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**COURT OF APPEALS  
DIVISION ONE  
THE STATE OF WASHINGTON**

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BEVERLY YBARRA, Appellant,

Vs.

MANUEL YBARRA, Respondent

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Brief of Respondent (RAP 10.3)

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ORIGINAL

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**Statement of the Case**

This matter comes before the court on modification of a Parenting Plan action. CP pg.109, l. 18-20. The parties have two children; Malena Nicole Ybarra, age 15, and Connor Alexander Ybarra, age 14. They have resided with Manuel and Christina Ybarra (Manuel's current wife) since November 2005. CP pg. 139, l. 22-pg. 140, l. 21.

The parties were divorced in June 1995. Between then and November 2005, the children resided primarily with petitioner Beverly Ybarra and had visitation with their father Manuel Ybarra. In November 2005, Beverly Ybarra attempted suicide. CP pg. 110, l. 3-4. She put a noose around her neck in her garage. RP, pg. 65, l. 13-16. She informed Connor of what had happened and Connor became very upset. RP, pg. 65, l. 16-17. Connor called Malena and Malena called her father. RP, pg. 65, l. 23-pg. 66, l. 6. Beverly Ybarra had been drinking alcohol and was depressed. RP, pg. 65, l. 9-20. Sheriff

J. L. Halderman went to Beverly Ybarra's home in response to an attempted suicide call. He spoke with Beverly Ybarra. RP, pg. 65, l. 9-20. His mental health report states that she was depressed because she had recently lost her job and had quit smoking. RP, pg. 65, l. 9-20. Beverly Ybarra told the officer that she had fastened a noose with a rope in the garage, and had put the noose around her neck in an attempt to commit suicide. RP, pg. 65, l. 9-10. It did not work. She informed her son Connor and her current husband about what she had done. RP, pg. 65, l. 9-10. She then had an unknown quantity of alcohol. RP, pg. 65, l. 9-10. She volunteered to go to the hospital and was taken there by the officer. RP, pg. 65, l. 9-10.

Manuel Ybarra then brought a Petition for Modification of the Parenting Plan since he was concerned about both the alcohol abuse and the psychological abuse that the children were under. RP, pg. 63, l. 13-pg. 64, l. 19. He obtained an ex parte restraining order transferring placement of the children on November 23, 2005. CP pg.139, l. 22-pg. 140, l. 9.

On March 14, 2006, Commissioner Brudvik found that there was adequate cause and a substantial change in circumstances and that the children should remain in their father's custody. CP pg. 140, l. 3-9. She appointed Mirka Navoski as Guardian ad Litem for the

children. CP pg. 109, l. 14-17. She ordered the children into counseling and that Beverly Ybarra should continue with her own counseling. CP pg. 140, l. 3-9. She also significantly ordered that Beverly Ybarra have an alcohol evaluation with collateral contacts. CP pg. 140, l. 3-9. She has never had that complete assessment done. RP, pg. 21, l. 2-pg. 23, l. 12.

Mirka Nakovski did both a preliminary parenting investigation and a follow up investigation. CP pg. 51-138 and pg. 105-163. Beverly Ybarra told Ms. Nakovski that she had attempted suicide and that she had told her son Connor, but she does not believe that it traumatized the children. CP pg.110, l. 20-pg. 111, l. 18.

Manuel Ybarra is now married to Christina Ybarra. CP pg. 113, l. 23. They have no children of their own. CP pg. 113, l. 23-24. They have a very stable household where Malena and Connor have resided since November 2005. RP, pg. 25, l. 8-22 and CP pg. 140, l. 20-22. His concerns are that Beverly Ybarra suffers from alcoholism and depression and the children are put under a great deal of stress by her. RP, pg. 63, l. 13-pg. 64, l. 19. He believes that Beverly Ybarra denies her abuse of alcohol and her psychological problems and this impacts the children. RP, p. 62, l. 22-23.

Further, Beverly Ybarra minimizes the danger of the children's involvement with sexual experimentation and drug and alcohol experimentation. CP pg. 21, l. 6-10. As an example, Beverly Ybarra allows Malena's boyfriend to sleep over at her house and allows Malena to sleep over at his house. RP, pg. 42, l. 3-10.

Manuel Ybarra keeps close track of their grades. CP pg. 152, l. 17-19. His home is very structured. As the Guardian ad Litem points out, it is very important for children of this age to have structure. CP pg. 159, l. 19-21.

The Guardian ad Litem conducted a very thorough investigation, visiting both homes, speaking with both parties, with the children, Christina Ybarra, and Beverly Ybarra's sister. CP pg. 51-138 and pg. 105-163.

She also spoke with Ed Lehman, Beverly Ybarra's marriage counselor. Beverly Ybarra is currently going through a divorce. Pastor Lehman saw parenting problems stemming from the fact that this was a blended family. CP pg. 126, l. 4-5.

She also spoke with Beverly Ybarra's therapist, Cathy Stratmeyer. Ms. Stratmeyer indicated to the Guardian ad Litem that on the night of November 22, 2005, Beverly was having depressive

symptoms and suicidal ideations and that is why the suicide attempt was made. CP pg. 127, l. 16-25.

Ms. Nakovski contacted Pacific Northwest Treatment where Beverly Ybarra underwent an assessment for drug and alcohol abuse in December 2005. CP pg. 129, l. 15-19. However, Beverly Ybarra never had the full assessment with collateral contacts as ordered by Commissioner Brudvik three months later. Ms. Merriweather, the assessor at Pacific Northwest Treatment, says... “The results of the tests are completely up to the truthfulness of the person answering the questions. “ CP pg. 130, l. 7.

The Guardian ad Litem also interviewed Carolyn D. Logsdon, PhD., who is the children’s counselor. One of the problems that she noted was that Malena did a fair amount of the care taking of her brother because her mother was unavailable. CP pg. 131, l. 21-23. She was also concerned that Ms. Ybarra inappropriately talks with Malena about marital issues with her step-father. CP pg. 132, l. 5-9.

She diagnosed Malena with adjustment disorder and she encouraged Malena to return in 1-2 weeks for psychotherapy to help her cope with the problems that she was having. CP pg. 132, l. 8-18. In her professional opinion, the children were being neglected at

Beverly Ybarra's home. CP pg. 133, l. 16-18. She believes the act of attempted suicide with a child at home to be very neglectful. CP pg. 133, l. 17-18. She stated that Manuel Ybarra is appropriately concerned about the children's welfare and even though the children would miss their friends, they should be placed with their father. CP pg. 133, l. 19-22.

The Guardian ad Litem also reviewed the Valley General Hospital Emergency Nursing Records, which indicated that the clinical impression was "major depression recurrent, severe without psychotic features" and "adjustment disorder with depressed mood." CP pg. 134, l. 1-10.

RCW 26.09.187 states "the court shall make residential provisions developmental level, and the family's social and economic circumstances." CP pg. 134, l. 19-23. Relying on this, the Guardian ad Litem concluded that the court should modify the prior Custody Decree or Parenting Plan because "the present environment is detrimental to the children's physical, mental and emotional health and the harm likely to be caused by the change of environment is outweighed by the advantage of the change to the child." CP pg. 135, l. 2-6. Her findings were that Manuel Ybarra's home was more stable and nurturing and consistent with the children's needs at their

developmental level. CP pg. 135, l. 9-11. The Guardian ad Litem felt that Manuel Ybarra took greater responsibility for performing the parenting functions related to the children's daily needs. CP pg. 135, l. 11-13. In her opinion, the father had maintained his relationship with the children throughout the years and the children are comfortable with him. CP pg. 135, l. 13-15.

The Guardian ad Litem recommended that Beverly Ybarra be re-evaluated with respect to her alcohol consumption, taking into account collateral sources and if necessary, undergo recommended treatment, and continue with her individual therapy. CP pg. 135, l. 4-14.

The Honorable Judge Krese ruled "The custody decree/parenting plan/residential schedule should be modified because a substantial change of circumstances has occurred in the circumstances of the children or the nonmoving party and the modification is in the best interest of the children and is necessary to serve the best interest of the children. This finding is based on the factors below." CP pg. 35, l. 4-7. Her honor went on to make specific findings in order to underpin her decision. The parties agree to the modification. The children's environment under the custody decree/parenting plan/residential schedule is detrimental to the

children's physical, mental or emotional health and the harm likely to be caused by a change in environment is outweighed by the advantage of a change to the children. CP pg. 35, l.24-27.

“The following facts, supporting the requested modification, have risen since the decree or plan/schedule or were unknown to the court at the time of the decree or plan/schedule: This case is more complicated than some. Some 29 months have past since the original Petition for Modification was filed. However, the court finds that at the time of the original change, the change was appropriate. The environment the children were living in was psychologically and emotionally detrimental to them given that the mother had made a suicidal gesture and had disclosed this gesture to the then 11 year old son.” CP pg. 35, l. 12-18.

“Further, the extent of the mother's drinking at the time was a source of embarrassment to the children. The commissioners finding that adequate cause had been met and that a substantial change of

circumstances had occurred and was appropriate. CP pg. 35, l. 19-21.

“The mother acquiesced to the residential change of the children and in the fall of 2007 agreed that the father was the primary parent and allowed the children to remain in his home.” CP pg. 35, l. 21-23.

“The parties drafted an Agreed Parenting Plan. On November 20, 2007, they went to a hearing to get it put into place. Despite not being entered with the court, it is a full settlement of the parenting issues and should be enforced unless it is not in the best interest of the children. The court finds that the Agreed Parenting Plan is in the best interests of the children.” CP pg. 35, l. 24-pg. 36, l. 2.

“The court finds that the mother was suffering from significant depression and anxiety in November 2005 when the Petition was filed and that she was contemplating suicide and treated for

depression.” CP pg. 36, l. 3-5.

“The court also finds that the drug/alcohol evaluation of Mr. Meriweather is of limited or no value because it consisted of simply self reporting. The mother never fully addressed the courts concern for alcoholism when she was ordered to have an alcohol evaluation with collateral contacts. CP pg. 36, l. 5-8.

“The court also finds that the mother’s continued relationship with the children’s step-father was detrimental to them. She involved the children in her decision to divorce their step-father as they were present when she moved out. This is indicative of her overall pattern of involving the children in parental decisions that are inappropriate for children and that are detrimental to their emotional, mental and psychological well being. The mother sees the children as friends and peers and not as children.” CP pg. 36, l. 8-13.

1 Response to Assignments of Error

**Response to Assignment of Error No. 1**

**The trial Court properly entered a Parenting Plan which placed the child with their father pursuant criteria set forth in 26.09.260**

**(2)(c)**

As the court is well aware, RCW 26.09.260 governs modification of parenting plans or custody decrees.

(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 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:

(a) The parents agree to the modification;

(b) The child has been integrated into the family of the petitioner with consent of the other parent in substantial deviation from the parenting plan;

(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 or environment is outweighed by the advantage of a change to the child; or...RCW 26.09.260 (2009)

The standard for appellate review sets the bar high for the Appellant to overcome. "Appellate court reviews the trial court's ruling on residential provisions in parenting plans for abuse of discretion." In re the Parentage of Schroeder (2001) 106 Wash. App. 343, 22 P. 3d 1280 The trial court appropriately applied the dictates of 26.09.260. The Snohomish Family Court Commissioner specifically found that there had been a substantial change in circumstances and that it was in the best interest of the children that they be removed from their mother's care and placed in the care of the father. The court based its decision upon the fact the home the children were living in was "psychologically and emotionally detrimental to them given that the mother had made a suicidal gesture and had disclosed this gesture to the then 11 year old son." CP pg. 35, l. 17-18. The court ordered the mother to have a drug and alcohol evaluation and follow treatment evaluations with collateral contacts. The court also appointed a GAL. This order was entered in the Fall of 2005. By the time of trial in

May of 2008 the mother still had failed to comply with this recommendation. The trial court specifically found that the drug and alcohol evaluation of Mr. Meriweather is of limited or no value because it consisted simply of self reporting. The mother never fully addressed the courts concern for alcoholism when she was ordered to have an alcohol evaluation with collateral contacts. By the time of trial the court continued to have concerns about the mother's alcoholism and her refusal to address the alcoholism in good faith. The trial court also had concerns about the mother's present ability to properly care for them as she "sees the children as friends and peers and not as children". CP pg 36, l. 13.

Further Ms. Ybarra entered into an agreed Parenting Plan signed off on by all parties after a mediation that places the children with Mr. Ybarra. This is the same Parenting Plan with minor modifications that the trial court adopted after trial. CP pg. 35, l. 24-27. This Parenting Plan while not signed by the court and therefore not an Order, does constitute a binding agreement between the parties and Ms. Ybarra in addition has followed that Parenting Plan from the time it was signed to present to let the children remain in Mr. Ybarra's home. This, coupled with the fact that the children have now been residing full time in Mr. Ybarra's home since

November 2005 also argues that they have been integrated into his household and into their schools here in Western Snohomish County and should not be taken out and put back into rural Sultan after forty months of being in Mr. Ybarra's care. The trial court based its ruling on the present circumstances of the children and did not abuse its discretion in granting the Final Parenting Plan in this matter.

Further, RCW 26.09.260(c) also dictates that the children should remain in Mr. Ybarra's care. Ms. Ybarra is still in denial about the psychologically devastating impact of her attempted suicide on the children. She will argue that the children want to come and live with her. However it is not in the children's best interest for them to go and live with her. That is what the Guardian ad Litem has decided repeatedly and that is also what a Court Commissioner has decided.

The Guardian ad Litem's supplemental report considers the following statutory factors:

RCW 26.09.187 (3)(i) "The relative strength, nature and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;"

Manuel Ybarra has taken greater responsibility in performing the parenting functions over the last 40 months and therefore is more capable in meeting the criteria of this prong of the statutory test. The trial court found that "the father has made every effort to correct this (Connor's behavioral problems) and is working with the principal and the school to properly address Connor's behavioral issues." CP pg. 36, l. 16-19.

RCW 26.09.187(3) (ii) "The agreements of the parties, provided they were entered into knowingly and voluntarily;"

The parties had agreed to a Parenting Plan which both parties signed off on and which the Guardian ad Litem is recommending. Therefore, there was agreement as to where the children should reside. This dictates that the children should remain in the placement of their father, Manuel Ybarra.

RCW 26.09.187(3) (iii) "Each parent's past and potential for future performance of parenting functions;"

To quote the Guardian ad Litem, "Both parents have the potential to perform as the children's custodial parents. The father has clearly demonstrated his ability to do so" and "Mother's involvement and influence on children's feelings about the custody proceedings have

been detrimental to the children and impact her ability to support the children emotionally in an appropriate way, particularly in the midst of this conflict and the recent problems with the children's behavior." Again, this factor dictates that the children should be left to reside with Manuel Ybarra. CP pg. 156, l.17-24.

RCW 26.09.187(iv) "The emotional needs and developmental level of the child;" Malena and Connor need structure, clear limits and emotional support. This is exactly what they get at their father's house and what is lacking at their mother's residence.

Ms. Ybarra suffers from severe episodic depression and from alcoholism. She has refused to have the proper court ordered alcohol evaluation. She instead, puts forth a smoke screen, the evaluations that she had done prior to Commissioner Brudvik's Order and done without collateral sources.

Finally, a review of the Guardian ad Litem's final report makes clear that she believes that the children should reside with their father. Adequate cause was based upon Beverly Ybarra's suicide attempt and that she had informed her then 11 year old son of the fact that she had attempted suicide.

The report also states “The mother appears unaware of the children’s behaviors and/or interests relating to sex and drugs. The father appears to have more of an insight into the situation. The mother has made some unwise parenting decisions by facilitating Malena’s boyfriend’s sleepovers at her home, by buying an age-inappropriate game for Connor and by involving the children in adult matters such as this trial.” CP pg. 21, l. 6-10.

Further, she has refused to resolve the issue surrounding her being ordered to have an alcohol assessment with collateral sources. She is in non-compliance with the Court’s order.

We ask that the court sustains the trial court rulings. The court clearly reviewed the criteria of RCW 26.09.260 (2009) and made specific findings on why the children should remain with their father.

2      Assignments of Error

**Assignment of Error No. 2**

**The trial Court's characterization of the Agreed Parenting Plan of November 2007.**

Appellant failed to read CR 2a in its entirety relying on the "done in open court on the record" clause. However she ignores the final sentence of CR 2a which states "or unless the evidence therefore shall be in writing and subscribed by the attorneys denying the same" CR 2a (2009)

As Appellant was representing herself she is the attorney who is now denying the agreement. The Agreed not Proposed Parenting Plan is a binding agreement between the parties as the trial court properly ruled.

### 3 Assignments of Error

#### **Assignment of Error No. 3**

The court properly set child support which has the mother Beverly Ybarra paying the father Manuel Ybarra and has the authority to do so. Each parent has duty to support their children. The Court used the pay stub provided by Beverly Ybarra to calculate her gross monthly income at \$3,333.30 and Mr. Ybarra's 2007 W-2 to calculate his gross monthly income of \$5,478.90. We offered the child support worksheets as a trial exhibit and asked that the court adopt those worksheets and the proposed Order of Child Support. Back support was then calculated off of that amount.

4 Assignments of Error 4

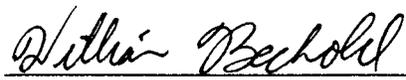
**Assignment of Error No. 4**

The request for a deviation was never made until the oral decision of the court and no worksheets with a deviation were presented to the trial court. RP, pg. 176.

**Conclusion**

The appellant's request for relief should be rejected in its entirety as it lacks foundation in the law and requests this court to overrule the factual findings of the trial judge who did not abuse her discretion in making her findings. The trial court made several specific findings concerning the mother's unfitness and they should be upheld.

DATED: 5/21/2009

  
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