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CLERK OF COURT OF APPEALS DIV I
STATE OF WASHINGTON

NO. 35629-5 II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE MARRIAGE OF:

NATHAN WYRICK, APPELLANT,

V.

ERIN DEMETRO, RESPONDENT

APPELLANT'S REPLY TO RESPONDENT'S RESPONSE

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**I. APPELLANT'S REPLY TO
RESPONDENT'S BRIEF IN RESPONSE**

A. The Court Abuses Its Discretion If It Fails to Apply the Standards of the Statute.

In re the Marriage of Boling, the Court of Appeals stated that:

“[A] court abuses its discretion if it fails to follow the statutory procedures or modifies a parenting plan for reasons other than the statutory criteria. *Halls*, 126 Wn. App. at 606. We consider statutory construction as a question of law requiring de novo review. *In re Marriage of Caven*, 136 Wn.2d 800, 806, 966 P.2d 1247 (1998).

In re Marriage of Boling (Boling v. Watson), 132 Wn.App. 222, 230-31 (2006).

B. The Trial Court's Abused Its Discretion in Failing to Support Its Ruling by Substantial Evidence.

RCW 26.09.260 limits the circumstances in which a court may modify a parenting plan. The key issue for the commissioner was whether the children's present environment was so detrimental to their well-being that the benefit of a change in the parenting plan would outweigh the harm from moving the children out of the mother's home.

In re the Marriage of Pennamen, 2006 Wn.App. 57765-4-I, at 27 (2007).

The first step then is to determine whether the child's present environment was “detrimental.”

It is not uncommon for divorced parents to have disparate views of proper parenting of a child. Because of the potential for endless wrangling between divorced parents, the legislature in its wisdom set a very high

standard upon which modification of a child's residence and custody must be based.

Detriment is a very high standard, closer to evidence of abuse or neglect. The court did not find that the child had been abused or neglected while in Appellant's care,¹ and none of the trial court's findings to which respondent refers even approach the high level of "detriment." Although the statute does not require abuse or neglect, the detriment standard is much higher than hurt feelings or differences of opinion between the parents. None of the court's findings satisfy the high standard of evidence required under RCW 26.09.260.

In the context of changing a child's residence in a modification proceeding, the court must have "substantial evidence" to support its finding of detriment. Substantial evidence in the case of a modification of custody proceedings must satisfy the standard set forth by the statute that considers the seriousness of a change in custody of a child. Appellant acknowledges that the court made findings in its order. Appellant contends that those findings do not meet the standard of "substantial evidence" as required under RCW 26.09.260.

¹ Further, the court did not set any restrictions on appellant's visitation under RCW 26.09.191 that would have been within the discretion of the court if abuse or neglect had been found.

C. **The Court Abused Its Discretion in Ignoring the Statute's Clear Preference to Maintain the Stability of a Child's Living Situation.**

RCW 26.09.260(2) establishes a presumption against changing a previously decreed residential schedule:

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.

Sections (1) and (2) establish a preference for stability in a child's living arrangements, absent specific circumstances relating to the best interests of the child.

In re Marriage of Boling (Boling v. Watson), 132 Wn.App. 222, 230-31 (2006).

Modification must be in the best interests of the child and is necessary to serve the best interests of the child. Again, divorced parents frequently have difference approaches to parenting the same child.

However, a modification is warranted only if it is necessary to protect the interests of the child. None of the court's findings rise to a level of necessity.

In Appellant's opening brief, appellant points out that respondent has not in fact offered the child anything different from what the child was

already receiving in the Appellant's home. Further, any supposed advantage offered in the respondent's home could have been addressed in appellant's home far short of a change in custody.

For example, the fact that the step-mother had worked with the school to obtain an IEP for the child who needed assistance and who clearly had benefited from such assistance is hardly a detriment to the child, but clearly a hurt to the mother's feelings. There was no evidence submitted at trial that the child did not know the difference between the step-mother and his biological mother that would have impaired respondent's relationship with her child.

Perhaps an admonition to the step-mother was warranted about her interactions with school personnel. However, it was not necessary to change custody of the child to achieve such a goal.

D. The Court Abused Its Discretion in Failing to Consider the Detriment to the Child in Modifying the Child's Residence.

RCW 26.09.260 clearly required the court to consider and weigh the detriment of moving a child from one home to another. The court never addressed this detriment to the child in which the child was removed from a stable home and placed with a parent who had a long history of instability, excessive alcohol use, and domestic violence. The court found

and accepted this history without comment as to its impact on the child's well-being.

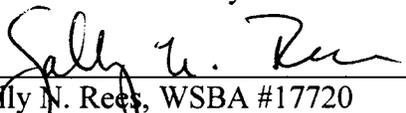
Similarly, the court did not consider the serious detriment of respondent's actions in removing the child from a home in which he had resided for extensive periods of time, breaking the bonds between the child and his step-siblings, changing the child's school late in the school year, and limiting the child's contact with his father and his step-mother who had a long history of taking substantial interest in and responsibility for Ethan's well-being.

Furthermore, the court never considered the facts that respondent had serious outstanding issues regarding domestic violence, alcohol use, driving without a license, and failing to appear in court (i.e. had a bench warrant issued for her arrest).

IV. CONCLUSION

For the reasons stated above and the record before the Court, Appellant asks the Court to reverse and remand the trial court for further proceedings consistent with this order.

RESPECTFULLY submitted this 29th day of November 2007.



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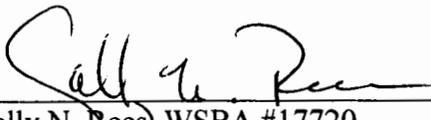
DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that I served a true and correct copy of this pleading upon Edward Lane, Attorney for Respondent, on November 29, 2007 by:

a. Via email to **edwlane@comcast.net**

b. Via U.S. Mail

Dated at Bellevue, Washington, this 29th day of November 2007.


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