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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

NO. 353974

IN RE:

HEIDI REGINA ENGSTROM n/k/a BENDICK,

APPELLANT

AND

JOSEPH LOGAN ENGSTROM,

RESPONDENT

OPENING BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On April 7, 2015, the parties entered into an agreed final Parenting Plan in which Ms. Bendick, (formerly known as Engstrom), was designated the primary residential parent and Mr. Engstrom was allowed residential time. **(CP 1-9)** The Parenting Plan contained no RCW 26.09.191 factors regarding the conduct of either parent and no limitations were placed on either parent's residential time. **(CP 2)** The parenting plan provisions were drafted to accommodate the relocation of Ms. Bendick and the children to the state of Florida. **(CP 86)**

After the entry of the final Parenting Plan, Mr. Engstrom relocated to the state of Pennsylvania before relocating again back to Spokane County, Washington by the summer of 2016. **(CP 87)**. While Mr. Engstrom resided in Pennsylvania and during the summer of 2016, the parties reached agreements on an alternative visitation schedule for Mr. Engstrom and did not follow the final Parenting Plan. **(CP 87)**

In July 2016, Mr. Engstrom was involved in a motor vehicle incident and was subsequently charged with a criminal driving offense in Spokane County, Washington. **(CP 64-85)** Documentation filed by Ms.

Bendick alleged that Mr. Engstrom was found to be under the influence of a prescription sleep medication called Zolpidem. (CP 83) Zolpidem is commonly known as Ambien. (CP 88). No other drugs were found in Mr. Engstrom's system. (CP 83) Mr. Engstrom was prescribed Ambien at the time of the incident but testified at the time of the modification action that he was no longer prescribed, nor taking, Ambien. (CP 83) Mr. Engstrom testified that Ambien has been associated with side-effects such as sleep driving and what has been commonly referred to as "Ambien blacks-outs". (CP 88)

Mr. Engstrom was charged and then released on his own recognizance (CP 69) He was ordered to not possess or use non-prescribed controlled substances, legend drugs or drug paraphernalia. (CP 70) He was further ordered not to use, possess or consume alcohol and/or marijuana. (CP 71) Mr. Engstrom entered a not guilty plea to the charge against him and awaits trial. (CP 88) Since his release, he has been fully compliant with the conditions of his release and has maintained full-time employment. (CP 88) Mr. Engstrom testified in his declaration that the children were not in his care at the time of the incident, (were in fact in the state of Florida), and that he voluntarily agreed to forego his visit

scheduled to take place shortly after the incident. **(CP 88-89)** Mr. Engstrom further testified that he had a good relationship with both children despite their relocation to Florida. **(CP 89)**

In her declarations prior to the adequate cause hearing, Ms. Bendick testified that she had conversations with Mr. Engstrom during which his speech was slurred and lethargic, although she alleged no particular time or date on which the alleged conversations occurred. She went on to allege that she believed Mr. Engstrom was abusing drugs, prescription or otherwise. **(CP 47)** This self-serving and unsubstantiated allegation was not supported by any medical evidence nor was it supported by the documentation submitted to the court regarding the criminal charge against Mr. Engstrom. **(CP 64-85)** Further, in his response, Mr. Engstrom specifically stated that he was fully compliant with all conditions of his release, which include prohibitions regarding the use of alcohol and drugs. **(CP 88)**

In her reply declaration, Ms. Bendick did not allege any other history of such incidents on the part of Mr. Engstrom and went on to acknowledge the incident may have been caused by Mr. Engstrom taking a prescription medication with “well-disclosed associated side effects, such

as “sleep driving”. **(CP 91)** Mr. Bendick did not allege the children had ever been harmed while in Mr. Engstrom’s care, nor did she challenge Mr. Engstrom’s testimony that he was no longer prescribed nor taking Ambien. **(CP 91-105)**

Ms. Bendick first filed a petition to modify the Parenting Plan in August 2016. **(CP 10-17)** Her petitioner alleged bases for both a minor modification and a major modification. In addition, Ms. Bendick alleged a basis for limitations against Mr. Engstrom. **(CP 13)** The adequate cause hearing was held on April 12, 2017 before the Honorable Nichole Swennumson, Superior Court Commissioner. **(CP 129-146)** Comm. Swennumson found adequate cause existed to modify the plan but left the final Parenting Plan in effect as a temporary order. **(CP 142-143)** Comm. Swennumson further clarified that her finding of adequate cause was limited to the allegations regarding the pending charge against Mr. Engstrom and that adequate cause was not found based on the allegations of missed visits. **(CP 144)**

A revision hearing was held before the Honorable Harold Clarke, III, Superior Court Judge, on May 11, 2017 and he revised the decision of Commissioner Swennumson. **(CP 148)**. Judge Clarke found that there

was no evidence of on-going behavior on the part of Mr. Engstrom and a lack of nexus between the single incident and future parenting and/or detriment to the children. Judge Clarke also found no other basis for a finding of adequate cause.

ARGUMENT

Regarding revisions of a commissioner's ruling, once the judge has made a decision on revision, the appeal is from the judge's decision, not the commissioner's decision. State v. Hoffman, 115 Wn. App 91 (2003). The appellate court's review of a judge's decision is more deferential than the judges's review of a commissioner's decision on revision. State v. Hoffman, 115 Wn. App 91 (2003).

A trial court's determination regarding a finding of adequate cause should only be overturned when the trial court has abused its discretion. Parentage of Jannot, 149 Wn.2d 123 (2003). A trial court abuses its discretion when the trial court's decision is manifestly unreasonable or made on untenable grounds or for untenable reasons. In re Marriage of Crump, 175 Wn. App. 1045 (2013). As set forth in In re Jannot, 110 Wn. App. 16, 22, affirmed in part, 149 Wn.2d 123 (2002):

The abuse of discretion standard is not, of course

unbridled discretion. Through case law, appellate courts set parameters for the exercise of the judge's discretion. At one end of the spectrum the trial judge abuses his or her discretion if the decision is completely unsupported, factually. On the other end of the spectrum, the trial judge abuses his or her discretion if the discretionary decision is contrary to the applicable law.

And as stated in **In re Marriage of Littlefield**, 133 Wn.2d 39, 47 (1997),

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

The trial court's challenged findings are reviewed for a determination of whether there is a sufficient quantity of evidence to persuade a fair-minded, rational person that the premise is true. **In re Marriage of Griswold**, 112 Wn. App. 333 (2002). "The absence of a finding on an issue is presumptively a negative finding against the person with the burden of proof." **George v. Helliard**, 62 Wn.App 378 (1991)

RCW 26.09.260 governs modification of parenting plans. The portions of the statute applicable in this appeal based on the petition and brief as filed by Ms. Bendick are as follows:

(1) Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the 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. The effect of a parent's military duties potentially impacting parenting functions shall not, by itself, be a substantial change of circumstances justifying a permanent modification of a prior decree or plan.

(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.

(4) The court may reduce or restrict contact between the child and the parent with whom the child does not reside a majority of the time if it finds that the reduction or restriction would serve and protect the best interests of the child using the criteria in RCW 26.09.191.

(Ms. Bendick did allege bases for a minor modification and further alleged that the children had been integrated into her home, however, the court commissioner found adequate solely on the basis of the pending

criminal charge and not on the other bases alleged. (CP 144) Ms. Bendick did not move to revise any portion of the commissioner's decision.)

RCW 26.09.191 covers the issue of limitations on a parent's time that may be necessary to serve and protect the best interests of children. In this particular case, the proposed Parenting Plan filed by Ms. Bendick alleged one basis for limitations: "Joseph Engstrom has a long-term emotional or physical problem that gets in the way of his ability to parent." (CP 22-29)

RCW 26.09.191(3)(b) allows the court to preclude or limit any provision of a parenting plan if the court finds that a parent has a long-term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in RCW 26.09.004.

RCW 26.09.270 requires the court to deny the request for modification if the moving party fails to establish that adequate cause exists based on affidavits setting forth facts supporting the requested modification.

In order to establish adequate cause, the moving party must provide "something more than prima facie allegations which, if proven,

might permit inferences sufficient to establish grounds for a custody change.” **Marriage of Roorda**, 25 Wn. App. 849 (1980) Further, given the existence of strong presumption in both statutes and case-law against modification, there is a heavy burden imposed on the moving party which must be satisfied. **Roorda** at 851.

The allegations of Ms. Bendick did not establish adequate cause.

In order to establish a finding of adequate cause for the purpose of limiting the parenting time of the non-custodial parent, Ms. Bendick was required to provide something more than prima facie allegations of the existence of the one factor she alleged on that issue, that being that Mr. Engstrom has a long-term emotional or physical impairment that interferes with the performance of parenting functions. Although Ms. Bendick alleged that Mr. Engstrom’s home was a detrimental living environment, as he is not the custodial parent, that section of **RCW 26.09.260** is not applicable. **George v. Helliard**, 62 Wn. App. 378 (1991).

In her pleadings, Ms. Bendick does not meet her burden of establishing that Mr. Engstrom has a long-term emotional or physical

impairment that interferes with his performance of parenting functions. As to the issue of long-term emotional or physical impairment, Ms. Bendick's allegation was that Mr. Engstrom was involved in an incident after taking Ambien and that at times when she has spoken to Mr. Engstrom his speech has been slurred and lethargic. **(CP 46-49 and CP 91-105)** Ms. Bendick did not request limitations in her proposed parenting plan regarding an alleged long-term impairment from drugs or alcohol. **(CP 22-29)** Further, in her reply, Ms. Bendick referred to the incident as being either a "conscious decision or failure to take reasonable precautions" on the part of Mr. Engstrom given the "well-disclosed" effects of Ambien. **(CP 91)** In neither of her declarations did she allege that Mr. Engstrom had suffered in the past any long-term emotional or physical impairments or that he is diagnosed with any long-term emotional or physical impairments. Further, none of the allegations she made reasonably lead to such an inference. The fact that Mr. Engstrom was prescribed a sleep medication does not lead to the inference that he suffers from a long-term emotional or physical impairment.

Further, even if such an inference could be drawn, Ms. Bendick failed to establish that Mr. Engstrom's incident with Ambien interfered

with his ability to perform parenting functions.

Ms. Bendick did allege that Mr. Engstrom did not exercise all of his residential time prior to the incident in June 2016. However, as was pointed out by both the commissioner and the judge, the final Parenting Plan included a provision in which both parents acknowledged that Mr. Engstrom would not always be able to exercise his residential time. **(CP 5)** That acknowledgement was included in a plan that had no restrictions against either parent. **(CP 1)**

Ms. Bendick alleged that Mr. Engstrom's speech was at times slurred and lethargic but did not allege any dates or times when such incidents ever took place. **(CP 47)** Specifically, Ms. Bendick did not ever allege that Mr. Engstrom's speech was lethargic or slurred during his residential time with the parties' children. In fact, Ms. Bendick appears to allege that these conversations took place during the period of time when Mr. Engstrom has been subject to conditions of release and has never been found to have violated any such conditions. Lastly, Ms. Bendick provided no statements from any other individuals, such as family she has in the area, who made any such claims.

The circumstances of this case are far different from those in cases

such as **Marriage of Frasier**, 33 Wn. App 445 (1982). In **Marriage of Frasier**, the appellate court concluded that there is no statute that requires a court to wait until damage to a child has actually occurred and is demonstrable before taking action. **Frasier** at 451. However, in that case there were allegations made that established a clear risk of detriment to the child. Post-dissolution, the mother moved with the minor child to Walla Walla, Washington where she engaged in a relationship with a convicted felon serving time in the Washington State Penitentiary. The mother not only visited the prison herself but frequently took the four-year-old child with her multiple times each week, with the child referring to the inmate as “daddy”. **Frasier** at 447. Additionally, the mother moved with the child five times in the 11 months preceding the trial date. **Frasier** at 447. The child had a close relationship with her father, who experienced difficulty exercising his visitation rights with her due to the mother’s actions. **Frasier** at 447. There were additional allegations that the child had become moody, was reluctant to talk about her home life, asked questions of a sexual nature, and that social workers had investigated and recommended a change in placement. **Frasier** at 447. Such facts if

sufficiently plead at an adequate cause hearing, would certainly be enough to establish that adequate existed to move forward with a modification action.

In the present case, Ms. Bendick alleged that Mr. Engstrom has a long-term emotional or physical impairment that interferes with his performance of parenting functions because he was prescribed Ambien and was involved in an automobile incident. In doing so, she acknowledged that incidents of “sleep-driving” are known potential side-effects of Ambien. **(CP 91)** She did not allege that Mr. Engstrom had a history of emotional or physical impairments. **(CP 91-105)** Nor did she dispute his testimony that he is no longer prescribed, and no longer taking, Ambien. Although she pointed out that Mr. Engstrom had fallen behind in his child support obligation, she did not allege that it was due to an emotional or physical impairment and she did not dispute his testimony that he continues to be full-time employed. In addition, Ms. Bendick did not allege that the children were harmed by the incident or that the incident had a direct effect on their relationship with Mr. Engstrom other than he agreed to forego his visit scheduled to begin shortly after the

incident occurred. At no point did Ms. Bendick allege a long term history of a course of conduct that would evidence a long-term impairment that would interfere with Mr. Engstrom's ability to parent their children.

In **McDaniel v. McDaniel**, 14 Wn. App. 194 (1982), also cited Ms. Bendick, there was also sufficient evidence to establish the possibility of detriment based on unchallenged findings that the children's poor diet, school attendance and poor attention to dental care, as well as exposure to marijuana smoking and other third parties in the home. **McDaniel**, at 197-198. But in that case, as in **Frasier**, there was a direct nexus between the concerns alleged and the parenting of the minor children. In the present case, Mr. Engstrom is alleged to have taken a sleep medication for which he had a valid prescription and then suffered from a known side effect of that medication, while the children were residing with Ms. Bendick on the other side of the country. Given the single incident that occurred when the children were not even in his care and the fact that Mr. Engstrom no longer takes the medication that caused the side effect resulting in the incident, Ms. Bendick did not demonstrate the possibility of future detrimental effect on the children.

Likewise, Ms. Bendick's reliance on In re Marriage of Ziegler & Sidwell 154 Wn.App 803 (2010) is misplaced. It is not disputed that a reasonable inference can be drawn that when children are traumatized by domestic violence in the home, the home is likely detrimental to the children's health. However, it cannot be reasonably inferred that because Mr. Engstrom experienced an incident resulting from a side-effect of a prescription medication, that he suffers from a long-term emotional or physical impairment that would interfere with his ability to perform future parenting functions, especially in light of the fact that he no longer takes the medication in question.

(It should also be noted that Ms. Bendick repeatedly states in her opening brief that Mr. Engstrom used Ambien while driving, rather than took Ambien and experienced the side-effect of sleep driving. There is no support in the record for Ms. Bendick's claim.)

At the end of her brief, Ms. Bendick lists a number of things that Mr. Engstrom did not prove to her satisfaction, ignoring the reality that the burden of proof was Ms. Bendick's. For example, Ms. Bendick states that Mr. Engstrom did not explain why he was prescribed Ambien, a sleep-aid and that he did not explain why he stopped taking it. Even if it were Mr.

Engstrom's burden of proof, a reasonable inference could be drawn that Mr. Engstrom took a sleep-aid to aid him in sleeping and that he stopped taking the medication because of the side-effect that led to the incident in June 2016.

Even the majority of the provisions proposed Parenting Plan filed by Ms. Bendick were not tailored to address the issues of an alleged long-term impairment on the part of Mr. Bendick. In fact, the plan itself seemed more designed to drastically reduce Mr. Engstrom's time and impose requirements that would make it impossible for him to comply with the plan, such as requiring Mr. Engstrom, who makes significantly less than Ms. Bendick, pay for all transportation expenses. Of note, although Ms. Bendick alleges that Mr. Engstrom has a long-term emotional or physical impairment, no provisions in her proposed plan require him to be evaluated or require him to seek treatment.

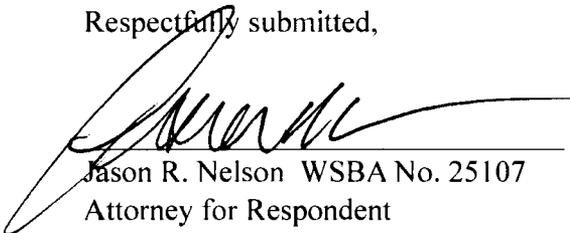
CONCLUSION

Ms. Bendick had the burden of establishing that adequate cause existed to modify the parenting plan by providing something more than prime facie allegations which, if proven, would permit inferences sufficient to support the finding. She failed to do so. Her allegation that

Mr. Engstrom failed to exercise some of his residential time was not a substantial change of circumstance given the parties' Parenting Plan contemplated he may not be able to exercise some of his residential time. The argument that the children's living environment is detrimental is not applicable to this situation given that Ms. Bendick was the primary parent. Likewise, the children could not have been integrated into her home because Ms. Bendick is the primary parent. Finally, Ms. Bendick did not establish that Mr. Engstrom suffers from a long-term emotional or physical impairment that interferes with his performance of parenting functions. In granting the motion to revise, Judge Clarke did not abuse his discretion.

Mr. Engstrom requests the appeal be denied.

Respectfully submitted,

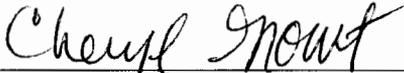


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DECLARATION OF SERVICE

I, Cheryl Growt, under penalty of perjury pursuant to the laws of the State of Washington, declare that on this 5th day of February, 2018, I put out via messenger service a copy of this brief to be delivered to my attorney Bryan Geissler, 205 North University, Ste 3, Spokane, Washington, 99206.

Signed at Spokane, Washington on this 5th day of February, 2018.



CHERYL GROWT, Legal Assistant