MODIFICATION OF CUSTODY

Your custody case involves the modification of a final parenting plan which has already been adjudicated. Modifications of a parenting plan or custody decree fall under two broad categories--major modifications and minor modifications. A major modification is the change of the primary caretaker from one parent to the other. A minor modification is the incremental increase or decrease of the alternate parent's residential time and can be brought by either parent.

A major modification is very difficult and requires a special showing and high quantum of evidence. It is not something that can be done merely because someone has the will to do so and the requisite filing fee. Our case law makes it clear that such proceedings are disfavored. In fact, courts must dismiss a major modification unless there is "adequate cause" for the petition. "Adequate cause" is a legal term of art found in our modification statute, RCW 26.09.260. Our appellate courts have defined adequate cause in a very stringent manner. Pretty much every family law attorney, and every judge and family law court commissioner understands that a party seeking to modify custody bears a heavy burden.

This material discusses the requirements and parameters of both major and minor modifications.

MAJOR MODIFICATIONS

Under the statute, there are basically four specific grounds for modifying the primary placement of a child:

1. *Detrimental Environment in the Custodial Parent's Home;*
2. *Consensual Integration of the child into the home of the Non-Residential Home in Substantial Variance to the Existing Parenting Plan;*
3. *Agreement of the Parties;*
4. *The Custodial Parent has been Found in Contempt Twice in Three Years for Violating the Residential Provisions of the Parenting Plan.*

Satisfying one or more of these grounds does not mean that you win and custody will be changed, but it does mean that there is adequate cause for the modification and it will proceed. Ultimately the determination of whether custody should be modified will depend on a balancing test of whether the advantages of the change in custody outweigh the upheaval caused by a custodial change coupled with a showing that the change is in

the best interests of the child.

Two of the foregoing grounds for a change of custody are far and away the most common: *Detrimental Environment* and *Consensual Integration.* I have yet to litigate a modification based on multiple contempt findings or based on agreement of the parties. The concepts of a detrimental custodial environment and consensual integration are, by contrast, quite common.

Detrimental Environment

The legal theory of modification based on the custodial parent's "detrimental environment" is a fairly difficult concept to articulate with precision, but clients need to know that the law imposes a very high threshold to clear for parties who want to modify primary custody. Distilling the law on "adequate cause" related to the notion of "detrimental environment" is probably accomplished, if a bit simplistically, by equating it with "unfitness." In fact, one appellate opinion basically coupled the modification standard of "detrimental environment" with "unfitness." Only if the residential parent is seriously deficient in their parenting will a petition to modify be permitted to proceed. Examples would include substance abuse, criminal activity, neglect, abuse, domestic violence, and/or demonstrable mental health limitations. Adequate cause in this area may be, in the final analysis, akin to Justice Potter Stewart's famous quip regarding pornography--"I don't know how to define it, but I know it when I see it."

Adequate cause for a modification based on this theory is the most difficult to establish. Vague and unsupported allegations of a detrimental environment are not sufficient, and would not qualify as adequate cause. The statute specifically states that a modification may be undertaken if 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." To prevail in such a theory, the moving party should have substantial corroboration of the specific problems in the residential parent's household. This is best produced by way of statements from neutral third parties, preferably counselors, teachers, or other professionals, or other reliable documentation.

In other words, a custody modification case is much more likely to find success if it is based upon extrinsic evidence beyond the mere subjective statement of the party seeking modification. In this day and age valuable evidence can come from the very parent's own social networking website, such as MySpace or FaceBook, or from their own email or text messaging communications. I litigated one case where the only real evidence of the mother's drug use were her own text messages importuning her drug supplier for more narcotics. Some care should be taken with the attorney so that such evidence can be obtained and authenticated in such a way that it will be admissible. Illicitly obtaining

private information by way of force or fraud may very well render it inadmissible, and will besmirch the character of the proponent.

Again, the burden on the moving party is heavy. Under our law, it is not sufficient to simply make "prima facie" allegations of parental malfeasance. The court in modification actions must evaluate and weigh the evidence and find it meritorious before a court allows a modification petition to go forward.

Consensual Integration

The other common basis for a change in custody is what is known as "consensual integration." Integration occurs when a child moves into the home of the non-residential parent and becomes "integrated" into that home. The precise point at which integration occurs is unclear. At least one court has held that a nonresidential father who had his son from April throughout the entire summer was not able to show integration, as it amounted to little more than an extension of summer visitation. Other cases suggest that brief periods of time in the home of the non-residential parent similarly do not show integration. It is obviously a judgment call, but I believe that a period of at least five or six months during the school year would be necessary to make a claim for integration.

Please bear in mind that "consensual integration" has two prongs. First, there must be "integration", but that integration must be "consensual". The residential parent must consent to the child becoming integrated into the home of the nonresidential parent. If a residential parent is able to show that the child resided with the other parent over their objection, and did not consent to the placement, then they would have a viable defense under the statute. In one reported opinion the residential parent was injured in an auto accident and was unable to take care of the children. The father provided care while the mother convalesced. Later he attempted to parley his respite care into full-blown custody and the court held that the mother didn't consent to a change in custody but only a transitory change while she recuperated.

Also, our state supreme court has defined "consent" as follows:

> **Consent refers to a voluntary acquiescence to surrender of legal custody. It may be shown by evidence of the relinquishing parent's intent, or by the creation of an expectation in the other parent and in the children that a change in physical custody would be permanent. The children's view as to where "home" is, and whether the environment established at each parent's residence is permanent or temporary are significant in determining whether "consent" and "integration" are shown.**

Under either modification basis, the party seeking the modification bears the burden of proof and it is virtually mandatory that the moving party's petition be corroborated by sufficient evidence which preferably comes from neutral thirty parties.

Adequate Cause Hearing

The first issue in any modification is whether there is adequate cause for the petition to go forward. This legal determination takes place at an adequate cause hearing shortly after the petition is filed. It is difficult to establish adequate cause, and many times courts will dismiss a petition for modification at the adequate cause hearing because it fails to satisfy the exacting legal standard governing modification actions. If adequate cause for the petition is established at the initial hearing, then the petition goes forward to a full-blown trial. In the meantime, the court can do a number of things on a temporary basis pending trial. First, the court does have authority to grant a temporary change in custody pending trial if the court believes that such a change is warranted by the evidence. Generally speaking, unless there is some realistic threat of imminent harm to a child, a court will maintain the original parenting plan pending some kind of investigation and further hearings in the case. There are exceptions to this judicial preference, and generally they involve demonstrable harm to a child. Also, if adequate cause is found, the court will invariably appoint a guardian ad litem to investigate the issues raised in the petition and make recommendations to the court.

A Guardian Ad Litem is commonly referred to as "The eyes and ears of the court." It is the Guardian Ad Litem's function to investigate the case, represent the best interests of the children, and report back to court with his or her recommendations. The length of this process varies greatly from case to case, but most investigations take at least thirty days. The Guardian Ad Litem will ultimately produce a written report containing his or her findings and recommendations. The Guardian Ad Litem's recommendations carry a great deal of weight with the court, so it is important that you are able to clearly convey your concerns and desires to the Guardian Ad Litem. The Guardian Ad Litem's function is one of the most important aspects of a custody dispute. Therefore, it is very important that you deal appropriately with the Guardian Ad Litem. When and if a Guardian Ad Litem is appointed in your case, we will provide you with additional information regarding this important phase of the litigation.

After the guardian ad litem report comes out, either party may ask the court to adopt the guardian ad litem recommendations pending trial. This involves another temporary hearing. Generally speaking a court is heavily inclined to accept the recommendations of the guardian ad litem pending trial, unless there is some significant flaw either with the

investigation or the recommendations themselves.

Thereafter, the matter will proceed to trial unless the parties are able to re-assess their case in light of the guardian ad litem's report and achieve a settlement. A trial is a much different proceeding then the hearings usually convened on the family law motion calendar. A trial consists of sworn live testimony from several witnesses and it may last several days.

In my experience, there is a fairly good chance that a case will settle after the guardian ad litem's recommendations have been published in a case.

MINOR MODIFICATIONS

Minor modifications involve either expanding or restricting a non-residential parent's time with the children. The statute spells out the limitations involved with minor modifications. The statute is a little bit convoluted, but there are several types of modification which do not involve changing the primary caretaker.

- You can seek to reduce or restrict the alternate parent's contact if the restriction would serve the best interests of the child (RCW 26.09.260 (4));
- You can seek minor modifications that do not exceed 24 full days in a calendar year (RCW 26.09.260 (5)(a))
- You can seek changes even in excess of the 24 days per year if the change is based on the alternate parents change in residence or an involuntary change in work schedule (RCW 26.09.260 (5)(b))
- An alternate parent subject to restrictions in a parenting plan may bring a minor modification to enjoy residential time without the restrictions based on a substantial change of circumstances specifically related to the need for the restrictions (RCW 26.09.270 (7))

All of these types of minor modification still need to be based on a showing of a substantial change of circumstances, but the heavy burden applied to a change in custody is not present. Although the courts are more lenient with allowing petitions for minor modifications to proceed, some care should still be taken in drafting even petitions for minor modification because there could be some procedural obstacles. For example, a minor modification by a parent seeking more time with a child who was an infant at the time of the initial parenting plan was dismissed because the court did not find a substantial change of circumstance. The court held that the parties knew the child would be getting older at the time they entered the initial parenting plan, and therefore authorizing a

modification solely based on the maturing age of the child alone was not appropriate, no matter how appropriate and well-intended. So if you are pursuing a modification based only the fact that the child has now matured to justify longer periods away from the majority caretaker you will want to plead additional facts to try to avoid getting struck down for lack of adequate cause. Typical examples of a substantial change of circumstances would be change of work schedule, relocation, or a substantial change in the relationship between the child and the non-residential parent.