on appeal, Brittanie Shaw argues this reviewing court should entertain her argument based on *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 141, 331 P.3d 40(2014), and *In re Wagner*, 18 Wn. App. 2d 588, 496 P.3d 742 (2021). Brittanie cites, from *SentinelC3, Inc. v. Hunt*, language that evidence submitted in opposition to summary judgment must be admissible. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 141 (2014). This passage only concerns a summary judgment proceeding and does not address the failure to object before the trial court. Brittanie claims *In re Wagner* stands for the proposition that, regardless of whether there is an objection or not, the trial court should be mindful of the evidentiary restrictions on hearsay evidence, and avoid reliance on such incompetent evidence. As Hunter

highlights, Brittanie did not provide a pin cite to the case because the *In re Wagner* opinion does not contain such language.

We move to the substance of the petition to modify the 2019 parenting plan. Brittanie Shaw identifies the son's heart condition, attention deficit, and poor school performance as substantial changes in circumstances since the 2019 parenting plan. We disagree. The son's heart condition existed before the plan. Although the son experienced his fingertips and lips turning blue, testing revealed no change in condition. The record shows no concrete diagnosis of ADHD. The son's performance in school has progressed while attending school in the United Kingdom.

Brittanie Shaw identifies the daughter's mental and emotional health difficulties and behavior in social settings as substantial changes in circumstances. The daughter received both a social phobia disorder diagnosis and an adjustment disorder diagnosis after entry of the 2019 parenting plan. Nevertheless, Brittanie does not show that the mental health difficulties resulted from living with Hunter, that Hunter failed to take adequate steps to address the difficulties, or that Brittanie would have better addressed the condition. Hunter sought counseling for the daughter at school. Hunter alerted Brittanie to the difficulties so that Brittanie could obtain an evaluation when the daughter joined Brittanie for the summer. The daughter no longer reports suicidal thoughts or depression.

Brittanie Shaw alleges substantial changes in Hunter's health and lifestyle. According to Brittanie, Hunter Shaw encountered serious health issues since moving to the United Kingdom. She emphasizes Hunter went to the emergency room twice in July 2020 for chest pains and left the children with strangers. Hunter presented facts to the contrary. He experienced muscle spasms after exercising with the children. He left the children with his new wife on each occasion he went to the emergency room.

Brittanie Shaw next argues that Hunter's lifestyle has changed since he and the children moved to the United Kingdom in that he disproportionately drinks alcohol and excessively plays video games. Nevertheless, Brittanie knew Hunter consumed alcohol during their marriage. According to Hunter, Brittanie encouraged him to play video games on the one occasion she observed his playing while she visited the United Kingdom. Brittanie asserts that Hunter's drinking habits render the children tardy to school. Hunter disagrees that his drinking caused any tardies. His new wife now makes certain the children arrive on time to school.

We review an adequate cause ruling by the superior court for an abuse of discretion. *In re Parentage of Jannot*, 110 Wn. App. 16, 18(2002). The superior court's decision fell within the range of evidence presented by the parties. Since the superior court reasonably concluded that Brittanie Shaw failed to establish a substantial change in circumstances, we affirm the denial of adequate cause. We need not decide whether any modification would serve the best interests of the children.

Attorney Fees

Hunter Shaw requests that this court award him reasonable attorney fees and costs on appeal on two grounds. First, Brittanie forwarded a frivolous appeal. Second, he has a need for fees and Brittanie has the ability to pay.

Under RAP 18.9(a), this court may award one party fees and costs against an opposing party who files a frivolous appeal. We consider the following factors when resolving whether an appeal is frivolous:

> (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not for that reason alone frivolous; (5) an appeal is frivolous if there are no debatable issues on which reasonable minds might differ, and the appeal is so totally devoid of merit that there was no reasonable possibility of reversal.

Carrillo v. City of Ocean Shores, 122 Wn. App. 592, 619, 94 P.3d 961 (2004).

We carefully reviewed all of the arguments forwarded by Brittanie Shaw. She misquoted the evidentiary standard that the trial court applies when addressing a major modification to a parenting plan. She reargued the facts when this court must defer to the superior court as to the facts. She asserted hearsay objections on appeal that she never forwarded before the superior court. We conclude that Brittanie did not raise any debatable issues on appeal. We award reasonable attorney fees and costs to Hunter because of a frivolous appeal.

CONCLUSIONS

We affirm the superior court's rejection of Brittanie Shaw's petition for modification of the parties' parenting plan. We grant Hunter Shaw fees on appeal.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Siddoway, C.J.

Staab, J.

Tristen L. Worthen
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals of the State of Washington Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

December 20, 2022

Jonathan A. Baner
Baner and Baner Law Firm
4007 Bridgeport Way W Ste D
University Place, WA 98466-4330
jonathan@banerbaner.com

Seju Oh
Stenzel Law Office
1325 W Mallon Ave
Spokane, WA 99201-2038
sejuoh@gmail.com

Miranda Baner
Baner & Baner Law Firm PLLC
4007 Bridgeport Way W Ste D
University Place, WA 98466-4330
miranda@banerbaner.com

Gary R. Stenzel
Gary R. Stenzel PS
1325 W Mallon Ave
Spokane, WA 99201-2038
stenz2193@comcast.net

CASE # 384284
In re: Hunter A. Shaw and Brittanie N. Shaw
LINCOLN COUNTY SUPERIOR COURT No. 1930124922

Counsel:

Enclosed please find a copy of the opinion filed by the court today. A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or, if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion. The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen Worthen
Clerk/Administrator

TLW/sh
Enc.

c: **E-mail** Honorable .Jeffrey Barkdull