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No. 76260-5-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

JOHN PATRICK OSMAN, Respondent

v.

TINA ANNELISE SCHMIDT, Appellant

PETITION FOR REVIEW TO THE WASHINGTON STATE SUPREME COURT

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III. Issues Presented for Review

A. As to the modification of the Georgia parenting plan order that eliminates a provision that requires each parent to make their child available to family members of the other parent on his or her residential time:

1. Is an order which the court would not have had the authority to impose on parties, enforceable if entered by agreement of the parties?

2. Is a fit parent, who petitions to modify a provision in an agreed final parenting plan order that placed restrictions on the exercise of his rights during his residential time relieved of fulfilling the burden of proof required under RCW 26.09.260(10) in order to eliminate that restriction?

3. Does a trial court in a parenting plan modification proceeding, have the authority to determine that a provision of a final parenting plan order entered by agreement of both parties as "appropriate" because it restricts the exercise of a fit parent's fundamental right under the Constitution of the United States, to decide whether and with whom his child will have contact?

4. Is a trial court absolved of the mandate to render findings of fact and conclusions of law as to whether a

substantial change of circumstances that render elimination of the provision as being in the best interests of the child under RCW 26.09.260(10), before it can eliminate such a provision in an order modifying the original parenting plan order?

B. As to modification of the provision of the Georgia parenting plan order that imbues Tina Schmidt with sole decision-making authority over educational and health care issues:

1. Does a pre-trial stipulation that adequate cause has been established as to each parent's petition to modify, absolve the court of the requirement of RCW 26.09.270 to hear evidence before it can modify the provision?

2. Are the changes of circumstance that justify modification of the residential schedule under RCW 26.09.260 (5) the same as those necessary to justify modification of a parent's decision-making authority under RCW 26.09.260 (10)?

3. Do findings of fact that support conclusions of law under that a substantial change of circumstances has occurred that justify the modification of the residential provisions of the Georgia parenting plan order under RCW 26.09.260(5), absolve the court of the mandate to render material findings of fact and conclusions of law related to decision-making authority under RCW 26.09.260 (10)?

IV. Statement of the Case

Tina Schmidt seeks acceptance by this court of review of a Court of Appeals decision that affirmed a trial court order that modifies an agreed final parenting plan order entered during trial in a parentage proceeding in Atlanta Georgia. The parties have one child together, Ella Grace Schmidt born on June 17, 2011 in Atlanta, Georgia (RP 146 and

149; (Ex. 4, page 1).[1] The agreement reached as to a final parenting plan order was signed by the parties, their legal counsel and the court on March 25, 2014. (Ex. 3, page 4).

The agreed parenting plan order included the following provisions pertinent to the modification proceeding that occurred in the Superior Court of King County. It contained two separate residential schedules, one for when each of the parents lived within the Atlanta metropolitan area; the other, should Tina relocate with Ella to King County, Washington, which the order permitted her to do. (Ex. 4, page 2).

During the trial in the Atlanta proceeding a GAL, Dr. Howard Drutman, testified about John's opposition to Tina's refusal to allow Ella to ever be vaccinated. (RP 80 - 81). Nevertheless the agreed order contained a provision giving Tina sole decision making authority over health care and educational issues. (Ex. 3, pages 4-5).

Drutman testified as to Tina's concerns, as well as his own, about John's recreational use of marijuana and alcohol as well as concerns over Tina's use of prescription painkillers. (RP 256). The final order contained

[1] Both parties agreed during the trial of this proceeding to be referred to by their first names (RP 86). For ease of reference the same will be done in this brief.

a provision requiring each party was to undergo random drug testing for a period of one year.

The order also contained the following provision that was not the subject of either parent's subsequent petition for modification but was eliminated in its entirety by the trial court over objection of Tina. Hereinafter the provision for ease of reference will be referred to as the "extended family" provision.

> "In the event that the Father's family is in the Mother's city of residence, the Mother shall accommodate the Father's family so that they can see the Child so long as the Child is in town.
>
> In the event that the Mother's family is in the Father's city of residence or in Chicago with the minor child, the Father shall accommodate the Mother's family so that they can see the Child so long as the Child is in town." (slip op, page 2).

Tina relocated with Ella to Federal Way, Washington in May of 2014. (Ex. 3, page 3). During the summer of 2015 she purchased real property in Port Orchard with a view toward living there. (RP 254). Since it needed extensive remodeling to be habitable, she and Ella were not able to move in until May 2016. (CP 35; RP 255). John relocated to South Seattle the day after Thanksgiving, on November 27, 2015. (RP 177; Ex. 3, page 3).

John filed a petition for modification seeking a new residential schedule (Ex. 24, page 4) and for joint decision-making authority over health and educational issues. (CP 34). His petition did not seek elimination of the "extended family" provision. (Ex. 24, page 5; Ex. 3, pages 3-4).

Earlier that year, John's ex-girlfriend revealed that the month after the drug testing requirement had ended, John had taken Ella to a marijuana dispensary in King County, and began smoking marijuana on a regular basis. Tina had filed a petition for modification in Atlanta, which she had to dismiss after John moved to Seattle. Her response to his petition included a counter-petition to modify, in which she requested that his residential time be conditioned upon the resumption of random drug testing and that he be made to follow all treatment protocols. She opposed modification of her sole decision making authority. (Ex. 25).

During the pendency of the King County proceeding, after the petition and counter-petition had been filed and served, the parties entered into two CR 2a agreements achieved through separate mediation sessions in which each party was represented by legal counsel. Those agreements included a residential schedule that accommodated Tina's relocation to Port Orchard with Ella to occur a few months later; that adequate cause to

hear John's petition and Tina's counter-petition had been established; that random drug testing for John resume, with a fallback provision requiring professionally supervised residential contact should he fail the testing or fail to obtain it. The "extended family" provision of the Atlanta final order was expanded to include Tina making Ella available to John's relatives should Ella be in Chicago with her. (Exs. 27 and 28).

The parties also hired Dr. Wendy Hutchins Cook as parenting evaluator. (RP 24). Each party's proposals to the trial court as to a final residential schedule were nearly identical. The residential schedules adopted by the court were not an issue on the appeal.

During trial, John submitted a proposed order of modification which eliminated the entire "extended family" provision. This prompted Tina to testify as to why she opposed elimination of it. (RP 94 and 95). John did not present any testimony at trial supporting elimination of the provision (Ex. 24).

The trial court granted John's requested modifications as to decision-making authority and eliminated the "extended family" provision in its entirety although it made no findings or conclusions of law regarding that decision. (CP 94-95). The Court of Appeals affirmed. A timely motion to reconsider was denied. As part of the motion the court was asked to

publish the aspect of the decision related to the extended family provision whether or not reconsideration was to be granted. That motion too was denied. The Court denied that motion on December 19, 2017. This petition followed.

V. Argument:

A. Elimination of The "Extended Family" Provision.

1. The Decision Is In Direct Conflict With The Following Court of Appeals Decisions: *Kinnan v. Jordan*, 131 Wa App 738 at 752, 129 P.3d 807 (2006), *In re Marriage of Stern*, 57 Wa App 707, 711, 789 P.2d 807, rev denied, 115 Wa 2d 1013, 707 P.2d 513 (1990), and *In re Marriage of Shyrock*, 76 Wa App 848 at 852, 888 P.2d 750 (1995): RAP 13.4(b)(2)

The "extended family" provision of the Georgia final parenting plan order is a restriction on the exercise of each parent's residential time with their child. "Removal of a restriction on residential time is governed by RCW 26.09.260 (10)". *Kinnan v. Jordan, supra* at 747 (2006). The Court of Appeals decision is directly contrary to the following holdings:

"RCW 26.09.260 (10) requires proof of a substantial change in circumstances and that the removal of the restriction is in the best interests of the child." *Kinnan v. Jordan, supra* at 755 (2006). John presented no evidence at trial regarding elimination of the provision.

"Compliance with the statutory criteria is mandatory. Failure of a trial court to make findings that reflect the application of each relevant factor is error." *Kinnan v. Jordan supra*, at 752, following the holding in *In re Marriage of Stern*, 57 Wa App 707, 711, 789 P.2d 807, rev denied, 115 Wa 2d 1013, 707 P.2d 513 (1990). (See also, *In re Marriage of Shyrock*, 76 Wa App 848 at 852, 888 P.2d 750 (1995).

The trial court made no findings of fact nor conclusions of law related to elimination of the provision. Thus, pursuant to RAP 13.4 (b) (2) this court should grant review.

2. There Is A Significant Issue of Law Under The United States Constitution: RAP 13(b)(3)

The Court of Appeals decision holds that the trial court did not abuse its discretion in failing to follow the mandates of RCW 26.09.260 since that provision of the Georgia order was "inappropriate". (slip op page 8). The court of appeals held that the order was inappropriate because it restricts John's fundamental right as a fit parent, under the U.S. Constitution, to determine whether and with whom their child will associate during his residential time, citing *Troxel v. Granville,* 530 U.S. 57, 72, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). (See slip op page 8).

Troxel, supra, was a case arising from the Supreme Court of the State of Washington that involved a court order that granted a grandparent, visitation rights with a child opposed by a fit parent. The order was reversed since it was based upon Washington's third party visitation statute which the court deemed unconstitutional. That case did not involve elimination of an order that places custodial restrictions on a fit parent entered by agreement of that parent. Thus, pursuant to RAP 13.4(b)(3), this court should accept review since the Court of Appeals decision squarely presents a significant question of law under the Constitution of the United States.

3. The Decision Is In Direct Conflict With The Supreme Court Decision, *State v. MacDonald*, 183 Wa2d 1, 346 P.3d 748 (2015): RAP 13.4(b)(1), *In re Marriage of Glass* 67 WaApp 378, 835 P.2d 1054 (1992), and *In re Marriage of Kennard* 176 Wa app 678, 310 P.3d 845 (2013).

The "extended family" provision of the agreed final order was not superimposed by the Atlanta trial court over objection of a party. The provision restricting the exercise of their fundamental rights as fit parents was imposed by the parties on themselves because their child's relationship with their respective extended family members was important enough to each of them to protect it as a court order. The decision of the

Court of Appeals is in direct conflict with this court's decision in *State v. MacDonald*, 183 Wa2d 1 at 9, 346 P.3d 748 (2015) which holds that agreements to forego a fundamental right under the U.S. Constitution are to be enforced especially where the party who does so receives a reciprocal benefit.

Here, both parties received a reciprocal benefit: the obligation of each to make their child available to the relatives of the other should any of them be in the city of residence of residence of the other while the child is there, during the other parent's residential time or John in Chicago with Ella.

The decision is also in conflict with Court of Appeals decisions that hold that agreed orders in modification proceedings that are beyond the authority of a trial court to impose on parties are valid and to be enforced if entered by agreement of the parties. A court has no authority to impose an order that renders spousal maintenance non-modifiable, but agreed orders to do so are to be enforced. *In re Marriage of Glass, supra* at 390-392 (1992). A court cannot impose a spousal maintenance escalator clause based upon the consumer price index or strictly related to increases or decreases in income. (see *In re Marriage of Coyle*, 61 Wa App 653, 811 P.2d 244 (1991). However, *In re Marriage of Kennard supra* at 687

(2013) holds that agreed orders that impose such obligations are valid and enforceable. Parties have the right to do to themselves what courts cannot otherwise impose on them.

Since the "extended family" provision of the Georgia final parenting order was entered by agreement of the parties, with the benefit of their trial counsel, the decision is directly contrary to the principles established in *Glass, supra* and *Kennard, supra.* Thus, the decision implicates RAP 13.4(b)(2). Review should be accepted.

4. The Decision Involves An Issue of Significant Public Interest Under: RAP 13.4(b)(4)

The decision treats the "extended family" provision as being "inappropriate" ab initio. That conclusion was based upon *Troxel v. Granville, supra*, which involved an order imposed by a trial court constituted placed a restriction upon the fundamental right of a fit mother to determine whether the child could have any contact with the third party grandmother. Since *Troxel v. Granville, supra* was handed down, the void created by the state legislature's failure to come up with a substitute third party visitation statute, has resulted in a hobson's choice for trial courts, and parties in the numerous instances state wide, in which a parent, unfit, due to neglect, abuse, psychoses, drug or alcohol addiction, loses the child

who subsequently forms a nurturing psychological bond with a third party, usually a relative such as a grandparent, who provides daily care, health and security.

The hobson's choice arises over what to do when that parent becomes fit prior to a final custody determination. In those cases, trial is a zero sum game. Courts cannot deprive a parent who may have been unfit, but who proves fitness when the custody determination is to occur. Trial courts are left with no choice but to take the child away from that third party who may have been that child's only source of love and security, in some cases for most of the child's life. The court has no authority to enter an order that protects the relationship. There are only two exceptions. One is proof of "actual detriment" to the child.

However, actual detriment is defined as extra-ordinary circumstances in which the child has special needs that a fit parent cannot fulfill that the third party can. The prospect of the loss of that bond because the fit parent who may not allow any contact at all, does not fulfill the actual detriment exception. (See, *In re Custody of Shields*, 157 Wa2d 126 at 145, 136 P.3d 117 (2006), *In re Custody of B.M.H.*, 179 Wa2d 224 at 238, 315 P.3d 470 (2013); *In re Custody of A.L.D.*, 191 Wa App 474 at 494, 363 P.3d 604 (2015).

In, *In re Custody of J.E.*, 189 Wa App 175 at 185, 356 P.3d 233 (2015) an award of residential time to an aunt with whom the child had lived for nearly ten years since age 2 was reversed as against her mother who demonstrated fitness since the child had no special needs.

The only vehicle left to well-intentioned parents and third parties to achieve a win-win scenario for the child, is the one remedy a trial court has no authority to impose: entry of an agreed order that provides for legally enforceable rights of visitation time to the third party.

With the amendment to GR 14.1 allowing for unpublished decisions to be cited in briefs and memoranda, there is a real danger that restrictions to a fit parent, such as agreeing in a final order to contact between the child and the only caretaker to provide nurturing love and security, might not be enforceable from the moment the ink is dry on that order. The holding is a disincentive to the entry of such creative solutions, as, for example, as occurred in one case that was recently before the court of appeals (see **Appendix 1**). The public interest involved should warrant this court accepting review under RAP 13.4(b)(4).

B. The Failure To Render Findings As To A Substantial Change of Circumstances Related To Decision-Making Authority Over Health Care and Education

1. **The Decision That A Stipulation That Adequate Cause Has Been Met Absolves The Trial Court Of Rendering Material Findings of Fact and Conclusions of Law Under RCW 26.09.260 Is Directly Contrary To *In re Marriage of Jefferson*, 154 Wa App 1038, 210 WL 532423 (2010) and *Kinnan v. Jordan*, 131 Wa App 738 at 752, 129 P.3d 807 (2006).**

The Court of Appeals decision holds that a stipulation as to adequate cause relieves a party of his or her burden of proof under RCW 26.09.260. Pursuant to RAP 13.4 (b) (2) that decision is in direct conflict with the holding in the unpublished decision of *In re Marriage of Jefferson*, 154 Wa App 1038, 210 WL 532423 (2010) which held that a stipulation as to adequate cause does not relieve the party of presenting at trial evidence that fulfills the burden of proof under RCW 26.09.260. The Court of Appeals concluded that the holding in *In re Marriage of Naval*, 43 Wa App 839, 844-845, 719 P.2d 1349 (1986) supports its conclusion. However the court's decision reflects a misreading of *Naval, supra.*

The CR2A agreement acknowledging that adequate cause had been demonstrated pertained to both Mr. Osman's petition and to Ms. Schmidt's counter petition by specific reference to both. (Ex. 27, 28). Adequate cause is not equivalent to a summary judgment. RCW 26.09.270 simply indicates that if adequate cause is established the case must be set for "a hearing" meaning a trial.

Naval, supra involved an agreement that a substantial change in circumstances had occurred related to modifications of residential time. Mr. Naval challenged the jurisdiction of the court under RCW 26.09.260 and cited cases that hold to the proposition that agreement had no legal force since parties cannot by agreement convey subject matter jurisdiction to a court that lacks it under RCW 26.09.260. *Naval, supra* at 841.

The court of appeals held that since the statute is not jurisdictional, and since the court had jurisdiction, the agreement was binding. The implications of agreements under RCW 26.09.270 was not at issue.

The agreement in *Naval, supra*, that a substantial change exists, was in effect is a summary judgment as to the ultimate issue authorizing the court to modify the existing plan. That is not the same as an agreement that merely acknowledges adequate cause. The Court of Appeals' decision erroneously treats both agreements as being synonymous in legal effect.

An agreement that acknowledges adequate cause under RCW 26.09.270 is merely a waiver of the need and expense of an adequate cause hearing. Tina never denied that adequate cause existed as to modifications of the residential time awarded in the Atlanta order. Nor did she ever acknowledge that modification of decision making authority was warranted. Her response denied that request, and her counter petition

sought a reduction of residential time due to his acknowledged use of marijuana that was deemed a problem in the Atlanta proceeding and which resumed after a year of random U.A.'s.

The decision that a stipulation as to adequate cause compels a modification is also in direct contradiction to the holding that the failure to require evidence to support the requested modification is error. *Kinnan v. Jordan, supra* at 752 (2006).

2. **Failing To Reverse For Want of Findings of Fact Material To The Elimination of the Sole Decision-making Provision of the Georgia Final Parenting Plan Order is in direct conflict with the holding in *Kinnan v. Jordan, supra* at 752 (2006); *In re Marriage of Stern, supra* at 711 (1990), and *In re Marriage of Shyrock, supra* at 852 (1995)**

The trial court found that John's geographic relocation to Seattle, was a substantial change of circumstances that justified a modification of his residential time under RCW 26.09.260(5). But those changes of circumstance did not implicate any modifications of the requirements of decision-making authority governed by RCW 26.09.260(10). The court of appeals held that proof fulfilling the standards required under (5) necessarily relieves a party of the responsibility of demonstrating those governed by (10), and thereby relieves the trial court as to its obligation to make material findings under (10). However, Tina had sole decision

making authority whether they both remained in the same community (Atlanta) or whether they lived in different states.

The Court of Appeals observed, that RCW 26.09.260 does not require a particularized finding of a substantial changes of circumstances as to any particular provision of a parenting plan a party wishes to modify. (See slip op page 5). For example, it is one thing to observe that subsection (5) of the statute pertaining to minor modifications of residential time, does not require separate findings of changed circumstances as to the different provisions of a parenting plan order governing, residential time during the school year, as distinguished from holidays, and then school vacations, etc. To so require would be superfluous.

However, it is quite another thing to conclude that satisfaction of one sub-section of RCW 26.09.260(5) which are related to minor modifications of residential schedules, precludes the need to prove the requirements of sub-section (10) of the statute which governs modifications of provisions not related to residential time. For example a final parenting order that finds a history of acts of domestic violence cannot require mutual decision-making under RCW 26.09.191(1), even if there is no fear that it will occur at the time the order is entered. See *In re*

Marriage of Caven, 136 Wash.2d 800, 966 P.2d 1247 (1998). A geographic relocation that was then unanticipated would be a substantial change in circumstances warranting a minor modification of residential time under RCW 26.09.260(5). Under the Court of Appeals decision in this case a trial court could award a modification to require mutual decision making under RCW 26.09.260(10) without the need to prove what circumstances have changed that pertain to decision making authority.

That holding is in direct contradiction to the principle that compliance with the statutory criteria under the governing sub-section of RCW 26.09.260 is "mandatory", otherwise the trial court has no authority to modify. *In re Marriage of Shyrock, supra* at 852 (1995). It is also in direct contradiction to the principle that the failure to render material findings as to what constitutes a substantial change in circumstances is reversible error. *Kinnan v. Jordan*, supra at 752 (2006) and *In re Marriage of Stern*, supra at 711 (1990). Therefore, pursuant to RAP 13.4(b)(3) this court should accept review.

Therefore this court should grant this petition and accept review.

VI. Conclusion

Pursuant to the considerations demonstrated under RAP 13.4 this court is asked to grant this petition and accept review.

DATED this 19 day of January, 2018.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Parentage and Support of ELLA GRACE SCHMIDT JOHN PATRICK OSMAN, Respondent, and TINA ANNELIESE SCHMIDT, Appellant.	No. 76260-5-I DIVISION ONE UNPUBLISHED OPINION FILED: November 13, 2017

APPELWICK, J. — Tina Schmidt challenges the trial court's modification of the decision-making provision of the parenting plan for her daughter. She also challenges the removal of a provision providing extended family members' access to the child. We affirm.

FACTS

Tina Schmidt and John Osman have a daughter, Ella Schmidt, born on June 17, 2011. On March 25, 2014, a final parenting plan was entered by agreement in Atlanta, Georgia. Ella resided a majority of the time with Tina. The order required the parents to confer and consult in good faith on major decisions about the child's religious upbringing, education, nonemergency health care, and extracurricular activities. If the parties were unable to agree upon a major decision, the order required that one parent send an e-mail describing the disputed issue, and gave

the other parent 48 hours to respond. If the parents could not agree on a decision after the required conferral, Tina had final decision-making authority. The final consent order permitted Tina to relocate to Seattle with Ella. In anticipation of the move, the parenting plan included two residential schedules: one before Tina relocated and one after she relocated. The parenting plan also contained two provisions concerning extended family:

> In the event that the Father's family is in the Mother's city of residence, the Mother shall accommodate the Father's family so that they can see the Child so long as the Child is in town.
>
> In the event that the Mother's family is in the Father's city of residence or in Chicago with the minor child, the Father shall accommodate the Mother's family so that they can see the Child so long as the Child is in town.

In May 2014, Tina moved from Georgia to Federal Way, Washington. John decided to relocate to Washington, to be closer to Ella. Without giving the required notice under the Georgia order, John moved to Washington in November 2015.[1] Tina purchased a house in Port Orchard, Washington in July 2015. In December 2015, Tina notified John via counsel that she intended to move by the end of the following month. Tina moved to Port Orchard in May 2016.

In Seattle, John filed a petition for modification of the parenting plan. He petitioned the court to modify the residential schedule. He also sought to modify the provisions on dispute resolution and decision-making authority on education and medical decisions. The parties stipulated that there was adequate cause to

[1] In November 2015, before Tina learned that John had relocated to Washington, she filed to modify the parenting plan in Georgia. She incurred $8,000 in attorney fees, which the trial court awarded to her in this proceeding. This is not an issue on appeal.

proceed with modifying the parenting plan. During the proceedings, Psychologist Dr. Wendy Hutchins-Cook completed a parenting evaluation of the parties. Hutchins-Cook made recommendations for a final parenting plan. She recommended that John and Tina have joint decision-making, and that final decision-making should be made via arbitration, instead of by Tina.

For its final order, the trial court considered the petition to modify the Georgia parenting plan, the child's best interest, the agreed order of adequate cause to change the parenting plan, and the other evidence before it at the November 2016 trial.[2] The court found that it was in the best interest of the child for the parents to have joint decision-making for nonemergency health care and education. The trial court eliminated the provision that each parent should make Ella available to the other parent's family when visiting the city where the extended family resides. Tina seeks review of the trial court's modification of decision-making authority over health care and education and the removal of the family visit provision.

DISCUSSION

Tina challenges the trial court's modification of the parenting plan. First, she argues the trial court erred in finding a substantial change of circumstances material to Tina's sole decision-making authority. Second, she argues the trial court erred in finding that the best interests of the child required that John have joint decision-making authority over health care and education decisions. Third,

[2] The residential schedule adopted by the trial court is not an issue on appeal.

she argues the trial court erred in removing the travel and family visitation provision of the Georgia parenting plan. Fourth, she argues that the trial court erred in failing to enter conclusions of law.

We review a trial court's decision to modify a parenting plan for abuse of discretion. In re Marriage of Zigler, 154 Wn. App. 803, 808, 226 P.3d 202 (2010). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. In re Marriage of Fiorito, 112 Wn. App. 657, 663-64, 50 P.3d 298 (2002). We uphold the trial court's findings of fact if they are supported by substantial evidence. In re Marriage of McDole, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993). We review conclusions of law to determine whether factual findings that are supported by substantial evidence in turn support the conclusions. In re Marriage of Myers, 123 Wn. App. 889, 893, 99 P.3d 398 (2004).

I. Substantial Change of Circumstances

Tina argues that the court erred in modifying the two nonresidential provisions, because it did not find that a substantial change of circumstances material to those provisions had occurred.

Modifications of parenting plans are governed by RCW 26.09.260 and RCW 26.09.270. In re Marriage of Adler, 131 Wn. App. 717, 723, 129 P.3d 293 (2006). The party seeking modification must establish adequate cause to alter the existing plan—typically that requires evidence of a significant change in circumstances unknown at the time of the original plan. In re Marriage of McDevitt, 181 Wn. App. 765, 769, 326 P.3d 865 (2014). To modify the nonresidential provisions, the parent must show a substantial change of circumstances of either parent or child, and the

adjustment is in the best interest of the child. RCW 26.09.260(10). A substantial change in circumstances justifying modification must be a change occurring after entry of original decree or a fact unknown to the trial court at that time. In re Marriage of Hansen, 81 Wn. App. 494, 500, 914 P.2d 799 (1996).

The parties here agreed to the threshold requirement of RCW 26.09.260—adequate cause to modify the parenting plan. In doing so, they stipulated that the Georgia parenting plan needed to be modified. The trial court may rely upon stipulations of the parties and does not err in failing to independently evaluate whether modification was appropriate. See In re Marriage of Naval, 43 Wn. App. 839, 844-45, 719 P.2d 1349 (1986) (holding that a party's stipulation to change in circumstances satisfies the statutory requirement).

The modification statute does not require a particularized finding that a change of circumstance must be found as to any individual provision of a parenting plan which a parent wishes to have modified. RCW 26.09.260(1), (10). Not surprisingly, neither does any case law. Once the necessary threshold determination is made, the entire order is before the court for modification. The trial court committed no error by addressing any provision of the parenting plan without making a change of circumstances finding particular to that provision.

II. Evidence of Best Interest of the Child

Tina next argues that there was no evidence that joint decision-making authority is in the child's best interest. She argues that the court failed to specify any finding of fact on which it concluded that joint decision-making was in the

child's best interest. She also asserts that the court did not adopt Hutchins-Cook's reasons for recommending joint decision-making.

The trial court found that, due to John's move to Washington, joint decision-making was now in the best interest of the child. The final order stated in pertinent part:

> The Court finds the father's relocation to Washington is a substantial change of circumstances and it is in the best interests of the child for the parties to have joint decision[-]making. The court finds the decision[-]making provisions in the Georgia order have not been followed by the mother with respect to her duty to consider and engage in meaningful discussion with the father. In fairness, the father acquiesced to much such decision[-]making, but has stepped up to request more involvement since his move to Washington.
>
> The court essentially adopts the parenting evaluator's suggestions for a method of dispute resolution where the parties are unable to agree, and that is reflected in the parenting plan entered this date. The parties themselves are amenable to the use of a parenting coach, and arbitration for unresolved disputes, which bodes well for its effectiveness.

The trial court relied on Dr. Hutchins-Cook evaluation and recommendations. Regarding decision-making, the evaluation states:

> Counselors for both Tina and John report that their clients are making improvements in the areas of refraining from focusing on the other parent or their anger and disappointment with the other parent. This benefits their communication. Better communication between the parents is supportive of Ella.
>
> The information I have gathered leads me to the conclusion that Ella would benefit from a change in the joint decision-making provision of the Georgia Parenting Plan. A review of the e[-]mail threads provided earlier in this report demonstrates non-compliance by Tina.
>
> It is not unusual for the parent having more time with the child to be the one initiating the decision-making process. Tina typically come forward with a declaration of what she is going to do; sometimes with a good description of logistics. John is to respond within 48 hours or

> her decision holds. When John was in Atlanta, he typically did not respond, and Tina rightfully moved ahead.
>
> John has been in Washington since November 2015, approximately 10 months. His perspective, which is fairly accurate, is that Tina bypasses the discussion part of the decision-making, or when he objects or makes a suggestion or proposal that is different than what she wants, her response is that she is not in agreement. The Georgia Plan specifies joint decision-making with Tina making the final decision when there is disagreement. Tina does in fact, in my opinion, bypass the first important step in the decision-making process as it is presented.
>
> Ella has two loving parents, both of whom want to be involved in her life. This involvement includes participation in decision-making about her life. This is not happening. This report includes recommendations to address this problem area.

In addition to the evaluation, the trial court also heard testimony from Hutchins-Cook that Tina was not following the decision-making process from the Georgia parenting plan. Further, it heard John testify that he relocated from Atlanta to Washington to be closer to Ella. And, it heard that John believed Tina attempted to reduce his involvement in their child's life, partly through minimizing his decision-making.

In her evaluation, Hutchins-Cook stated that Ella "would benefit from a change in the joint decision-making provision of the Georgia Parenting Plan . . . [because] [i]t is not being implemented as described." When asked why she thought joint decision-making was in the child's best interested, she testified,

> Both parents want to be involved in this child's life. Both are active, intelligent, interested parents. Communication between them. Communication about what Ella may or may not be participating in the future. Important for Ella to the degree she'll recognize that her father's involved in the process or not.

The trial court had ample evidence from the testimony and recommendation of the evaluator to determine that the change of decision-making was in the child's best interest. It stated it adopted the parenting evaluator's suggestions for a method of dispute resolution when the parents are unable to agree. This establishes the factual basis for the change just as if the trial court had stated explicitly that it found the testimony of the evaluator persuasive. The record leaves no doubt as to the source of the facts on which the trial court concluded that it was in the best interest of the child for the parents to have joint decision-making.

III. Chicago Travel Provision

John's proposed parenting plan asked the court to remove the provision that either parent make Ella available to the other parent's family. Tina argues the trial court erred in removing the provision. At trial, Tina testified that she wanted the provision to remain. She contends that the trial court made no findings regarding the provision, as required under CR 52.

Requiring both parents to make Ella available to the other parent's family when traveling was a provision providing residential time with nonparents. In light of Troxel v. Granville, 530 U.S. 57, 72, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (recognizing the fundamental rights of parents to decide their children's visitation with third parties) requiring either parent to provide access to other family members was inappropriate. The trial court rightly removed this reciprocal provision. No finding of fact was required for the trial court to make such a change. The trial court did not abuse its discretion.

IV. Findings and Conclusions of Law

Tina argues that the trial court erred in failing to enter conclusions of law as required by CR 52(a)(1) and CR 52(a)(2)(B) on the mandatory form. She contends that the trial court erred because under the section entitled "findings and conclusions" on the mandatory form the trial court did not specifically delineate any conclusions of law. On the final order of findings the court states,

> [I]t is in the best interests of the child for the parties to have joint decision[-]making for non-emergency health care and education. The court finds that the father's relocation to Washington is a substantial change of circumstances and it is in the best interests of the child for the parties to have joint decision[-]making.

These are conclusions of law required to modify the nonresidential provisions of the parenting plan: that there was a substantial change and that is in the best interest of the child. RCW 26.09.260(10). That they are mislabeled or not separately set forth is not grounds for reversal. See City of Tacoma v. William Rogers Co., 148 Wn.2d 169, 181, 60 P.3d 79 (2002) (affirming that a conclusion of law erroneously labeled as a finding of fact is nevertheless reviewed as a conclusion of law).

V. Attorney Fees

Tina requests attorney fees as well as sanctions. She relies on opposing counsel's intransigence in her request for fees. She argues that opposing counsel's brief had numerous misstatements and frivolous arguments. We do not find her assertion of intransigence credible. Tina also requests an award of sanctions for opposing counsel's failure to cite to the record in his response brief. Imposing sanctions is discretionary. RAP10.7; Ventenbergs v. City of Seattle, 163

Wn.2d 92, 109, 178 P.3d 960 (2008). We decline to award fees or impose sanctions.

We affirm.

WE CONCUR:

ANDERSON AND FIELDS

January 19, 2018 - 1:02 PM

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COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

TINA ANNELISE SCHMIDT, Appellant, v. JOHN PATRICK OSMAN, Respondent,	)	DECLARATION OF SERVICE

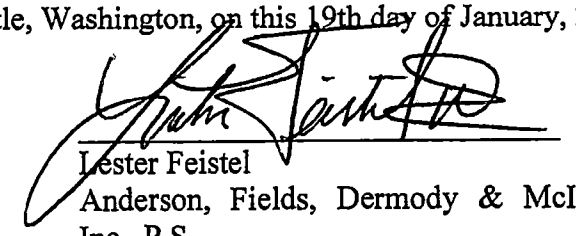
I, Lester Feistel, state and declare as follows:

I am a paralegal in the Law Offices of Anderson, Fields, Dermody & McIlwain, Inc., P.S. On the 19th day of January, 2018, I served via email, true and correct copies of the Petition for Review to the Washington State Supreme Court to:

Philip C. Tsai
Tsai Law Company, PLLC
2101 Fourth Ave, Suite 2200
Seattle, WA 98121
phil@tlclawco.com
(206) 728-8000

I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED at Seattle, Washington, on this 19th day of January, 2018.



Lester Feistel
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ANDERSON AND FIELDS

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