

FILED

OCT 09 2007

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 35397-4-III

COURT OF APPEALS, DIVISION III OF THE STATE OF
WASHINGTON

In Re the Marriage of:

HEIDI REGINA ENGSTROM, Appellant,

and

JSEPH LOGAN ENGSTROM, Respondent.

APPELLANT'S BRIEF

R. Bryan Geissler
Attorney for Appellant
N. 205 University Ste. #3
Spokane, WA 99206
(509) 928-0926
WSBA#12027

TABLE OF CONTENTS

	<u>Page</u>
A. Table of Authorities	3
B. Assignment of Error	4
C. Issues Pertaining to Assignments of Error	5
D. Statement of the Case	6
E. Argument	9
F. Conclusion	14

TABLE OF AUTHORITIES

<u>Table of Cases</u>	<u>Page</u>
<i>Davis v. Globe Machine Mfg. Co., Inc.</i> , 102 Wash.2d 68, 77, 684 P.2d 692 (1984)	10
<i>In re Marriage of Fraser</i> , 33 Wn.App. 445, 451, 655 P.2d 718, 721 (1982)	11-12
<i>In re Parentage of Jannot</i> , 149 Wn.2d 123, 128, 65 P.3d 664, 667 (2003), <i>as amended</i> (Apr. 30, 2003)	10
<i>McDaniel v McDaniel</i> , 14 Wn.App. 194, 599 P.2d 699 (1982)	12
<i>In the Matter of the Marriage of Roorda</i> , 25 Wn.App. 849, 852, 611 P.2d 794 (1980), <i>overruled on other grounds</i> , <i>In re Parentage of Jannot</i> , 149 Wn.2d 123, 126-27, 65 P.3d 664 (2003)	9-10
<i>Salas v. Hi-Tech Erectors</i> , 168 Wn.2d 664, 669, 230 P.3d 583, 585 (2010)	10
<i>In re Marriage of Zigler & Sidwell</i> , 154 Wn.App. 803, 813-814, 226 P.3d 202 (2010)	13
 <u>STATUTES</u>	
RCW 26.09.260	8
RCW 26.09.270	9

I. Assignment of Error

1. The trial court, in revising Commissioner Nichole Swennumson's April 12, 2017 order, erred in denying Petitioner's motion for adequate cause.

Issue Pertaining to Assignment of Error

1. Where the father is criminally charged with a driving related felony causing serious injury to another resulting from his admitted use of prescription medication and does not disclose to the court the underlying reason for the medication use, nor the steps he has taken to address the charged conduct, nor does he deny the mother's observations regarding his physical condition while using the medication, and acknowledges that he missed a scheduled visit because he was shaken up as a result of the accident, did the trial court err in requiring that the father's conduct be ongoing and directly cause a present detriment to the children in order to meet the threshold requirement of adequate cause ? (Assignment of Error 1.)

II. STATEMENT OF THE CASE

The parties stipulated to a parenting plan on April 7, 2015. CP 9. Though differing reasons are offered for it, both parties acknowledge that the visitation provisions of the parenting plan were not strictly followed. CP 30 and CP 87. On September 27, 2016, Mr. Engstrom was charged by Spokane County with the felony crime of vehicular assault. CP 83. This charge stemmed from a July 12, 2016 incident where Mr. Engstrom was driving under the influence of Ambien, a prescription sleep medication, and crossed over the center line causing a collision with another vehicle seriously injuring the other driver, a man named Michael Myers, CP 81, whom Mr. Engstrom is now restrained from contacting. CP 70. Mr. Engstrom does not deny that he was taking Ambien at the time of the accident, and references that the drug has an “associated” side effect of causing its users to have “Ambien black-outs.” CP 88.

When she reached out to him about his exercising further visits with the children in the late summer of 2016, Mr. Engstrom vaguely told Petitioner that he had been involved in a “fender bender,” CP 93, and did not feel up to seeing the children and was feeling “shook up” and “out of it.” CP 93. Mr. Engstrom admits that “[i]t is true that I did forego another summer visit with the kids

in 2016 after the incident in July of 2016, I was pretty shook up by the incident itself.” CP 88. Petitioner only learned the full nature and extent of this incident through a request for the police report. CP 93. On September 27, 2016, knowing what had truly happened, she moved for a finding of adequate cause to modify the existing parenting plan. CP 39-40.

In support of her motion for a finding of adequate cause, Petitioner offered the following evidence based on her observations:

Whenever I talk to Mr. Engstrom, his speech is lethargic and slurred. I have noticed that he often has no recollection whatsoever of our recent conversations. He has told me that his sleep pattern has become inconsistent and he wakes up at all hours of the night.

I believe that Mr. Engstrom is abusing drugs, prescription or otherwise, and his dependency on drugs is affecting his judgment and ability to provide for his own safety, much less the safety of our children.

CP 47 (¶¶ 7 & 8). Mr. Engstrom never filed a declaration denying either of these assertions.

Commissioner Nichole Swennumson heard the motion for adequate cause on April 12, 2017. RP 129-146. In granting the motion, the Commissioner likened the case to one where the other parent had been charged with driving under the influence, RP 142, and stated that:

Kids aren't present, but there could still be an underlying concern, and mom isn't wrong to be concerned when somebody is driving under the influence and I'm cognizant

that Mr. Engstrom's argument about how it occurred and he can't say much anyway because there is a criminal matter pending. But I do think adequate cause has been met. Mom has a right to be concerned and **we don't have to wait for harm to occur to the children. The potential of harm is enough.** And so today I'm going to find adequate cause. I think that has been met.

RP 142 (emphasis added).

The Commissioner's order reflected her ruling that the finding of adequate cause was based "solely on the pending criminal charge." CP 108. Mr. Engstrom moved to revise this order. CP 111-112.

Judge Harold Clarke heard the motion to revise on May 11, 2017. CP 148. In overturning the Commissioner's decision on adequate cause, Judge Clarke found that Mr. Engstrom's pending criminal charge for vehicular assault was insufficient to establish even a *prima facie* finding of detriment to the children under the modification statute since there was no "nexus" or causal connection between the criminally charged activity and a showing of ongoing present detriment to the children. CP 147. In effect, Judge Clarke disagreed with Commissioner Swennumson's assessment that the "potential of harm is enough" to establish adequate cause. This appeal followed. CP 161.

III. ARGUMENT

Standard of Review

RCW 26.09.260 governs modification of a parenting plan.

It provides:

(1) ... {T}he court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child.

(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:

....(c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

RCW 26.09.260.

The court will, however, allow a full hearing on a petition or motion to modify a parenting plan only if the petitioner overcomes the threshold requirements of RCW 26.09.270, which provides:

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

RCW 26.09.270.

‘Adequate cause’ is defined as ‘something more than prima facie allegations which, if proven, might permit inferences sufficient to establish grounds for a custody change.’ *In the Matter of the Marriage of Roorda*, 25 Wn.App. 849, 852, 611 P.2d 794 (1980), *overruled on other grounds*, *In re Parentage of Jannot*, 149 Wn.2d 123, 126–27, 65 P.3d 664 (2003).

A trial court’s denial of adequate cause is reviewed for abuse of discretion. *In re Parentage of Jannot*, 149 Wn.2d 123, 128, 65 P.3d 664, 667 (2003), *as amended* (Apr. 30, 2003). Discretion is abused when the trial court’s decision is based on untenable grounds or reasons. *Davis v. Globe Machine Mfg. Co., Inc.*, 102 Wash.2d 68, 77, 684 P.2d 692 (1984). A decision is based on untenable grounds or for untenable reasons if the trial court, as here, applies the wrong legal standard or relies on unsupported facts. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583, 585 (2010).

The present case involves the limited issue of whether a pending felony criminal vehicular assault charge against a parent constitutes sufficient *prima facie* evidence of a detrimental environment to warrant a hearing on whether the parenting plan should be modified. Commissioner Swennumson, applying the correct legal standard, found that it did. Judge Clarke reluctantly

overturned her decision, but his reasoning for doing so was, respectfully, an abuse of discretion.

The trial court, contrary to established case law, untenably required the mother to establish that the father's admitted criminally charged conduct directly resulted in a present detriment to the children

In ultimately denying adequate cause, Judge Clarke determined that Petitioner had shown no “nexus” between the criminally charged conduct and a present ongoing detriment to the children resulting from that conduct, primarily based on the statement from Mr. Engstrom that he was no longer taking the medication, ignoring the fact that there was no evidence of this other than Mr. Engstrom’s statement and no other evidence offered as to why he was taking the medication in the first place or why, if it had been prescribed, he had stopped taking it. This was an abuse of discretion resulting from application of an incorrect legal standard. There is no requirement that the court find that a party’s living situation or environment is actually causing ongoing detriment or harm to the child, i.e., the environment can be examined by the court with the child’s best interests standard in mind and a court can find adequate cause without waiting for the child to be harmed. As Commissioner Swennumson aptly expressed- “the potential of harm is enough.” RP 142.

This rule is set forth in *In re Marriage of Fraser*, 33 Wn.App. 445, 451, 655 P.2d 718, 721 (1982), as follows:

An environment may be detrimental even though its deleterious effects have not yet appeared. There is nothing in the language of the statute relied upon or the cases interpreting the statute which compels a court to wait until damage has actually occurred and is demonstrable before taking corrective action in child custody cases.

In re Marriage of Fraser, 33 Wn.App. 445, 451, 655 P.2d 718, 721 (1982).

In *McDaniel v McDaniel*, 14 Wn.App. 194, 599 P.2d 699 (1982), the court rejected the requirement that there must be a showing of the detrimental effect of a parent's conduct upon the minor child. In *McDaniel*, the court stated:

Second, petitioner contends that the evidence is insufficient to show that the children's present environment is "detrimental to ... [their] physical, mental, or emotional health" as required by RCW 26.09.260(1)(c). We disagree. The unchallenged findings reveal that the children's diet, school attendance and dental care were irregular and that they were exposed to marijuana smoking and the presence of a man living with the petitioner. These findings amply support the conclusion that the environment provided by the petitioner is detrimental to the children.

McDaniel, 14 Wn.App. at 197-198.

Thus, although evidence of irregular diet, dental care and school attendance and exposure to marijuana smoking did not directly demonstrate present damage to the child and the trial court specifically stated that the mother's behavior did not lead to the conclusion that the children were unsafe in her home, the court in *McDaniel* still upheld a finding of adequate cause to have a

hearing on a modification of custody. *Fraser*, 33 Wn.App. at 451, 655 P.2d at 722 (citing *McDaniel*, 14 Wn.App. 197-198).

Similarly, in the case of *In re Marriage of Zigler & Sidwell*, 154 Wn.App. 803, 813-814, 226 P.3d 202 (2010), the court upheld a trial court's finding of adequate cause where there was evidence of domestic violence in the mother's home even though the mother argued that the moving party had not shown detriment to the children. The *Zigler* court stated (emphasis added): "Children who live in violent homes are traumatized by the violence and more likely to commit crimes as adults. [treatise cited]. ***A reasonable inference from the record, then, supports the trial court's findings*** that Ms. Zigler's home is detrimental to Blake's health." *Zigler & Sidwell*, 154 Wn.App. at 814.

Here, just as in *McDaniel*, *Zigler*, and *Fraser*, the trial court is required to make reasonable inferences from the record before it that Mr. Engstrom's medication use while driving, his uncontroverted presentation of slurred speech and forgetfulness and inability to complete his visitations because of his being shaken up from both the accident and his pending felony trial, is clearly sufficient *prima facie* evidence of detriment to at least allow for a hearing on these issues. This is especially true where, as here, Mr. Engstrom has never offered any explanation for why he is on this particular medication, why he stopped taking it, how

he has dealt with the issues that led him to take the medication in the first place, and what steps he might be taking to address this problem. Given the trial court's ruling, Petitioner is sending her children from Florida to Washington and can only hope that Mr. Engstrom has addressed these problems and that he will not be placing these children in harm's way, or have the ability or physical capacity to care for them properly. She should at least be entitled to the full evidentiary hearing which a finding of adequate cause would provide. None of the judicial officers hearing this motion faulted Petitioner for bringing the motion or found in any way that she was using the motion to harass Mr. Engstrom, which is the primary reason behind the requirement of establishing adequate cause. Since that is the case, and there is *prima facie* evidence of the potential for harm, as found by the Commissioner below, this court should, respectfully, find that the revising judge abused his discretion.

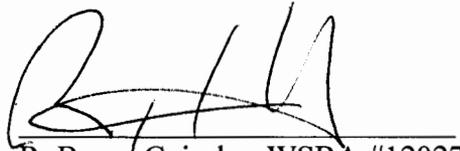
IV. CONCLUSION

The trial court failed to recognize what both Commissioner Swennumson and other courts have acknowledged- credible evidence of the potential for harm is sufficient to establish the right to a modification hearing. There is no requirement of showing a direct "nexus" of harm between the world of alleged felony criminal conduct by a parent and the children in its orbit. Because

Judge Clarke applied the standards incorrectly, his decision was untenable and the order on revision below should be reversed and this case remanded for a full hearing on Ms. Engstrom's petition for modification of the parenting plan.

Dated: October 9th, 2017.

Respectfully Submitted,



R. Bryan Geissler, WSBA #12027
Attorney for Appellant

FILED

OCT 09 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**SUPERIOR COURT OF WASHINGTON
COUNTY OF SPOKANE**

In re the Marriage of:

Petitioner: HEIDI BENDICK, f/k/a
Engstrom,

and

Respondent: JOSEPH ENGSTROM.

No. 07-3-02993-0

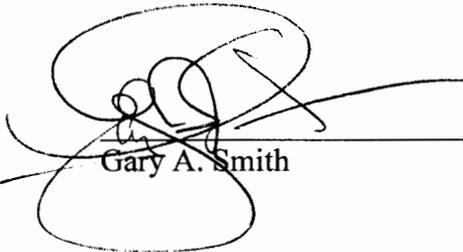
Div. III No. 353974

DECLARATION OF MAILING

I, Gary Smith, certify under penalty of perjury under the laws of the State of Washington, that on the 9th day of October 2017 I deposited in the United States postbox with first class postage affixed a copy of *Appellant's Brief* addressed to:

Jason Nelson
925 West Montgomery Avenue
Spokane, Washington 99205

Signed at Spokane Valley, Washington on October 9, 2017.



Gary A. Smith

ORIGINAL