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Case #: 1035764

THE SUPREME COURT OF WASHINGTON

Court of Appeals No. 397491-III

Spokane County Superior Court No. 23-3-0043032

In re:

ROBERT WALDEN,

Respondent,

and

LYNDSEY HANSEN (f.k.a. WALDEN),

Petitioner.

PETITION FOR REVIEW

JULIE C. WATTS/WSBA #43729
Attorney for Petitioner
The Law Office of Julie C. Watts, PLLC
505 W. Riverside Ave., Suite 210
Spokane, WA 99201
(509) 207-7615

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I. IDENTITY OF PETITIONER

The petitioner is Lyndsey Hansen (f.k.a. Walden).

II. DECISION BELOW

Petitioner seeks review of the *Opinion* entered by Division III of the Court of Appeals on September 24, 2024.

III. ISSUE FOR REVIEW

1. Whether Division III's decision is in conflict with decisions of the Washington Supreme Court, the Court of Appeals, as well as Washington statute, and whether it implicates constitutional and public policy issues pursuant to RAP 13.4(b)(1)-(4).

IV. STATEMENT OF THE CASE

a. Establishment of Agreed Final Parenting Plan (2017)

In 2017, Mr. Walden and Ms. Hansen agreed to a final parenting plan for their two children through mediation of their divorce.¹ Final orders were signed by Mr. Walden on April 26, 2017, and by Ms. Hansen on May 12, 2017.² At the time, both parties lived in Spokane, Washington; however, shortly after

¹ CP 14-25.

² CP 25.

mediation, Mr. Walden moved to Hailey, Idaho with his new partner.³

The final orders were subsequently signed and entered by the Lincoln County Superior Court on July 7, 2017.⁴

Both parties agree that the agreed parenting plan was not subsequently followed.⁵

b. Ms. Hansen's *Petition for Modification* (04/18/2022)

In 2021, Mr. Walden gave notice to Ms. Hansen that he was “moving back to the area”⁶ and intended to establish residence in Hayden, Idaho.⁷ Ms. Hansen tried to facilitate additional residential time with Mr. Walden in his new home, but their children experienced difficulty adjusting.⁸ After a few months, Ms. Hansen decided to seek modification of the agreed parenting

³ CP 58-59; 79-80; 242; *Opening Brief*, pg. 8.

⁴ CP 24.

⁵ *Opening Brief*, pg. 9.

⁶ CP 242.

⁷ CP 80, 242.

⁸ CP 83.

plan.⁹ On April 18, 2022, Ms. Hansen filed a petition with Lincoln County Superior Court requesting both a major and minor modification to the agreed parenting plan.¹⁰ Her request for a minor modification asserted a substantial change in circumstances based on Mr. Walden's move to Hayden, Idaho pursuant to RCW 26.09.260.¹¹

On May 10, 2022, Mr. Walden filed a declaration asking the Lincoln County Court to “deny Lyndsey’s request to find adequate cause to change the parenting plan ...”¹² The declaration also asserted there was no reason to change the plan because: “Despite the increased distance from Spokane, 560 miles and 8.5 hours of driving each way, I still made the trip every other weekend to spend time with the girls.”¹³

⁹ CP 83, 85.

¹⁰ CP 58-62.

¹¹ CP 59-60; CP 407, *Order of Dismissal*, pg. 2.

¹² *Opening Brief*, pg. 15.

¹³ CP 243

At hearing on May 12, 2022, Mr. Walden’s attorney addressed the Lincoln County Court: “[W]e would request that this court deny the parenting plan as proposed by Ms. Walden and *deny the request for adequate cause* — to modify this parenting plan.”¹⁴

The Lincoln County trial court found Mr. Walden’s arguments persuasive, and it denied Ms. Hansen’s request for a finding of adequate cause and subsequently dismissed her petition.¹⁵ In its oral ruling, the trial court stated: “it appears [Mr. Walden] is a caring father, and he’s made a lot of effort to stay in touch with his children,” concluding “[s]o frankly, I am not finding adequate cause to modify the parenting plan.”¹⁶

c. Mr. Walden’s *Petition for Modification* (12/29/2022)

A few months later, Mr. Walden filed his own request for a minor modification of the parenting plan, claiming a substantial

¹⁴ 2 RP at 14.

¹⁵ CP 406-07.

¹⁶ CP 477; emphasis added.

change in circumstances based on Mr. Walden's move to Hayden, Idaho¹⁷– the identical basis previously asserted by Ms. Hansen, which he had *vigorously* opposed mere months prior.¹⁸

After a change of venue, the matter was heard by Spokane County Superior Court, and a written decision was entered denying Mr. Walden's request¹⁹ and ruling that Mr. Walden was judicially estopped from requesting relief based on his move:

Mr. Walden's argument in Lincoln County against Ms. Walden's petition for a major and minor modification was that his move did not constitute a substantial change of circumstance. His declaration describes the efforts he went through to ensure that he was seeing the children every other weekend. This position is clearly inconsistent with his current position that his move is a substantial change of circumstance. Mr. Walden's argument that he did not stipulate to the move as a substantial change of circumstance because it would require him to stipulate to Ms. Walden's allegations of abandonment and integration are without merit. Mr. Walden could have asked the court to find that

¹⁷ CP 483-86, 496 (“Given that I now live about an hour away from Lyndsey and the girls, I believe it in their best interest and more practical for everyone involved to...increase my time with the girls...”); *Opening Brief*, pgs. 38, 41-43.

¹⁸ CP 242.

¹⁹ CP 611-16.

his move was a substantial change for a minor modification and asked the court to adopt his proposed parenting plan instead.

Mr. Walden's argument [led] Lincoln County to make the finding that there was not adequate cause for a major or minor modification. The court finds that this led [] Lincoln County Superior Court to be misled.

Finally, Ms. Walden is at a disadvantage because she agreed in her prior petition that Mr. Walden's move constitutes a substantial change of circumstance, while at the same time being estopped from arguing that the outcome of the move is detrimental.²⁰

Mr. Walden appealed,²¹ and on September 24, 2024, Division III of the Washington State Court of Appeals entered a ruling that reversed the Superior Court's decision and remanded the matter for a full hearing on Mr. Walden's modification petition.²²

V. ARGUMENT

- 1. Division III's decision is in conflict with numerous decisions of the Supreme Court, the Court of Appeals, as well as Washington statute, and it implicates constitutional and public policy issues pursuant to RAP 13.4(b)(1)-(4).*

²⁰ CP 614-15

²¹ CP 617-18.

²² *Opinion*, pg. 1.

The facts in this matter are undisputed.

Ms. Hansen filed a petition for a minor modification alleging adequate cause based on a substantial change of circumstances, i.e., Mr. Walden's move to Hayden, Idaho, which Mr. Walden opposed and successfully persuaded Lincoln County to *dismiss*; a few months later, Mr. Walden filed his own petition for a minor modification alleging adequate cause based on a substantial change of circumstances, i.e., Mr. Walden's move to Hayden, Idaho, which was denied by Spokane County Superior Court based on judicial estoppel.

Spokane County's decision was reversed by Division III's *Opinion*, however, which failed to make a distinction between Mr. Walden's opposition to Ms. Hansen's request for a major modification (which it justified by saying "this was because Ms. Hansen sought to reduce his time with his daughters and deprive him of decision-making authority"²³) and his opposition to her request for a *minor* modification, which is what is at issue on

²³ *Opinion*, pg. 18.

appeal. The *Opinion* took the radical position that identical facts can provide sufficient adequate cause for the *father's* request to proceed with a petition for a minor modification, while simultaneously being insufficient for the *mother's* request to proceed with a petition for a minor modification. This is problematic because, unlike major modifications, minor modifications can be based on a substantial change of circumstances in the life of *either* parent or the child (RCW 26.09.260(5)); therefore, it makes no difference which parent makes the request to modify. The *Opinion* rather startlingly asserts that when Lincoln County dismissed Ms. Hansen's petition for lack of adequate cause (finding that Mr. Walden's move to Hayden was not a sufficient change of circumstances to support a minor modification of the parenting plan), that evaluation only applied to minor modifications proposed by *Ms. Hansen*, noting: "[Lincoln County] held there was not adequate

cause to hold a full hearing on *Ms. Hansen's petition*.”²⁴

Despite the statutory language, Division III appears to believe that a determination of adequate cause is based, not on an evaluation of the factual circumstances, but rather on the premature evaluation of the proposed parenting plan *prior* to a substantive hearing. But any additional factors unique to a party's proposed parenting plan in a minor modification are normally addressed “*after* a court has found a substantial change in the parties' or child's circumstances.”²⁵

Even more perplexing, Division III claimed that while Lincoln County *explicitly* dismissed Ms. Hansen's petition for a minor modification for lack of adequate cause, it somehow simultaneously implied that adequate cause for a minor modification nevertheless existed, noting that the court “recognized that the current parenting plan was problematic,”²⁶

²⁴ *Opinion*, pg. 18.

²⁵ *In re Marriage of Tomsovic*, 118 Wn.App. 96, 107, 74 P.3d 692 (2003)(emphasis added).

²⁶ *Opinion*, pg. 18.

and “[i]t would be anomalous to conclude that the Lincoln County court would have ordered mediation if the court did not think there was any reason to modify the parenting plan.”²⁷ This is, frankly, rather shocking. There is no rational basis or jurisprudential principle that supports Division III treating a court’s unrelated decision as an implied finding of adequate cause, nor does Washington law provide any authority to support the interpretation of any order as an implied ‘finding of adequate cause to make a minor modification based on Mr. Walden’s move’ in a context where the request to make a ‘finding of adequate cause to make a minor modification based on Mr. Walden’s move’ had already been explicitly denied/dismissed.

The *Opinion*’s decision to provide Mr. Walden with a full hearing on the identical factual basis for which Ms. Hansen was

²⁷ *Opinion*, pg. 18; it is worth noting that having *dismissed* the petition for lack of adequate cause, Lincoln County did not properly have jurisdiction over the parties to order them to engage in mediation related to the dismissed proceeding. That ought never to have occurred, but since no party appealed it, it was not an issue raised or argued on appeal.

denied a hearing (at Mr. Walden's behest) is offensive to justice and violative of Ms. Hansen's due process rights by denying her the equal protection of the law that Mr. Walden now enjoys. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."²⁸ "Parental rights have been categorized as a 'liberty' protected by the due process clause of the Fourteenth Amendment."²⁹ "Procedural elements of this constitutional guarantee are notice and the opportunity to be heard and defend before a competent tribunal in an orderly proceeding adapted to the nature of the case."³⁰ Ms. Hansen was not permitted to be heard on her petition for a minor

²⁸ *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976).

²⁹ *In re Ebbighausen*, 42 Wn.App. 99, 102-03, 708 P.2d 1220 (1985).

³⁰ *Id*

modification, which was predicated on the same factual basis as Mr. Walden's minor modification.

The *Opinion's* ruling also violates public policy and invites increased litigation; parties will be encouraged to oppose valid and meritorious petitions if they are, like Mr. Walden, permitted to foreclose relief to their co-parent by being uncompromising regarding their reasonable requests in the knowledge that they will be able to successfully pursue their own requests on the same basis later.

Contrary to the *Opinion's* assertion that "[t]here is nothing inherently unfair about allowing Mr. Walden to seek the same modifications he had sought all along,"³¹ there is something both obviously and fundamentally unfair about permitting Mr. Walden to proceed on claims where Ms. Hansen was obstructed

³¹ *Opinion*, pg. 18; contrary to the *Opinion's* assertions, Mr. Walden never made any timely request to the Lincoln County Superior Court regarding a modification to the parenting plan, nor did the Lincoln County Superior Court ever consider any request from Mr. Walden regarding a modification to the parenting plan.

at Mr. Walden's request. Mr. Walden successfully interfered with Ms. Hansen's ability to obtain precisely *the same relief* that he now demands on an *identical basis* despite his previous opposition. There is no clearer definition for the term "unfair" than an adjudicator receiving two identical claims and arbitrarily granting one and denying the other.

VI. CONCLUSION

The *Opinion* in this matter entirely misapplies Washington family law as well as the law governing judicial estoppel. It harms Ms. Hansen and creates confusing and dangerous persuasive precedent in an area of law that is already challenging for families to navigate. This matter directly affects Washington's children, and Ms. Hansen respectfully requests that this Court grant review.

The undersigned certifies that the foregoing motion contains 2,061 words not including the appendices, title sheet, table of contents, table of authorities, certificate of service, signature blocks, and this certification of compliance.

Respectfully submitted this 24th day of October, 2024,

s/Julie C. Watts
WSBA #43729
The Law Office of Julie C. Watts, PLLC
505 W. Riverside Ave., Suite 210
Spokane, WA 99201
Telephone: (509) 207-7615
Fax: (509) 352-1929
E-mail: julie@watts-at-law.com

CERTIFICATE OF ATTORNEY

I certify that on October 24, 2024, I arranged for delivery of a copy of the foregoing *Petition for Discretionary Review* to the following:

Counsel for Mr. Walden

Via Email only

Evan C. Dobbs
Allen Fischer
510 W. Riverside Ave., Ste. 600
Spokane, WA. 99201-0515
evan@allenfischer.com

s/Julie C. Watts
WSBA #43729
The Law Office of Julie C. Watts, PLLC
505 W. Riverside Ave., Suite 210
Spokane, WA 99201
Telephone: (509) 207-7615
Fax: (509) 352-1929
E-mail: julie@watts-at-law.com

THE LAW OFFICE OF JULIE C. WATTS, PLLC

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Filing Motion for Discretionary Review of Court of Appeals

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Phone: (509) 207-7615

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

In the Matter of the Marriage of:)	No. 39749-1-III
)	
ROBERT J. WALDEN,)	
)	
Appellant,)	
)	UNPUBLISHED OPINION
and)	
)	
LYNDSEY M. WALDEN,)	
)	
Respondent.)	

PENNELL, J. — Robert Walden appeals a trial court order on adequate cause that dismissed a petition for minor modification to the parties’ parenting plan. We reverse and remand for a full hearing on the modification petition.

FACTS

Robert Walden and Lyndsey Hansen, formerly known as Lyndsey Walden, married in 2006. They have two school-age daughters. In 2016, Mr. Walden initiated an action in Lincoln County Superior Court to dissolve the marriage. Proceeding pro se, both parties

stipulated in February 2017 to an order authorizing their mediator to prepare agreed-upon final orders.

As relevant here, the parties agreed to a parenting plan imposing no restrictions on either parent and requiring joint decision-making. The plan required the parties to attend mediation “[t]o solve disagreements” about the plan, rather than going straight to court. Clerk’s Papers (CP) at 16. The plan named Ms. Hansen the children’s primary custodian. It provided that Mr. Walden was entitled to have the children stay with him every other weekend, as well as an overnight visit every other Wednesday, and a week of uninterrupted vacation time in the summer. The plan stated “the parents agree to return to mediation to expand the parenting plan as needed.” *Id.* at 17.

Mr. Walden signed the parenting plan on April 26, 2017. Ms. Hansen signed it on May 12, 2017.¹ The final dissolution orders, including the parenting plan, were not entered until July 7, a delay apparently resulting from outstanding payments due to the mediator. As Ms. Hansen wrote in an April 2022 declaration, “The original parenting

¹ The signatures were an acknowledgement that the proposed parenting plan was agreed to and presented by the parties, and that it could be entered by the court without notice to either party. *Id.* at 25. A handwritten notation was added to the proposed plan, and acknowledged by the parties on June 20 and 21, memorializing their agreement to maintain the under school-age residential schedule once their older daughter began kindergarten, “until further order of the court.” *Id.* at 18.

plan was built with the idea that [Mr. Walden] was living locally here in Spokane, the same city as myself and our children.” *Id.* at 80.

During June 2017, after the parties’ agreement to the parenting plan but before the court issued its final orders, Mr. Walden moved to Hailey, Idaho, more than an eight-hour drive from Spokane. As a result, from day one, the parties never strictly followed their parenting plan. The parties agree that, given the distance, Mr. Walden never exercised his Wednesday overnight visits as contemplated by the plan. The parties disagree about the frequency with which Mr. Walden failed to exercise weekend visitation while he lived in Hailey, but it is undisputed that some weekend visits, as well as frequent phone contact, occurred.

In late 2021, Mr. Walden and his current wife moved to Hayden, Idaho, which the parties agree is roughly a one-hour commute from Ms. Hansen’s Spokane County home.

In April 2022, Ms. Hansen petitioned to modify the parenting plan. She sought both major and minor modifications. As the reason for her requested major modifications, Ms. Hansen claimed, first, that the children “have been integrated” into Ms. Hansen’s new family unit “in substantial deviation” of the original plan, with Mr. Walden’s consent; and second, that Mr. Walden’s home was “detrimental” to the children’s health. *Id.* at 59; *see* RCW 26.09.260(2)(b), (2)(c). As the reason for her minor modifications,

Ms. Hansen claimed the original plan was “difficult to follow because” Mr. Walden “has moved.” CP at 60; *see* RCW 26.09.260(5)(b).

In her modification petition, Ms. Hansen asked the court to adopt her proposed parenting plan that included new RCW 26.09.191 findings and resultant restrictions against Mr. Walden. Specifically, Ms. Hansen’s proposed plan included, as reasons for placing limitations on a parent, that Mr. Walden had “abandoned” his children, “has a history of domestic violence,” and makes “[a]busive use of conflict.” CP at 63-64; *see* RCW 26.09.191(1)(a), (1)(c), (2)(a)(i), (2)(a)(iii), (3)(e). As for major modifications, Ms. Hansen’s proposed plan provided her with sole decision-making authority over the children and a slight reduction in Mr. Walden’s residential time. Rather than his current entitlement to every other weekend with the children, Ms. Hansen’s plan would reduce this entitlement to every third weekend. As for minor modifications, Ms. Hansen wanted one of her daughters to be in counseling, restrictions on Mr. Walden’s interactions with that daughter, removal of the mediation requirement, and for pickup and drop-off of the children to take place at a neutral site rather than the parties’ homes. CP at 64; *see id.* at 60, 65, 67.

On May 3, 2022, Ms. Hansen separately served Mr. Walden with a notice of her intent to relocate with the children from Spokane to Deer Park.

On May 10, 2022—just two days before the adequate cause hearing on the modification petition—Mr. Walden filed a document formally styled as an “Objection about Moving with Children and Petition about Changing a Parenting/Custody Order.” *Id.* at 237. Notwithstanding the document’s title, Mr. Walden stated, he did “not object” to Ms. Hansen moving with the children, “but I ask the court to approve my proposed Parenting Plan or Residential Schedule.” *Id.* The filing went on to state, “If the children are allowed to move with [Ms. Hansen], I ask the Court to approve the *Parenting Plan* or *Residential Schedule* that is proposed by me.” *Id.* at 238.

Mr. Walden separately filed a proposed parenting plan that would retain joint decision-making. Mr. Walden proposed changes to the children’s residential schedule. He sought to remove the Wednesday overnight visits from the parenting plan and retain the every-other-weekend schedule during the school year, but expand his summertime entitlement from every-other-weekend to an equal residential schedule.

In support of his “objection” and proposed parenting plan, Mr. Walden filed a sworn declaration. He began his declaration, “I respectfully ask that this Court deny [Ms. Hansen’s] request to find adequate cause to change the parenting plan based on her allegations, and deny her new requested parenting plan. Instead, I request that [the] Court to adopt my parenting plan” *Id.* at 241. Mr. Walden claimed the superior court had

“per se [a]dequate [c]ause” for the modifications set forth in his proposed plan, based on Ms. Hansen’s proposed relocation to Deer Park. *Id.*

Mr. Walden claimed he had been planning to file a petition of his own since his recent move to Hayden, but Ms. Hansen filed the instant petition first. He informed the court that he believed “expanded time” as the children aged “was contemplated in the prior parenting plan and is in the best interest of our daughters.” *Id.* In support of this contention, he cited the original parenting plan, which stated, “the parents agree to return to mediation to expand the parenting plan as needed.” *Id.* at 251; *see id.* at 17; *see also id.* at 18 (handwritten stipulation in original parenting plan contemplating that the under school-age residential schedule would be maintained “until further order of the court” even as the children aged and started attending school). Mr. Walden claimed that, when he and his current wife moved to Hailey, they always intended to move back somewhere closer to Spokane in a few years after her daughters graduated high school, with the expectation of increased visitation with his own children once the move occurred.

Mr. Walden referenced that his recent move to Hayden was a valid reason for granting him more residential time during the summer, writing, “It seems cruel that now that [my wife] and I have finally reached our goal of moving back up to the Spokane area to be near the girls, that [Ms. Hansen] is attempting to unnecessarily limit my time.”

Id. at 249. Mr. Walden noted that a weeknight visit during the school year was impractical given the girls' residence in Spokane County, but contended "[t]here is no reason the girls shouldn't spend equal time with each parent during the Summer."

Id. at 248-49.

Mr. Walden disputed Ms. Hansen's allegations of abandonment, domestic violence, and abusive use of conflict. He claimed there was no proof that his oldest daughter was having anxiety attacks, but he nevertheless said he was supportive of her receiving counseling.

The superior court held an adequate cause hearing, as scheduled, on May 12, 2022.

At the outset of the hearing, Ms. Hansen's counsel addressed the court:

The first thing I need to just address is something that was raised by Mr. Walden in his declaration, which is exactly the reason that we are here. We are here on a motion for adequate cause and a motion for temporary orders under a petition for modification. It is true that Ms. [Hansen] has . . . served a notice of intent to relocate. However, that is a separate proceeding. It is my understanding that Mr. Walden's objection to that has not been properly served. So, the relocation action, if there is going to be one, is not before the court today. And any requests by Mr. Walden related to relocation are not before the court today.

Rep. of Proc. (RP) (May 12, 2022) at 4. The court agreed that the issue of relocation was not before the court that day.

Mr. Walden’s counsel began his argument by stating, “I don’t want to belabor the point, but Mr. Walden’s position today is that he does have a right to ask for increased time.” *Id.* at 13. Counsel represented that, upon the filing of a notice of relocation and objection, “per se adequate cause [is established pursuant to RCW 26.09.260(6)] to modify the parenting plan” and the court could then adopt either party’s proposed plan. *Id.* at 13-14. The court interrupted Mr. Walden’s attorney, reminding him that “the relocation issue is not in front of me.” *Id.* at 14. Mr. Walden’s attorney conceded, “Okay, understood. I’ll move on In that case, Your Honor, we would request that this court deny the parenting plan as proposed by Ms. [Hansen].” *Id.* Mr. Walden’s counsel finished his argument by adding, “I think that even though it’s not before the court today, the final parenting plan did anticipate that Mr. Walden would be getting more time as the girls got older and that’s what he eventually hopes to get.” *Id.* at 22.

The superior court proceeded to its oral ruling:

. . . [F]irst, I want to point out that neither of the parties were following the original parenting plan, apparently. Yes, he moved to Hailey, Idaho; and if Ms. [Hansen] was concerned that he wasn’t visiting them, it seems like that’s the time she would [have] brought a petition to modify. But it also appears that he is a caring father, and he’s made a lot of effort to stay in touch with his children. I look at the photos, it looks like . . . very happy children with their father.

It seems that this comes down to a few issues; one is the issue of the counselor, one is the issue of the visits between the parties, the frequency of the father’s visits with the children. And then added to that the parties don’t

appear to be able to cooperate very well with each other, and there seems to be an issue of about how often he can Facetime with the children.

. . . [O]ne of my comments will be that [the] parenting plan made Ms. [Hansen] the custodian and it seemed to contemplate that she would be the primary parent. So, allegations that she's doing all the parenting in terms of day-to-day decisions it seems like that's what the original parenting plan contemplated.

. . . .

. . . I'll agree that there doesn't seem to be any type of medical evidence that the child . . . is having some kind of stress or anxiety disorder. But mom wants to send the child to a counselor and . . . father agrees to send the child to a counselor. So, I'm not seeing an issue there. Then mom wants to change the parenting plan to every three weeks when the original parenting plan contemplated every other week, that's not a huge difference and it seems like both parties agree to not have the Wednesday visitation in there

. . . All right, so then I go to the original parenting plan . . . which says that to solve disagreements about this parenting plan the parents will go to mediation. It does not appear that's occurred. I don't know why nobody has brought it up, but that's what the parenting plan contemplates. When I look at the issues, counselor, which both parties agree, visits including maybe not having the Wednesday visits, the parents' inability to communicate effectively on parenting, that gets handled a lot in my court with the parents using a family app. I assume both parties are probably agreeable to that. Then we get to the amount of Facetime the father has with the children, does it happen at a certain time, if it doesn't happen at a certain time, does he get to make it up, all those things could be resolved through mediation.

So frankly, I am not finding adequate cause to modify the parenting plan. Now, I don't know what the—I really don't know what the issue as to relocation is, and that's not in front of me. But what is in front of me I do not find adequate cause to modify the parenting plan. I find that you can resolve these issues in mediation it seems as far as the Wednesday visits, both parties agree. As far as the counseling, both parties agree. So, that's it. I do not find adequate cause to modify the parenting plan as it stands. These children, obviously, Mr. Walden has a desire to be a parent in these

children's lives, they have a right to have their father be a parent in their lives; and we're talking every other weekend and I just don't find adequate cause to modify it at this time.

CP at 475-78.

The court subsequently entered an order on adequate cause:

1. [Lyndsey Hansen] made a *Motion for Adequate Cause Decision*, [Robert Walden] objected to adequate cause being found as to [Ms. Hansen]'s Petition, and the court finds there is reason to approve this order. An adequate cause hearing was held. The Court considered the file, the pleadings submitted by parties, and the argument of counsel.

The Court Finds:

. . . .

4. Adequate Cause

There is not adequate cause (valid reasons) to hold a full hearing or trial about the *Petition*. The *Petition* should be dismissed.

5. Other Findings (if any)

Of the issues raised by [Ms. Hansen] that this Court deemed valid, the parties are encouraged to settle and resolve those issues through mediation.

Oral findings incorporated.

The Court Orders:

6. Decision

No Adequate Cause—The *Petition to Change a Parenting Plan or Custody Order* is dismissed.

7. Other orders (if any)

The parties are encouraged to attend mediation on the issues of counseling, the mid-week visits, and other disagreements the parties may have as to the current parenting plan.

Id. at 406-07.

Despite the court’s suggestion, mediation did not take place. Mr. Walden filed a motion to compel mediation, noting he would like “to mediate his requests to increase his time in the summer months and around the holidays.” *Id.* at 409. Mr. Walden requested that, if Ms. Hansen continued to avoid mediation, he be allowed to file his own modification petition “even absent mediation.” *Id.* at 410. The motion further sought sanctions for Ms. Hansen’s purported intransigence. Mr. Walden noted a hearing on his motion to compel mediation.

After a hearing on July 5, 2022, the superior court granted Mr. Walden’s motion to compel mediation, but denied his request for sanctions.

The court-ordered mediation was unsuccessful. In the meantime, Mr. Walden began exercising his right to midweek overnight visits pursuant to the terms of the original parenting plan.

In December 2022, Mr. Walden filed a petition in the superior court for a minor modification of the parenting plan, and simultaneously filed a proposed plan. Mr. Walden

sought the same changes to the children’s residential schedule as he had proposed in his May 10, 2022, filing. That is, in his December 2022 proposal, he again sought the removal of the Wednesday overnight visits, and to retain the every-other-weekend schedule during the school year, but shift to an equal residential schedule during the summer. He moved for a finding of adequate cause and noted a hearing on his adequate cause motion.

In a simultaneously filed declaration, Mr. Walden cited his move to Hayden as a change in circumstances, explaining, “Given that I now live about an hour away from Lyndsey and the girls, I believe it is in their best interest and more practical for everyone involved to remove the mid-week visit during the school year and instead increase my time with the girls over the summer months.” *Id.* at 496. He cited the provision in the original parenting plan by which the parties agreed to “‘return to mediation to expand the parenting plan as needed,’” and the handwritten note by which the parties contemplated maintaining the existing under school-age residential schedule for their children once they reach school age “‘until further order of the court.’” *Id.* at 497 (quoting *id.* at 17-18). Mr. Walden opined that his proposal was in the children’s best interest because it would allow the children to have “significant blocks of time” with each of their parents when they are out of school for the summer. *Id.* at 498-99.

Ms. Hansen filed a memorandum and sworn declaration in opposition to Mr. Walden's petition. Ms. Hansen claimed "[t]his court has already ruled that [Mr. Walden's] moves to and from southern Idaho were insufficient to establish a substantial change of circumstances [Mr. Walden] cannot now use that as a foundation for his requests." *Id.* at 521. Ms. Hansen argued "the Court has no ability to re-open this plan." *Id.* Ms. Hansen agreed the mid-week visits should be removed from the parenting plan, because it is impractical, but opposed any other changes to the plan.

Apart from objecting to Mr. Walden's petition, Ms. Hansen also moved to change venue to Spokane County. Mr. Walden objection to the venue motion, but the court granted the motion and the matter was transferred to Spokane County Superior Court. The court did not rule on Mr. Walden's modification petition before transferring venue.

Approximately one week after Lincoln County transmitted its case file to Spokane County, Mr. Walden moved for a finding of adequate cause on his petition.

In Spokane County, a superior court commissioner heard argument on Mr. Walden's motion for adequate cause. The commissioner found there was adequate cause to support the petition and scheduled a full hearing. Ms. Hansen moved to revise the commissioner's ruling, arguing Mr. Walden was "judicially estopped" from citing his move to Hayden as a substantial change in circumstances. *Id.* at 575.

A superior court judge granted Ms. Hansen’s motion to revise, thereby denying adequate cause and dismissing Mr. Walden’s petition. The superior court held that Mr. Walden was “judicially estopped from alleging that his move constitutes a substantial change of circumstances for a minor modification.” *Id.* at 614. The court reasoned:

Mr. Walden opposed [Ms. Hansen’s] modification in its entirety arguing that there was no detriment or integration and that the move did not constitute a substantial change. On May 16, 2022, [the Lincoln County court] agreed and denied adequate cause on Ms. [Hansen]’s petition for a major and minor modification. . . .

. . . .

Mr. Walden’s argument in Lincoln County against Ms. [Hansen]’s petition for a major and minor modification was that his move did not constitute a substantial change of circumstance. His declaration describes the efforts he went through to ensure that he was seeing the children every other weekend [when he lived in Hailey]. This position is clearly inconsistent with his current position that his move is a substantial change of circumstance. Mr. Walden’s argument that he did not stipulate to the move as a substantial change of circumstance because it would require him to stipulate to Ms. [Hansen]’s allegations of abandonment and integration are without merit. Mr. Walden could have asked the court to find that his move was a substantial change for a minor modification and asked the court to adopt his proposed parenting plan instead.

Id. at 613-14. The superior court opined that, if it agreed with Mr. Walden, it would create the impression the Lincoln County court was misled and that Ms. Hansen would be unfairly disadvantaged from allowing Mr. Walden to cite his move as a substantial change. The court further held that the parenting plan’s provision by which the parents

agreed to return to mediation to expand the plan did not excuse Mr. Walden from pointing to a substantial change in circumstances.

The superior court also held that, in the alternative, even if Mr. Walden was not judicially estopped from “arguing that his moves . . . constitute[] a substantial change of circumstance,” the moves were “in fact, . . . not . . . a substantial change of circumstance.” *Id.* at 615. The court noted first that Mr. Walden’s move “was known to the parties” prior to the entry of the final parenting plan in July 2017. *Id.* Second, the court reasoned that Mr. Walden could not “in good faith” claim the Wednesday overnight visits were now impractical due to his residence in Hayden when he had “voluntarily abdicated” those visits for years while living in Hailey. *Id.* at 616.

Mr. Walden timely filed a notice of appeal.

ANALYSIS

At issue in this appeal is whether Mr. Walden has established adequate cause for a minor modification to the parties’ parenting plan pursuant to RCW 26.09.260(1) and (5). Our review is of the superior court judge’s decision, not the commissioner’s. *In re Marriage of Lyle*, 199 Wn. App. 629, 633, 398 P.3d 1225 (2017).

Here, the superior court judge determined Mr. Walden had failed to establish adequate cause on two bases: judicial estoppel and lack of factual basis. Each of these

determinations is reviewed for abuse of discretion. *See Miller v. Campbell*, 164 Wn.2d 529, 536, 192 P.3d 552 (2008) (judicial estoppel); *In re Parentage of Jannot*, 149 Wn.2d 123, 125-26, 65 P.3d 664 (2003) (factual basis). While the abuse of discretion standard is deferential, it has its limits. Discretion is abused if the court's decision is rooted in legal error or is exercised on untenable grounds or for untenable reasons. *Ugolini v. Ugolini*, 11 Wn. App. 2d 443, 446, 453 P.3d 1027 (2019).

We discuss the superior court judge's two bases for revision in turn.

Judicial Estoppel

“‘Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.’” *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (quoting *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)). This doctrine seeks to preserve respect for judicial proceedings, and to avoid inconsistency, duplicity, and waste of time. *Id.*

“Three core factors guide a trial court's determination of whether to apply the judicial estoppel doctrine.” *Arkison*, 160 Wn.2d at 538. The first factor asks whether the party's prior position and later position are “*clearly inconsistent*.” *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 864, 281 P.3d 289 (2012) (emphasis added);

see also Arkison, 160 Wn.2d at 538. The second factor weighs in favor of estoppel if the record indicates that either the first or second court “was misled.” *Anfinson*, 174 Wn.2d at 864; *see also Arkison*, 160 Wn.2d at 539. The third factor supports estoppel if the party would “‘derive an unfair advantage’” from being allowed to assert the purportedly inconsistent position. *Arkison*, 160 Wn.2d at 539 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)).²

Here, none of the three core factors support finding judicial estoppel.

First, Mr. Walden has not taken clearly inconsistent positions. Throughout these proceedings, Mr. Walden has consistently maintained that the parenting plan needed to be changed due to his move to Idaho and the impracticality of the Wednesday visits. While Mr. Walden opposed Ms. Hansen’s petition for a major modification in the Lincoln County proceedings, this was because Ms. Hansen sought to reduce his time

² These factors are neither exclusive nor exhaustive. *See Kellar v. Estate of Kellar*, 172 Wn. App. 562, 580, 291 P.3d 906 (2012); *DeAtley v. Barnett*, 127 Wn. App. 478, 483, 112 P.3d 540 (2005); *see also New Hampshire*, 532 U.S. at 750 (“‘[T]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation’”) (quoting *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982)). Additional factors “may” guide a court’s decision, including whether the first-asserted position was successfully maintained; whether a judgment has been rendered adopting the prior position; whether the parties and questions are identical; and whether a misled party has changed position based on the inconsistent arguments. *Kellar*, 172 Wn. App. at 580.

with his daughters and deprive him of decision-making authority. Mr. Walden had made clear during the Lincoln County proceedings that he did not oppose “reopen[ing] the parenting plan.” CP at 594. In fact, he even filed a proposed parenting plan as part of those proceedings. *See id.* at 366-72.

Nor was the Lincoln County court misled about Mr. Walden’s position. That court held there was not adequate cause to hold a full hearing on *Ms. Hansen’s petition*. *Id.* at 406-07. Nevertheless, the court recognized that the current parenting plan was problematic. In recognition that the original plan required mediation to settle the parties’ disputes, the Lincoln County court first encouraged and then required the parties to engage in mediation. It would be anomalous to conclude that the Lincoln County court would have ordered mediation if the court did not think there was any reason to modify the parenting plan.

Finally, there are no countervailing fairness concerns. There is nothing inherently unfair about allowing Mr. Walden to seek the same modifications he had sought all along, a request on which no trial court has yet reached the merits.

Given none of the three core factors support application of judicial estoppel, the Spokane County Superior Court abused its discretion by invoking judicial estoppel as a bar to finding adequate cause. *See Anfinson*, 174 Wn.2d at 865 (holding judicial

estoppel did not apply “[b]ecause two of the three factors disfavor[ed] application”); *see also Arp v. Riley*, 192 Wn. App. 85, 101, 366 P.3d 946 (2015) (reversing where “the record does not establish . . . the pertinent elements of judicial estoppel”).

Factual basis

To establish adequate cause for a full hearing on a parenting plan modification, a petitioning parent has the burden of presenting “‘evidence sufficient to support a finding on each fact that [they] must prove in order to modify.’” *In re Custody of T.L.*, 165 Wn. App. 268, 275, 268 P.3d 963 (2011) (quoting *In re Marriage of Lemke*, 120 Wn. App. 536, 540, 85 P.3d 966 (2004)). In the context of a minor modification petition, this entails showing that there has been a substantial change of circumstances and that modification is in a child’s best interests. RCW 26.09.260(1), (5).

The superior court ruled Mr. Walden failed to present sufficient facts to establish a substantial change of circumstances. While Mr. Walden claimed that his move to Idaho satisfied this criterion, the court noted that this fact was known to the parties at the time the original parenting plan was entered by the Lincoln County court. In addition, the court faulted Mr. Walden for failing to seek modification of the plan at any time during the years he lived in Hailey, Idaho. Because of this, the court reasoned, Mr. Walden’s

argument that the weeknight visits—which he had never exercised—were only now impractical was brought in bad faith.

We disagree with both of the superior court’s reasons for rejecting Mr. Walden’s proof as to a change of circumstances.

The record makes plain that, at the time the parties agreed to terms of the original parenting plan, Mr. Walden lived in Spokane and the expectation was that he was to remain there. Although the Lincoln County court did not enter the parties’ agreed parenting plan until after Mr. Walden moved to Idaho, the court was not alerted to the move at the time it entered its final parenting plan. Thus, Mr. Walden’s move from Spokane to Idaho qualified as a change of circumstances that was “unknown to the court at the time of” the original plan. RCW 26.09.260(1). Given the “paramount concern for the best interests of the child,” it is not the timing of the circumstances that matters, but rather whether the circumstance was previously known to the court. *See In re Marriage of Timmons*, 94 Wn.2d 594, 597-98, 617 P.2d 1032 (1980).


Mr. Walden’s delay in bringing to the attention of the court his relocation from Washington is not fairly attributable to bad faith. For years after Mr. Walden moved to Idaho, *neither* parent petitioned to modify the plan, notwithstanding its obvious impracticality, and notwithstanding that they were not following it. Instead, the parents

found extrajudicial work-arounds. Once Mr. Walden moved to Hayden, Idaho, he was close enough to exercise more robust visitation and began asking for the court's assistance in short order. The timing of Mr. Walden's decision to engage in litigation is not a basis for denying adequate cause, especially given it is uncontested that the current parenting plan is unworkable and contrary to the best interest of the parties' children.

CONCLUSION

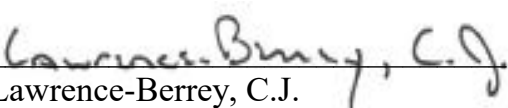
The superior court's order on revision denying adequate cause on Mr. Walden's petition to modify the parenting plan is reversed. This matter is remanded with instructions for the court to hold a full modification hearing. The parties' requests for attorney fees are denied, as is Mr. Walden's request for judicial reassignment.

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.




Pennell, J.

WE CONCUR:



Lawrence-Berrey, C.J.



Fearing, 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>

September 24, 2024

Evan C. Dobbs
Allen Fischer
510 W. Riverside Ave., Ste. 600
Spokane, WA 99201-0515
Evan@allenfischer.com

Julie Christine Watts
The Law Office of Julie C. Watts, PLLC
505 W. Riverside Ave., Ste. 210
Spokane, WA 99201-0518
julie@watts-at-law.com

Christell Ann Casey
The Law Offices of Julie C. Watts, PLLC
505 W. Riverside Ave., Ste. 210
Spokane, WA 99201-0518
christell@watts-at-law.com

CASE # 397491

In the Matter of the Marriage of: Robert J. Walden & Lyndsey M. Walden
SPOKANE COUNTY SUPERIOR COURT No. 2330043032

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 of this decision by the Washington 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 that the moving party contends this court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration that merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of a decision. RAP 12.4(b). Please file the motion electronically through this court's e-filing portal. 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 the decision (should also be filed electronically). RAP 13.4(a). The motion for reconsideration and petition for review must be received by this court on or before the dates each is due. RAP 18.5(c).

Sincerely,

Tristen L. Worthen
Clerk/Administrator

TLW:btb
Attachment

c: **E-mail** Honorable Jacquelyn High-Edward