

NO. A-19-959

IN THE NEBRASKA SUPREME COURT

MEAGHANN SHAW WEAVER,

Plaintiff/Appellee,

v.

JOHN GLEN WEAVER,

Defendant/Appellant.

APPEAL FROM THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

The Honorable James T. Gleason, District Court Judge

BRIEF OF APPELLANT

PETITION FOR FURTHER REVIEW

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STATEMENT OF JURISDICTION

I. BASIS OF JURISDICTION

Pursuant to Neb. Rev. Stat. § 25-1911, this case was subject to review by the Nebraska Court of Appeals since a final order was entered by the District Court of Douglas County, Nebraska on August 9, 2019. (T47-49). The Supreme Court of Nebraska granted further review of the Court of Appeals ruling dated August 12, 2020.

II. DATE OF ENTRY OF ORDER

The Douglas County District Court entered an Order on August 9, 2019. (T47). An Order on the Motion to Alter or Amend was entered on October 18, 2019. (T47-49 and 56). The Nebraska Court of Appeals opinion was entered on August 12, 2020. The Plaintiff/Appellee, Meaghann Shaw Weaver (hereinafter referred to as “Meaghann” or “Appellee”) filed a Petitioner for Further Review on September 16, 2020.

III. DATE OF NOTICE OF APPEAL AND DEPOSIT OF DOCKET FEE

Defendant/Appellant, John Glen Weaver (hereinafter referred to as “Glen” or “Appellant”), filed a Notice of Appeal with the Clerk of the Douglas County District Court on November 6, 2019. Meaghann, filed a Petitioner for Further Review on September 16, 2020.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is an appeal of the decision of the District Court of Douglas County, Nebraska, which, after trial, the Honorable James T. Gleason entered an Order on August 9, 2019 denying the relief sought by Glen, specifically, a modification of custody and parenting time. (T47-49). The Court also entered an order on October 18, 2019, overruling Glen’s Motion to Alter or Amend. (T56).

II. ISSUES TRIED IN THE COURT BELOW

The trial Court ruled on Glen's Complaint to Modify requesting joint legal and physical custody of the minor child. (T25-28, 47-49, and 56).

III. HOW THE ISSUES WERE DECIDED

The trial court found that it would be in the best interests of the minor child for her to spend more time with her father, but found that there was "no sufficient evidence of a material change in circumstance not within the contemplation of the parties which would warrant the modification of the Decree from the District Court of the District of Columbia." (T47). Based on the fact that the court found that there was no material change in circumstances, the court denied the relief sought by Glen. (T47).

IV. SCOPE OF REVIEW

"Child custody and visitation determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion." *Heistand v. Heistand*, 267 Neb. 300, 673 N.W. 2d 541 (2004); *Tremain v. Tremain*, 264 Neb. 328, 646 N.W. 2d 661 (2002); *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W. 2d 611 (2002); and *Wild v. Wild*, 13 Neb. App. 495, 696 N.W. 2d 886 (Neb. App. 2005).

"An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence." *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007). Put another way, a judicial abuse of discretion "exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters

submitted for disposition through a judicial system.” *Lebrato v. Lebrato*, 3 Neb. App. 505, 510-511, 529 N.W. 2d 90 (1995) and *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W. 2d 107 (1994).

“In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.” *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W. 2d 528 (1999).

PROPOSITIONS OF LAW

1. Child custody and visitation determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Heistand v. Heistand*, 267 Neb. 300, 673 N.W. 2d 541 (2004); *Tremain v. Tremain*, 264 Neb. 328, 646 N.W. 2d 661 (2002); *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W. 2d 611 (2002); and *Wild v. Wild*, 13 Neb. App. 495, 696 N.W. 2d 886 (Neb. App. 2005).
2. An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.” *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007).
3. Put another way, a judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Lebrato v. Lebrato*, 3 Neb. App. 505, 510-511, 529 N.W. 2d 90 (1995) and *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W. 2d 107 (1994).
4. In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at

issue. *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W. 2d 528 (1999).

5. A decree is a judgment, and once a decree for dissolution becomes final, its meaning, including the settlement agreement incorporated therein, is determined as a matter of law from the four corners of the decree itself. *Carlson v. Carlson*, 299 Neb. 526, 909 N.W.2d 351 (Neb. 2018).
6. The principles of law regarding the meaning of a judgment are well settled. Ambiguity exists in a document when a word, phrase, or provision therein has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Rice v. Webb*, 287 Neb. 712, 844 N.W.2d 290 (Neb. 2014).
7. If the contents of a dissolution decree are unambiguous, the decree is not subject to interpretation and construction, and the intention of the parties must be determined from the contents of the decree. In such a case, the effect of the decree must be declared in the light of the literal meaning of the language used. *Rice v. Webb*, 287 Neb. 712, 844 N.W.2d 290 (Neb. 2014).
8. Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and will be affirmed absent an abuse of discretion by the trial court. *Jones v. Jones*, 305 Neb. 615, 941 N.W.2d 501 (Neb. 2020).
9. A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Jones v. Jones*, 305 Neb. 615, 941 N.W.2d 501 (Neb. 2020).
10. Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing either that the custodial parent is unfit or that the best

interests of the child require such action. *Jones v. Jones*, 305 Neb. 615, 941 N.W.2d 501 (Neb. 2020).

11. Stipulations voluntarily entered into between the parties to a cause or their attorneys, for the government of their conduct and the control of their rights during the trial or progress of the cause, will be respected and enforced by the courts, where such stipulations are not contrary to good morals or sound public policy. *Theisen v. Theisen*, 708 N.W.2d 847, 14 Neb. App. 441 (Neb. App. 2006), citing *Walters v. Walters*, 12 Neb.App. 340, 673 N.W.2d 585 (2004) and *McGuire v. McGuire*, 11 Neb.App. 433, 652 N.W.2d 293 (2002).
12. A stipulation that includes a clause in the decree that no change in material circumstances has to be proven for a change in visitation does “not contradict the statute controlling child visitation, as the statute looks to the best interests of the child as being paramount in decisions of child visitation and does not require a material change in circumstances.” *Walters v. Walters*, 12 Neb.App. 340, 673 N.W.2d 585 (2004), referencing Neb. Rev. Stat. § 42-364(2).
13. Courts will enforce valid stipulations unless some good cause is shown for declining to do so, especially where the stipulations have been acted upon so that the parties could not be placed in status quo. *Walters v. Walters*, 12 Neb.App. 340, 673 N.W.2d 585 (2004).
14. The Full Faith and Credit Clause of U.S. Const. art. IV, § 1, requires states to give the same effect to a judgment in the forum state that it has in the state where the court rendered the judgment. *Weaver v. Weaver*, 28 Neb. App. 716 (Neb. App. 2020), citing *In re Adoption of Jaelyn B.*, 293 Neb. 917, 883 N.W.2d 22 (2016).
15. Acting under its authority in art. IV, § 1, Congress enacted 28 U.S.C. § 1738A (2012) to ensure states give full faith and credit to other states' custody orders.” *Weaver v. Weaver*, 28

Neb. App. 716 (Neb. App. 2020), citing *Gjertsen v. Haar*, 347 P.3d 1117 (Wyo. 2015).

16. Section 1738A(a) provides: ‘The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State. *Weaver v. Weaver*, 28 Neb. App. 716 (Neb. App. 2020).
17. Likewise, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Neb. Rev. Stat. §§ 43-1226 to 43-1266 (Reissue 2016 & Cum. Supp. 2018), provides that a court of this state shall accord full faith and credit to an order issued by another state and consistent with the UCCJEA which enforces a child custody determination by a court of another state unless the order has been vacated, stayed, or modified by a court having jurisdiction to do so under §§ 43-1238 to 43-1247. See § 43-1260. *Weaver v. Weaver*, 28 Neb. App. 716 (Neb. App. 2020).
18. In addition, a court of this state shall recognize and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with the UCCJEA or the determination was made under factual circumstances meeting the jurisdictional standards of the UCCJEA and the determination has not been modified in accordance with the UCCJEA. § 43-1250(a). *Weaver v. Weaver*, 28 Neb. App. 716 (Neb. App. 2020).
19. The best interest of a child are the primary and paramount considerations in any custody or parenting time decision. See *Jones v. Jones*, 305 Neb. 615, 941 N.W.2d 501 (Neb. 2020), *State on behalf of Kaaden S. v. Jeffery T.*, 303 Neb. 933, 932 N.W.2d 692 (2019), and *Fine v. Fine*, 261 Neb. 836, 626 N.W. 2d 526 (2001).

20. Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing either that the custodial parent is unfit or that the best interests of the child require such action. We have described this showing as a two-step process: First, the party seeking modification must show a material change in circumstances, occurring after the entry of the previous custody order and affecting the best interests of the child. Next, the party seeking modification must prove that changing the child's custody is in the child's best interests. *Jones v. Jones*, 305 Neb. 615, 941 N.W.2d 501 (Neb. 2020).
21. It is a well-established proposition that "[t]he responsibility of the trial court to determine questions of custody and visitation of minor children according to their best interests is an independent responsibility and cannot be controlled by the agreement or stipulation of the parties." *Walters v. Walters*, 12 Neb.App. 340, 673 N.W.2d 585 (2004), citing *Deacon v. Deacon*, 207 Neb. 193, 201, 297 N.W.2d 757, 762 (1980) and *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).
22. Any person who claims a right under the law or a uniform course of practice to an attorney fee must file a motion for allowance of such fee, supported by an affidavit which justifies the amount of the fee sought for services in the appellate court. Neb. Ct. R. App. P. § 2-109(F).
23. Pursuant to § 2–109(F), a motion for attorney fees must be filed within 10 days of either (1) the release of the court's opinion or (2) the entry of the order of the court disposing of the appeal. *State v. Joshua M.*, 21 Neb.App. 71, 838 N.W.2d 1 (Neb. App. 2013).
24. In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014).

25. When an attorney fee is authorized, the amount of the fee is addressed to the trial court's discretion, and its ruling will not be disturbed on appeal absent an abuse of discretion. *Patera v. Patera*, 24 Neb.App. 425, 889 N.W.2d 624 (2017). See also *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215, (1990); *Ritter v. Ritter*, 234 Neb. 203, 209, 450 N.W.2d 204, 209-10 (1990); *Ritchie v. Ritchie*, 226 Neb. 623, 413 N.W.2d 635 (1987); and *Smith v. Smith*, 222 Neb. 752, 386 N.W.2d 873 (1986).
26. When attorney fees are authorized, the trial court exercises its discretion in setting the amount of the fee, which ruling an appellate court will not disturb on appeal unless the court abused its discretion. *Stewart v. Heineman*, 296 Neb. 262, 892 N.W.2d 542, (2017). See also *State v. Rice*, 295 Neb. 241, 888 N.W.2d 159 (2016).
27. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.” *Weaver v. Weaver*, 28 Neb.App. 716, 728 (2020), citing *Applied Underwriters v. S.E.B. Servs. of New York*, 297 Neb. 246, 898 N.W.2d 366 (2017).
28. An award of attorney fees under Rule 2-109(F), which, when allowed, is typically granted to a prevailing party and against an adverse party.” *Gerber v. P & L Finance Co., Inc.*, 301 Neb. 463, 919 N.W.2d 116, (2018).

STATEMENT OF FACTS

Glen hereby incorporates and reasserts his Statement of Facts as set forth in Appellant’s brief drafted by John A. Kinney. Glen further incorporates the statement of facts as set forth in the Background section of the Opinion of the Nebraska Court of Appeals for *Weaver v. Weaver*, dated August 12, 2020. *Weaver v. Weaver*, 28 Neb.App. 716, 728 (2020).

SUMMARY OF THE ARGUMENT

The trial court erred in finding that Glen was required to show a material change in circumstances to modify custody or visitation. The Court of Appeals was correct in finding that the trial court abused its discretion with such a ruling. Based on the trial court's abuse of discretion, the Court of Appeals properly reversed the trial court's decision and remanded the case back for the district court to reconsider the relief sought by Glen.

As the Court of Appeals found, a material change in circumstances was not required to be shown given the parties' agreement that custody could be modified based on the interests of the child. The Court of Appeals considered all of the evidence presented at trial and the totality of the circumstances. Finally, the Court of Appeals did not err in awarding Glen attorney's fees as the prevailing party on appeal.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR IN FINDING THAT A MODIFICATION COULD BE GRANTED BASED SOLELY ON THE NEEDS OR INTERESTS OF THE CHILD WITHOUT A MATERIAL CHANGE IN CIRCUMSTANCES OR FAIL TO GIVE LITERAL MEANING TO THE ENTIRETY OF THE PARTIES' PARENTING PLAN.

The Findings of Fact, Conclusions of Law, and Judgment of Absolute Divorce entered by the Superior Court of the District of Columbia on May 17, 2016 incorporated the Separation and Property Settlement Agreement of the parties dated March 31, 2016. Paragraph 4.2 of the Stipulation and Property Settlement Agreement entered into by Glen Weaver and Meaghann provides that “[u]pon a material and significant change in circumstances of either party, or in the needs or interest of Bravery, either party may request a modification to the physical custody of

Bravery.” (T8, emphasis added). Given the parties agreement that custody could be modified based solely on the best interest of Bravery, the Court of Appeals did not err in finding that a material change of circumstances did not need to be proven.

“A decree is a judgment, and once a decree for dissolution becomes final, its meaning, including the settlement agreement incorporated therein, is determined as a matter of law from the four corners of the decree itself.” *Carlson v. Carlson*, 299 Neb. 526, 909 N.W.2d 351 (Neb. 2018). “The principles of law regarding the meaning of a judgment are well settled. Ambiguity exists in a document when a word, phrase, or provision therein has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.” *Rice v. Webb*, 287 Neb. 712, 844 N.W.2d 290 (Neb. 2014). “If the contents of a dissolution decree are unambiguous, the decree is not subject to interpretation and construction, and the intention of the parties must be determined from the contents of the decree.” *Id.* “In such a case, the effect of the decree must be declared in the light of the literal meaning of the language used.” *Id.*

“Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and will be affirmed absent an abuse of discretion by the trial court.” *Jones v. Jones*, 305 Neb. 615, 941 N.W.2d 501 (Neb. 2020). “A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.” *Id.*

“Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing either that the custodial parent is unfit or that the best interests of the child require such action.” *Id.* However, “[s]tipulations voluntarily entered into between the parties to a cause or their attorneys, for the government of their conduct and the

control of their rights during the trial or progress of the cause, will be respected and enforced by the courts, where such stipulations are not contrary to good morals or sound public policy.” *Theisen v. Theisen*, 708 N.W.2d 847, 14 Neb. App. 441 (Neb. App. 2006), citing *Walters v. Walters*, 12 Neb.App. 340, 673 N.W.2d 585 (2004) and *McGuire v. McGuire*, 11 Neb.App. 433, 652 N.W.2d 293 (2002). “Courts will enforce valid stipulations unless some good cause is shown for declining to do so, especially where the stipulations have been acted upon so that the parties could not be placed in status quo. *Walters v. Walters, supra*. “To incorporate this provision in the decree and then ignore it cannot be justified. The trial court erred and abused its discretion in denying modification based on a finding that there was no material change in circumstances.” *Id.* “[G]iven the stipulation and its prior order, the trial court should have looked to the best interests of the children to determine whether an increase or change in the decree's visitation provisions was warranted. *Id.*

Since the parties agreed that custody could be modified based on the interests of Bravery, and a substantial or material change in circumstances was not required to be proven, the Court of Appeals did not err in finding the same. In *Walters*, the Nebraska Court of Appeals found that a stipulation that included a clause in the decree that no change in material circumstances had to be proved for a change in visitation did “not contradict the statute controlling child visitation, as the statute looks to the best interests of the child as being paramount in decisions of child visitation and does not require a material change in circumstances.” *Walters v. Walters, supra*, referencing Neb. Rev. Stat. § 42-364(2). Therefore, the Court found that the stipulation was “not against good morals or public policy and should have been followed by the trial court. *Id.*

Nebraska is not the only state to recognize that custody can be modified without a showing of a material change in circumstances if the parties agree otherwise. The Supreme Court

of Wyoming held that “[t]he California order contains a unique provision allowing modification of visitation upon a showing that it is in the child's best interest, without requiring the petitioner to show a material change of circumstances.” *Gjertsen v. Haar*, 2015 WY 56, 347 P.3d 1117 (Wyo. 2015). While Wyoming law typically requires a material change of circumstances to modify a custody, the Supreme Court of Wyoming found that the California order had to be enforced pursuant to its terms due to the full faith and credit clause. See also *In re Marriage of Schlenker*, 300 N.W.2d 164, 165-66 (Iowa 1981); *In re Marriage of Vandergaast*, 573 N.W.2d 601 (Iowa App. 1997); *Hulm v. Hulm*, 484 N.W.2d 303 (S.D. 1992); *Williams v. Williams*, 425 N.W.2d 390, 393 (S.D.1988).

Just as the Supreme Court of Wyoming gave full faith and credit to the order entered in California, outside the jurisdiction of Wyoming, so should this Court in this case with regards to the order entered in the District of Columbia. “The Full Faith and Credit Clause of U.S. Const. art. IV, § 1, requires states to give the same effect to a judgment in the forum state that it has in the state where the court rendered the judgment.” *Weaver v. Weaver*, 28 Neb. App. 716 (Neb. App. 2020), citing *In re Adoption of Jaelyn B.*, 293 Neb. 917, 883 N.W.2d 22 (2016).

“Acting under its authority in art. IV, § 1, Congress enacted 28 U.S.C. § 1738A (2012) to ensure states give full faith and credit to other states' custody orders.” *Id.*, citing *Gjertsen v. Haar*, 347 P.3d 1117 (Wyo. 2015). “Section 1738A(a) provides: ‘The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.’ (Emphasis supplied.)” *Weaver v. Weaver*, *supra*.

“Likewise, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Neb. Rev. Stat. §§ 43-1226 to 43-1266 (Reissue 2016 & Cum. Supp. 2018), provides that a court of this state shall accord full faith and credit to an order issued by another state and consistent with the UCCJEA which enforces a child custody determination by a court of another state unless the order has been vacated, stayed, or modified by a court having jurisdiction to do so under §§ 43-1238 to 43-1247. See § 43-1260.” *Id.* “In addition, a court of this state shall recognize and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with the UCCJEA or the determination was made under factual circumstances meeting the jurisdictional standards of the UCCJEA and the determination has not been modified in accordance with the UCCJEA. § 43-1250(a).” *Id.* “There is no dispute that the trial court in Washington, D.C., properly exercised jurisdiction in conformity with the UCCJEA at the time the decree was entered or that Nebraska now qualifies as the child's home state under the UCCJEA. See §§ 43-1227 and 43-1238.” *Id.* “Therefore, the decree and agreement must be enforced according to their terms.” *Id.*

Just as the Supreme Court of Wyoming recognized, “the Supremacy Clause, U.S. Const. art. I, cl. 2, federal law preempts state law in proper cases. Here, federal law requires we give full faith and credit to the California order as long as it is in effect.” *Gjertsen v. Haar, supra*. Not only has the Nebraska Court of Appeals authorized parents to enter into a stipulation modifying custody or parenting time without the need to show a material change in circumstances, but Nebraska is required to do so under the full faith and credit clause when a judgment is entered in another jurisdiction. See also Neb. Rev. Stat. §§43-1250 and 43-1260.

Meaghann would have the Court insert words into paragraph 4.2 of the parties’ agreement in order for “literal meaning” to be “given to the sentence”. (Brief of Appellee,

Petition for Further Review, 6). Meaghann contends that just a showing of a material and significant change in circumstances could constitute a modification even if the modification were not in the child's best interests. Such a reading of the parties' stipulation is clearly violative of long-standing Nebraska case law that holds that the best interest of a child are the primary and paramount considerations in any custody or parenting time decision. See *Jones v. Jones*, 305 Neb. 615, 941 N.W.2d 501 (Neb. 2020), *State on behalf of Kaaden S. v. Jeffery T.*, 303 Neb. 933, 932 N.W.2d 692 (2019), and *Fine v. Fine*, 261 Neb. 836, 626 N.W. 2d 526 (2001). Furthermore, this Court has held a modification is a two-step process. "Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing either that the custodial parent is unfit or that the best interests of the child require such action." *Jones v. Jones*, 305 Neb. 615, 941 N.W.2d 501 (Neb. 2020). "We have described this showing as a two-step process: First, the party seeking modification must show a material change in circumstances, occurring after the entry of the previous custody order and affecting the best interests of the child. *Id.* "Next, the party seeking modification must prove that changing the child's custody is in the child's best interests." *Id.* Clearly it will always be necessary to show that a modification of custody or parenting time is in a child's best interests even if a substantial or material change in circumstances has been proven.

Meaghann argues that the Court of Appeals did not read the settlement agreement correctly as the Court of Appeals added the word "best" in front of "interests of the child" in paragraph 4.2 of the parties' agreement. The fact that the word "best" does not appear in front of "interests of the child" is of no significance. Meaghann is merely grasping at straws in an attempt to avoid a change of custody or visitation time based on Bravery's interest, which she previously agreed to do. The trial court specifically found that it would be in Bravery's "best interests" to

have more parenting time with her father. (T47). The trial court used the language “best interests”. The Court of Appeals did not read anything into the agreement. The Court of Appeals merely reiterated what the trial court had already found.

Meaghann also argues that the Court of Appeals ignore the literal meaning of the paragraph 4.4 of the agreement that state that, upon a request for modification, the parties “shall apply the then-governing legal standard to such a request for modification of custody.” (Brief of Appellee, Petition for Further Review, 7). Meaghann argues that this statement “affirmatively recognizes that any Court adjudicating a modification is going to apply its own governing legal standards.” *Id.* Meaghann goes on to argue that the District Court correctly applied Nebraska precedent in denying to modify custody or visitation “as there was no material and significant change in circumstances.” *Id.* Meaghann completely ignores the Nebraska precedent set forth in *Walters*, which specifically allows for a modification without a change in circumstances if the parties agreed to such a clause in their stipulation. *Walters v. Walters, supra.*

Therefore, all the District Court had to find was that it was in Bravery’s best interests that custody or visitation be modified. The District Court found just that. “In the Court’s opinion it would be in the best interest of the minor child if she were to have more visitation time with her father.” (T47). Based on such a finding, the District Court should have modified custody and/or parenting time between Bravery and Glen.

II. THE COURT OF APPEALS DID NOT ERR IN FINDING THAT APPELLANT WAS NOT REQUIRED TO PROVE A MATERIAL CHANGE IN CIRCUMSTANCES.

Meaghann argues that “*Walters* is an anomaly and is inconsistent with Nebraska precedent.” (Brief of Appellee, Petition for Further Review, 7). This is simply not true.

“Stipulations voluntarily entered into between the parties to a cause or their attorneys, for the government of their conduct and the control of their rights during the trial or progress of the cause, will be respected and enforced by the courts, where such stipulations are not contrary to good morals or sound public policy.” *Theisen v. Theisen, supra*, citing *Walters v. Walters, supra*, and *McGuire v. McGuire, supra*. The decision in *Walters* does not violate Nebraska law.

Meaghann even admits this in her brief when trying to argue to the contrary.

Meaghann argues that there was a reason for a stipulation that a modification could be made without a showing of a material change in circumstances in *Walters*, namely, the mother’s mental health. This is not a valid argument. Either the agreement of the parties to allow for a modification of custody absent a showing of a material change of circumstances violates Nebraska law or it doesn’t. The reason for the stipulation is not important. While Meaghann initially argues that *Walters* “is inconsistent with Nebraska precedent”, she later argues that it was clear in *Walters* that the “stipulations were intentional and meant to address the mother’s mental health.” (Brief of Appellee, Petition for Further Review, 8). So Meaghann agrees that such stipulations can be made and upheld under Nebraska law.

Meaghann attempts to distinguish *Walters* from this case by arguing that “the Walters’ stipulations were intentional and meant to address the mother’s mental health. In the Weaver decree, there is no such clear intent to modify legal standards as to modifications.” (Brief of Appellee, Petition for Further Review, 8). This is inaccurate; the very fact that the parties put a clause into their agreement which allows for modification of custody based solely on the best interests of the child is a showing of intent in and of itself. Furthermore, whatever the reason or intent may be for such a stipulation is irrelevant. What is important is that agreements such as this comply with Nebraska law.

In Meaghann's Petitioner for Further Review she further states that there was no discussion regarding the "delegation of judicial authority to the counselors by allowing them to determine parenting time." Meaghann corrects this argument in her brief on her Petition for Further Review. As the court noted in *Walters*, a provision allowing a counselor to determine the visitation of a parent is not valid under Nebraska law. "It is a well-established proposition that "[t]he responsibility of the trial court to determine questions of custody and visitation of minor children according to their best interests is an independent responsibility and cannot be controlled by the agreement or stipulation of the parties." *Walters v. Walters, supra*, citing *Deacon v. Deacon*, 207 Neb. 193, 201, 297 N.W.2d 757, 762 (1980) and *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002). Therefore, the court in *Walters* specifically vacated the portion of the order providing for custody to be determined by counselors. *Walters v. Walters, supra*.

The fact that parents cannot supersede the court's responsibility to determine custody and visitation does not mean that parties cannot agree to allow for modification of custody and visitation without a showing of a material change in circumstance and look solely to the best interests of the child. There is no inconsistency in holding that parents cannot delegate decisions of custody and visitation to third parties while also holding that parents can agree to allow for a modification based solely on a child's best interests. It will still be for the trial court to determine the exact custody and visitation arrangement in a modification proceeding where the parties have entered into such an agreement. Agreeing that modification can be based on best interests alone is not delegating the decisions of custody and visitation to a third party. The two are separate and distinct.

Meaghann argues that *Walters* ignored the well-established precedent that it is for the trial court to determine custody and visitation of a minor child in accordance with the child's best interests and that such a responsibility "cannot be controlled by the agreement or stipulation of the parties or by third parties" As noted above, *Walters* addressed this issue. Requiring only a showing of best interests of a child to warrant a modification does not take away a court's authority and requirement to determine custody and visitation of a child. It is still for the court to decide what custody and visitation arrangement is best for a child whether a material change in circumstances also has to be proven or not. In a situation as this where the parties agree that modification can be made solely by a showing of the child's best interest, the trial court still has to find that it is in the child's best interest to make such a modification and to determine what the custody and visitation arrangement will be.

Finally, Meaghann argues that the Court of Appeals reliance on *Gjertsen v. Haar, supra*, and the full faith and credit clause was misguided in that it does not require a state to use "the original state's legal standards governing modifications". (Brief of Appellee, Petition for Further Review, 9). Specifically, Nebraska law would have to be applied to modify Glen and Meaghann's agreement. And "Nebraska law does not allow parental stipulations pertaining to the custody of a minor child to be controlling on the trial court." (Brief of Appellee, Petition for Further Review, 10). While it's true that stipulations regarding custody and visitation "cannot be controlled by the agreement or stipulation of the parties", and it is the "responsibility of the trial court to determine questions of custody and visitation of minor children according to their best interests", that simply means that a trial court is not required to approve parties' stipulation regarding what custody and visitation should look like. *Walters v. Walters, supra*. It does not mean that parties cannot stipulate that only a showing of the best interest of the child need be

made to modify custody or parenting time. The *Walters* court addressed both of these arguments within the same case. So, it's absurd to say that Nebraska law does not allow for a modification without a showing of a material change in circumstances.

Finally, Meaghann argues that if parties are allowed to agree to a modification of custody and parenting time without a change in circumstances, “a games playing parent could negotiate favorable property settlement and alimony terms and then immediately seek to modify custody, parenting time and child support.” (Brief of Appellee, Petition for Further Review, 10). This proposition by Meaghann is without merit for two reasons. First, at present, a parent could negotiate a favorable property settlement and alimony terms and then immediately seek to modify custody, parenting time and child support. The ruling in *Walters* does not change that scenario. Second, even on a best interest of the child standard, the reality is that no court will find that it is in the best interest of a child to change custody immediately after the entry of a Decree without some change in circumstance. For example, the parents stipulate to 50/50 joint custody on January 1. One parent files for modification of custody on March 1. Under only a best interest of the child standard, there would be no basis to modify the parenting plan without some evidence of a change in circumstances, which effects the best interest of the child.

The entire argument by Meaghann misses the point of the discussion by the Nebraska Court of Appeals. The Nebraska Court of Appeals is not mandating that the parties can by stipulation change Nebraska law on a determination of custody. Rather, the instant case is about whether Nebraska will honor a stipulation from another state on modification of child custody. “Stipulations voluntarily entered into between the parties to a cause or their attorneys, for the government of their conduct and the control of their rights during the trial or progress of the cause, will be respected and enforced by the courts, *where such stipulations are not contrary to*

good morals or sound public policy.” *McGuire v. McGuire, supra*. [Emphasis added.] Therefore, stipulations entered in another state will be honored in Nebraska if the *stipulation is not contrary to good morals or sound public policy*. In discussing whether the stipulation by Weavers violated “sound public policy,” the Court of Appeals reviewed cases in Nebraska whereby a stipulation on child custody was addressed and found that a stipulation will be upheld if it does not contradict Neb. Rev. Stat. 42-364(2) which looks to the *best interests* of the child as being paramount in decisions of child custody. *Weaver v. Weaver, supra*, citing to *Walters v. Walters, supra*. Thus, Meaghann’s argument that the decision by the Court of Appeals forever changes Nebraska law on child custody is misleading.

III. THE COURT OF APPEALS DID NOT FAIL TO CONSIDER THE TOTALITY OF THE EVIDENCE AT TRIAL.

As noted by Meaghann, the trial court specifically found that it would be in Bravery’s best interest that Glen be granted more parenting time. (T47). Meaghann is right that the trial court did not specifically indicate that joint custody would be in Bravery’s best interest. Although, the trial court did not specifically say that joint custody would not be in Bravery’s best interest either. (T47). While Glen petitioned the court to award the parties joint legal and physical custody, that does not mean that the trial court is required to award joint custody. (T27).

The Nebraska Court of Appeals reversed “the trial court’s order and remand[ed] the cause with directions consistent with” the opinion of the Court of Appeals. *Weaver v. Weaver, supra*. The Court of Appeals specifically held that “[b]ecause the district court found that it would be in the child's best interests to have more time with Glen, we reverse, and remand for the district court to reconsider the relief sought by Glen in accordance with the best interests of

the child.” *Id.* This does not necessarily mean that the District Court of Douglas County has to award Glen joint custody as he prayed for.

All of Meaghann’s concerns set forth in her brief, such as parenting time and limited contribution to work related daycare, can still be considered by the trial court upon remand when deciding what custody and visitation is in Bravery’s best interests. While Glen will continue to request that joint custody be awarded, just because this case is remanded with further directions to provide more parenting time for Glen, as the trial court found would be in Bravery’s best interests, does not automatically mean that Glen would be awarded joint custody. It is for the trial court to decide what custody and visitation should look like.

Because it is for the trial court to determine the actual custody and parenting time to be awarded to the parties, the Court of Appeals did not need to further discuss the evidence presented at trial. Even after hearing all of the evidence presented, including the concerns raised by Meaghann in her brief, the trial court still found that increased parenting time with Glen would be in Bravery’s best interest. Therefore, the Court of Appeals did not fail to consider the totality of the evidence presented at trial, as the trial court heard this evidence and still found additional parenting time would be in Bravery’s best interest. The Court of Appeals did not require the trial court to grant the parties joint custody upon remand, as alluded to by Meaghann.

IV. THE COURT OF APPEALS DID NOT ERR IN AWARDING APPELLANT ATTORNEY FEES ON APPEAL.

Meaghann alleges that the Court of Appeals erred in awarding attorney fees to Glen. Meaghann argues that the District Court correctly found that there was no material change in circumstances. Apparently, Meaghann believes that attorney’s fees were not appropriate on

appeal based on the District Court's findings, which were overturned on appeal. Meaghann cites no law or rule to support her position that the award of attorney fees was improper.

Neb. Ct. R. App. P. § 2-109(F) provides that any person who claims a right under the law or a uniform course of practice to an attorney fee must file a motion for allowance of such fee, supported by an affidavit which justifies the amount of the fee sought for services in the appellate court. "Pursuant to § 2-109(F), a motion for attorney fees must be filed within 10 days of either (1) the release of the court's opinion or (2) the entry of the order of the court disposing of the appeal." *State v. Joshua M.*, 21 Neb.App. 71, 838 N.W.2d 1 (Neb. App. 2013). The opinion of the Court of Appeals was entered on August 12, 2020. Glen filed his Motion for fees August 21, 2020. Glen complied with all of the necessary requirements for the Court of Appeals to award him fees. Which they did, as the Motion for fees was granted, at a reduced rate, on September 14, 2020.

Attorney's fees in this matter were a right under the law. This matter originated as a divorce in Washington D.C. and was later registered in Nebraska. Neb. Rev. Stat. § 42-351 provides that attorney's fees can be awarded in divorce proceedings. "In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion." *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014). "When an attorney fee is authorized, the amount of the fee is addressed to the trial court's discretion, and its ruling will not be disturbed on appeal absent an abuse of discretion." *Patera v. Patera*, 24 Neb.App. 425, 889 N.W.2d 624 (2017). See also *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215, (1990); *Ritter v. Ritter*, 234 Neb. 203, 209, 450 N.W.2d 204, 209-10 (1990); *Ritchie v. Ritchie*, 226 Neb. 623, 413 N.W.2d 635 (1987); and *Smith v. Smith*, 222 Neb. 752, 386 N.W.2d 873 (1986). "When

attorney fees are authorized, the trial court exercises its discretion in setting the amount of the fee, which ruling an appellate court will not disturb on appeal unless the court abused its discretion.” *Stewart v. Heineman*, 296 Neb. 262, 892 N.W.2d 542, (2017). See also *State v. Rice*, 295 Neb. 241, 888 N.W.2d 159 (2016).

Meaghann further argues that the Court of Appeals declined to address all of Glen’s arguments and those arguments are without merit. Despite this, the Court of Appeals awarded attorney fees “for the drafting and assertion of meritless positions.” The Court of Appeals never stated that the other assigned errors were meritless, rather, that the other assigned errors need not be address. “Given the outcome of this assignment of error, we need not address Glen’s remaining assigned errors.” *Weaver v. Weaver, supra*. “An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.” *Id.* citing *Applied Underwriters v. S.E.B. Servs. of New York*, 297 Neb. 246, 898 N.W.2d 366 (2017).

Finally, Meaghann argues that the Motion for Attorney Fees did not provide a basis for an award of fees. And the Court of Appeals did not cite a reason for its award of fees. However, the Motion clearly stated that the request for fees was being made “pursuant to Rule 9F of the Nebraska Supreme Court and Court of Appeals Procedural Rules”. Neb. Ct. R. App. P. § 2-109(F) doesn’t require any other basis for fees to be alleged in a motion for attorney’s fees. Furthermore, “...an award of attorney fees under Rule 2-109(F), which, when allowed, is typically granted to a prevailing party and against an adverse party.” *Gerber v. P & L Finance Co., Inc.*, 301 Neb. 463, 919 N.W.2d 116, (2018). Glen was the prevailing party at the Court of Appeals level and thus the award of fees was proper and justified.

Certificate of Service

I hereby certify that on Wednesday, December 02, 2020 I provided a true and correct copy of this *Brief of Appellant John* to the following:

Meaghann S Weaver represented by Virginia A Albers (20336) service method: Electronic Service to **valbers@saalawyers.com**

Signature: /s/ Flynn, Stephanie Nicole (24565)