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IN RE MARRIAGE OF MCDOLE: MODIFYING CHILD CUSTODY BY IGNORING STATUTORY STANDARDS

Virginia A. Petersen

Abstract: In In re Marriage of McDole, the Washington Supreme Court upheld the modification of a parenting plan that changed the primary residential parent. By relying in part on the mother's interference with visitation, the court not only undermined the important policy underlying the modification statute of maximizing finality in custody determinations, but it also failed to read the modification statute as a whole. The court also inappropriately relied on the mother's move out of the state and continued conflict between the parents. The court further failed to explicitly explain the legal bases for its decision, providing little guidance for future interpretation of the modification statute.

Many experts have recognized that modification of a permanent parenting plan or child custody decree should be discouraged because it can disrupt the continuity and stability of the child’s environment. The Washington Legislature responded to this concern and made modification more difficult to obtain by imposing strict statutory requirements. In In re Marriage of McDole, the Washington Supreme Court undermined this legislative action by affirming a modification. The original dissolution decree in McDole had designated the mother as the primary residential parent. In upholding a modification, the supreme court inappropriately relied on the mother’s interference with visitation, her move to another state, and the continued conflict between the parents. By relying in part on the mother’s interference with visitation, the court failed to read the modification statute as a whole and undermined the statute’s fundamental goal of protecting continuity and stability in the child’s environment. The court also ignored contempt remedies and sanctions that must be used before resorting to modification. By relying in part on the mother’s move out of state, the court violated the policy that punishment of the parent must not be visited upon the child. The court further undermined the important policy of finality in custody decisions by failing to clarify the legal bases of its decision, providing little guidance to courts deciding future

2. See infra notes 37–46 and accompanying text.
modification claims. Because visitation disputes are common, the *McDole* decision could prompt a significant increase in modification claims.

I. THE EVOLUTION OF WASHINGTON’S MODIFICATION STATUTE

A. The Modification Standard Before the 1973 Statute

Prior to 1973, judges had broad discretion in modifying child custody decrees. Former RCW 26.08.110, repealed in 1973, provided that custody decrees could be “modified, altered and revised by the Court from time to time as circumstances may require.” This statute provided little guidance to courts about when to hear a modification case and about what factors to consider when making a custody determination. Thus, courts gradually developed general guidelines to use in such cases. In order to grant a modification, courts had to find a material change in circumstances concerning the welfare of the child and that the child’s welfare would be promoted by the modification. The best interests of the child was the governing principle guiding these decisions. Appellate courts deferred to the trial judge’s determination of what was in the best interests of the child, on the grounds that the trial judge had the opportunity to personally observe parents and witnesses.

Because there was little statutory guidance about what factors to consider when deciding modification cases, decisions were often subjective, reflecting the personal values or biases of the trial judge, rather than reasoned precedent. Thus, prior to 1973, the outcome of modification cases was difficult to predict. Because each parent can often make plausible arguments why it would be in the child’s best

8. Dykes, 69 Wash. 2d at 876, 420 P.2d at 862.

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interests to be with him or her, the best interests standard, without more, creates a greater incentive to litigate than a more determinate rule.\textsuperscript{11}

\textbf{B. The 1973 Modification Statute}

In 1973, the Washington Legislature passed the Marriage Dissolution Act, which provided statutory guidance in deciding modification cases.\textsuperscript{12} The statute was modeled on the Uniform Marriage and Divorce Act\textsuperscript{13} (UMDA), and was designed to disfavor modification.\textsuperscript{14} The main goal of this new statute was to maximize finality in custody awards.\textsuperscript{15} Finality in custody is important because custodial changes are highly disruptive to children.\textsuperscript{16} Furthermore, exposing children to continual relitigation is detrimental to the stability of their environment.\textsuperscript{17} The statute attempted to achieve this goal of finality by providing procedural safeguards and by requiring the courts to follow more stringent standards in modification decisions.

\textbf{1. Procedural Safeguards and Strict Standards}

The 1973 statute instituted procedural safeguards to prevent parties from using questionable modification claims to harass the custodial parent.\textsuperscript{18} For example, RCW 26.09.270 requires a party seeking modification of a custody decree to file and serve an affidavit setting forth facts supporting the requested modification, along with the

\begin{footnotes}
\item[11] Id.
\item[15] Id.
\item[17] In re Marriage of Murphy, 48 Wash. App. 196, 203, 737 P.2d 1319, 1323 (1987) (Green, J., dissenting). Green stated:
\begin{quote}
The policy reasons underlying RCW 26.09.260 and the presumption in favor of custodial continuity and against modification are (1) to maximize finality of custody awards since children and their parents should not be subjected to repeated litigation of the custody issues determined in the original action; (2) to prevent “ping-pong” custody litigation since stability of the child's environment is of utmost concern; and (3) to preserve the basic policy of custodial continuity since custodial changes are viewed as highly disruptive to the child.
\end{quote}
\end{footnotes}
modification motion. Unless the court finds the affidavit of the moving party has established "adequate cause" for hearing the motion, the court must deny the motion. In In re Marriage of Roorda, the court of appeals interpreted "adequate cause" to require more than prima facie allegations that, if proven, might permit inferences sufficient to establish grounds for modification. Before a hearing on the merits can take place, the petitioner must allege actual facts that, if true, would overcome the presumption of custodial continuity. In In re Marriage of Mangiola, the court of appeals emphasized the importance of protecting the custodial parent from harassment and providing stability for the child by imposing a heavy burden on a petitioner that must be satisfied before the court convenes a hearing. The statute also discourages frivolous claims by requiring the court to assess attorneys' fees and court costs against the petitioner if it finds that the motion to modify was brought in bad faith.

In addition to procedural safeguards, the 1973 statute instituted strict guidelines for modification after adequate cause is found. The statute prohibits the court from modifying the prior custody decree or parenting plan unless it finds a substantial change in circumstances of either the child or the custodial parent. The court must make this assessment only on the basis of facts that arose since the prior decree or that were unknown to the court at the time of the prior decree. Only if the original decree was a result of a default judgment or an agreement between the parties can pre-decree facts be considered in a modification proceeding.

20. Id.
28. In re Marriage of Timmons, 94 Wash. 2d 594, 598–99, 617 P.2d 1032, 1035–36 (1980) (holding that when a dissolution is uncontested, pre-decree facts can be considered in a modification proceeding); McDaniel v. McDaniel, 14 Wash. App. 194, 196–97, 539 P.2d 699, 701 (1975) (holding that because the original custody decree was obtained by default, the court can consider facts that existed prior to the original decree).
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In addition to finding a substantial change in circumstances, the court must find that the modification is in the best interests of the child and is necessary to the best interests of the child.\textsuperscript{29} Thus, a change in circumstances is not, by itself, enough to permit a modification. The court must find that the change of circumstances requires a modification to protect the best interests of the child.\textsuperscript{30}

Although these standards did not present a major shift from the common law, the 1973 statute went even further. It provided that the court must find one of three additional prerequisites before granting a modification. The court may not grant a modification unless it finds: 1) that the parents agree to the modification; 2) that the child has been integrated into the family of the petitioner with the custodial parent’s consent; or 3) that “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. . . .”\textsuperscript{31}

The third prerequisite has two separate prongs. The court must first determine if the child’s present environment is detrimental to the child’s physical, mental, or emotional health. The present environment at issue in this balancing test is the custodial environment named in the original custody decree.\textsuperscript{32} Second, the court must balance the harm from the present environment against the harm likely to be caused by a change in environment. The court can grant a modification only if the advantage of the change outweighs the harm of the change.\textsuperscript{33}

Case law is ambiguous concerning whether actual harm must be shown or whether potential harm is enough. The Washington Court of Appeals has held that the third prerequisite requires a showing of actual harm.\textsuperscript{34} Scholarly criticism has suggested that granting a modification based on potential future harm undermines the basic policy of the

\begin{itemize}
\item \textsuperscript{32} George, 62 Wash. App. at 383, 814 P.2d at 241.
\item \textsuperscript{34} Anderson v. Anderson, 14 Wash. App. 366, 541 P.2d 996 (1975) (reversing the trial court’s modification where the mother was found to be immature, emotionally unstable, and mentally unbalanced, because there was no evidence that this negatively affected the children); Wildermuth v. Wildermuth, 14 Wash. App. 442, 542 P.2d 463 (1975) (reversing the trial court’s modification, because there was no showing that the mother’s cohabitation with a man who was not her husband was harmful to the children and the trial court’s prediction of probable harm to the children was not enough to justify a modification).
\end{itemize}
statute.\textsuperscript{35} In \textit{In re Marriage of Timmons}, however, the Washington Supreme Court upheld a modification based on evidence of potential harm.\textsuperscript{36} While the court did not specifically hold that evidence of potential harm is sufficient, its result appears to assume that premise.

2. \textit{The Underlying Policy of Finality in Custody Decisions}

The 1973 modification statute embraces the policy that finality in custody decisions is an important factor in providing children with stability and continuity. The UMDA, which served as the model for the Washington statute, was governed by the belief that finality in custody decrees is of utmost importance. The UMDA drafters relied in part on the wide consensus of experts that "insuring the decree's finality is more important than determining which parent should be the custodian."\textsuperscript{37} Many experts agree that stability and continuity in the child's relationships are crucial to the child's well-being.\textsuperscript{38} Laws that make it easy for parents to repeatedly challenge custody decrees threaten that continuity and stability that are central to the child's development.\textsuperscript{39} The 1973 statute recognized the value of continuity and stability by requiring courts to focus on the likely harm caused by the modification itself.\textsuperscript{40}


\textsuperscript{36} \textit{In re Marriage of Timmons}, 94 Wash. 2d 594, 617 P.2d 1032 (1980) (holding that the trial court findings that the mother was unstable and insecure were sufficient evidence of a "potential harm" to the children and satisfied the criteria for modification under RCV 26.09.260(1)(c)).


\textsuperscript{38} Mnookin, \textit{supra} note 9, at 265:

This proposition cannot be proven beyond any doubt by existing empirical studies, and accurate predictions for a particular child about the effects of the lack of stability are beyond existing techniques. But a substantial and impressive consensus exists among psychologists and psychiatrists that disruption of the parent-child relationship carries significant risks.

\textit{See} Goldstein et al., \textit{Beyond the Best Interests of the Child} 31–35 (1979); Heine, \textit{supra} note 35, at 450; Watson, \textit{supra} note 37, at 64; Wexler, \textit{supra} note 9, at 800.

\textsuperscript{39} Goldstein, \textit{supra} note 38, at 37–39; Watson, \textit{supra} note 37, at 64.

\textsuperscript{40} Unif. Marriage and Divorce Act § 409, 9A U.L.A. 628, Commissioner's Note (1987) ("Any change in the child's environment may have an adverse effect, even if the noncustodial parent would better serve the child's interest.").
Experts also believe that the constant threat of relitigation inhibits the custodial parent’s relationship with the child by causing both parent and child to live in fear of possible modifications. If parents are constantly aware of the legal threat to custody, they may lose “spontaneity” in parenting. Better parenting will result if custodial parents can be secure in their custodial role, without feeling the need to constantly anticipate the court’s reaction to their parenting activities and to conform their behavior accordingly. Furthermore, defending legal actions for modification can burden the custodial parent financially. The 1973 statute addresses these problems through its heightened standards for modification as well as through the procedural safeguards that discourage claims brought in bad faith or with insufficient evidence.

Another important justification for finality in modification cases is family autonomy. The initial divorce and custody decision creates a new post-divorce familial unit comprised of the custodial parent and child. This new family is entitled to the same amount of protection from state interference as a pre-divorce two-parent family. Consequently, the state should not be allowed to remove the child from the custodial parent’s home absent a finding of serious endangerment to the child. The justification for the state’s initial intrusion, the parents’ lack of agreement, no longer applies. The fact that a couple divorces should not allow the state to use a “shattered family” rationale to justify indefinite jurisdiction over the new family unit.

C. 1989 Amendments Addressed Visitation Interference

One question that frequently arises in actions for modification is whether one parent’s interference with the other’s visitation rights is

41. Watson, supra note 37, at 63.
42. Id.
43. Id. See also Goldstein, supra note 37, at 117.
44. Watson, supra note 38, at 63.
45. See supra notes 25–33 and accompanying text.
46. See supra notes 18–24 and accompanying text.
48. Id. See Goldstein, supra note 38, at 35 (“all child placements, except where specifically designed for brief temporary care, shall be as permanent as the placement of a newborn with its biological parents”).
49. Wexler, supra note 9, at 807–08.
50. Id. at 817. See Shernow, supra note 47, at 708–09.
sufficient grounds for ordering a modification. In 1989, the Washington Legislature passed a bill, amending sections of the Marital Dissolution Act, to address this question. The new legislation added a fourth alternative prerequisite for modification that gives courts guidance on when interference with visitation can be a basis for modification. The bill also added provisions for enforcement of the residential schedule and required every parenting plan to contain a warning to parents about the consequences of non-compliance.

Even before the Marital Dissolution Act of 1973, the supreme court had repeatedly held that a parent's willful violation of the decree should not be a determining factor in custody cases. The underlying rationale of these decisions was that the welfare of the child, rather than punishment of parents, should be the paramount concern. The original Marital Dissolution Act did not specifically address whether violating the decree by interfering with visitation rights should be grounds for modification. The Act did, however, give the courts broad discretion in punishing the noncomplying parent through contempt proceedings and other means. Courts continued to hold that a violation of the decree alone was not justification for a modification. The supreme court affirmed this rule and its policy in Schuster v. Schuster, holding that interfering with the noncustodial father's visitation rights was not by itself a sound reason to modify the custody decree.

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55. Shaffer, 61 Wash. 2d at 699, 379 P.2d at 995; Thompson, 56 Wash. 2d at 244, 352 P.2d at 179; Malfait, 54 Wash. 2d at 413, 341 P.2d at 154, Annest, 49 Wash. 2d at 62, 298 P.2d at 483.
56. 1987 Wash. Laws 2025 (repealed 1989) ("the court has broad discretion to punish the conduct by a punitive award or other remedies, including civil or criminal contempt, and may consider the conduct in awarding attorneys' fees").
57. Anderson v. Anderson, 14 Wash. App. 366, 368–69, 541 P.2d 956, 997 (1975) (holding that interfering with the visitation rights of the father is not by itself a sound reason to modify the decree).
58. Schuster v. Schuster, 90 Wash. 2d 626, 630, 585 P.2d 130, 133 (1978). In affirming this rule the Court relied in part on a section of the Marital Dissolution Act that dealt with initial custody decisions. Id. Former RCW 26.09.190 provided that "[t]he court shall not consider conduct of a proposed guardian that does not affect the welfare of the child." 1973 Wash. Laws 1225 (repealed 1987).
In 1989, the Legislature narrowed the courts' discretion in dealing with parents who did not comply with the dissolution decree or parenting plan. It passed a bill amending the Marriage Dissolution Act to spell out specific consequences for a parent who has not complied with the residential provisions in the parenting plan and has been found in contempt of court. On the first finding of contempt, the noncomplying parent must: 1) make up for any visitation time that the moving parent missed as a result of the noncomplying parent; 2) pay all court costs and attorneys' fees incurred due to the noncompliance, and reasonable expenses incurred in locating or returning the child; and 3) pay a civil penalty not less than $100 to the moving party. The court may order the parent to be imprisoned for no more than 180 days if the parent is able to comply but unwilling to do so.

On a second finding of contempt for noncompliance with a residential plan, the parent must provide the noncustodial parent twice the amount of time missed due to the noncompliance. Additionally, the civil penalty must not be less than $250, although expenses and possible imprisonment remain the same.

The 1989 bill also clarified when interference with visitation can appropriately be considered in granting a modification. Specifically, the court must retain the current residential schedule unless, as the new fourth prerequisite states, the nonmoving parent has been held in contempt of court at least twice within three years for failure to comply with residential provisions in the parenting plan. Thus, this amendment implicitly allows courts to modify based on interference with visitation only if the court has first used the other available remedies.

This same bill added a new provision requiring that all court orders containing parenting plan provisions include a warning to parents about the consequences of violating the residential provisions. The statute specifically spells out the proper language, warning parents that a violation of the residential provisions with actual knowledge of its terms is punishable by a citation for contempt of court.

60. Id.
62. Id.
64. Id.
66. Id.
II.  \textit{IN RE MARRIAGE OF McDOLE: THE BATTLE OVER JOEY}

Cynthia Hatch and James McDole were married on February 22, 1986, and had a child, Joseph McDole (Joey) on January 12, 1987.\textsuperscript{67} Their marriage was dissolved on November 23, 1988.\textsuperscript{68} Both parents petitioned to become Joey’s primary residential parent. The court designated Cynthia the primary residential parent because she had been Joey’s primary caregiver.\textsuperscript{69} James was awarded visitation of two days a week, plus additional vacations and holidays.\textsuperscript{70} Although the court orally enjoined the parents from taking the child from Walla Walla County without the court’s permission, the dissolution decree itself contained no such restriction.\textsuperscript{71} Although James had no problems visiting Joey immediately after the decree, a dispute arose over visitation with Cynthia’s son from a previous marriage, also named James.\textsuperscript{72} Once the court ordered scheduled visitation with the child, however, Cynthia complied with the order and did not interfere.\textsuperscript{73}

On March 9, 1990, Cynthia moved to Utah to marry Lance Hatch. She consulted her attorney, who reviewed the dissolution decree and advised her that there was no prohibition on removing her child from the state.\textsuperscript{74} She moved to Utah with Joey without personally notifying James.\textsuperscript{75} Her attorney, however, sent him a letter, received by him on March 9, notifying him of the move and suggesting a revised visiting schedule.\textsuperscript{76}


\textsuperscript{68} \textit{Id.}

\textsuperscript{69} \textit{Id.} at 886, 841 P.2d at 771.

\textsuperscript{70} \textit{Id.}

\textsuperscript{71} \textit{Id.}

\textsuperscript{72} \textit{Id.}

\textsuperscript{73} \textit{Id.}

\textsuperscript{74} \textit{Id.} at 886, 841 P.2d at 771–72.

\textsuperscript{75} \textit{Id.} Cynthia testified that she did not notify James of her plans to move and get married because she feared that he would try to stop her and harass her. \textit{In re Marriage of McDole}, 122 Wash. 2d 604, 607, 859 P.2d 1239, 1241 (1993) (per \textit{curiam}). It is important to note that in the initial dissolution proceeding, the court found that he had harassed her in the past. Findings of Fact and Conclusion of Law at 3, \textit{In re Marriage of McDole}, (Walla Walla Super. Ct. Nov. 23, 1988) (No. 88-3-00084-5). In the dissolution decree, the court expressly ordered James to refrain from continuing to harass her. Decree of Dissolution of Marriage at 5, \textit{In re Marriage of McDole}, (Walla Walla Super. Ct. Nov. 23, 1988) (No. 88-3-00084-5).

\textsuperscript{76} \textit{McDole}, 67 Wash. App. at 886, 841 P.2d at 772.
On March 12, 1990, James filed a motion to modify the dissolution decree and designate him the primary residential parent. He also filed a motion for temporary custody and requested an order requiring Cynthia to show cause why she should not be held in contempt for violating the court’s order by removing Joey from Walla Walla County. The hearing for this motion was scheduled for March 23. On March 15, Cynthia moved to continue argument on the motion because she was getting married and would not be able to appear. The judge postponed ruling on the continuance and ordered Cynthia to provide an address and a telephone number where Joey could be reached. On March 19, the judge denied the continuance because only a business telephone number had been provided, but indicated that the court might reconsider the continuance if Cynthia provided a residential telephone number. Cynthia provided a residential telephone number for Joey but the hearing proceeded as scheduled. Cynthia did not appear for this hearing, and her attorney renewed her request for a continuance. Concluding that Cynthia was not being candid with the court, the trial court noted that this was “too much messing around” and granted temporary custody to James. Cynthia complied and transferred Joey into James’s custody on March 31. She was not held in contempt of court.

On July 2, 1990, the court heard oral argument on James’s motion to modify the parenting plan. Richard Garcia, a social worker, testified through deposition that he had evaluated Joey following his return from Utah and found that Joey may have been injured by the move. His opinion was based on the fact that Joey once cried when talking to James from Utah and cried at night for two weeks after returning to Walla Walla. Thus, it is not clear whether Richard Garcia was referring to harm from Joey’s move to Utah or from his return to his father’s home in Walla Walla.

77. McDole, 122 Wash. 2d at 606, 859 P.2d at 1240.
78. McDole, 67 Wash. App. at 886, 841 P.2d at 772.
79. Id.
80. Id.
81. Id at 886–87, 841 P.2d 772.
82. Id. at 887, 841 P.2d at 772.
83. Id.
86. Id. at 887, 841 P.2d at 772.
87. Id.
The trial court found that Cynthia was “resistive” to visitation and that this resistance represented a substantial change in circumstances.88 It found that Cynthia would continue to interfere with Joey’s contact with his father and, therefore, continuing to live with Cynthia would be detrimental to Joey.89 The court found that modification was necessary to serve the best interests of the child and that the harm likely to be caused by the change of environment was outweighed by the advantage of the change.90 Based on these findings, the court modified the decree to designate James the primary residential parent.

The court was unclear whether its finding that Cynthia was resistive to visitation meant that she had actually interfered with visitation or that she was just likely to interfere in the future. This confusion is intensified by another finding that, since the initial decree, “the only problems between the parties” were James’s difficulties in securing visitation rights with Cynthia’s son from a previous marriage.91 Yet another finding states that the father was unable to contact Joey between March 9 and March 20 because of his move to Utah.92 Thus, the only evidence of interference with James’s visitation with Joey cited by the trial court is James’s inability to contact his son after the move to Utah. The trial court did not find that Cynthia violated the decree by moving to Utah with Joey.

The court of appeals reversed the trial court’s modification order.93 The court properly noted that a trial court should not modify a permanent residential schedule unless it finds the threshold requirements that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is necessary to serve the best interests of the child.94 In addition, both parts of the third prerequisite must be satisfied. The court must find that the child’s present environment is detrimental to the child’s physical, mental, or emotional health and that the harm likely to be caused by a change of environment is outweighed by the advantage of the change to the child.95 The court of appeals then held that the evidence did not support a finding of a

89. Id. at 2.
90. Id. at 3.
91. Id. at 1.
92. Id. at 2.
94. Id. at 888, 841 P.2d at 773.
95. Id.
substantial change in circumstances. It further found that there was no evidence from which the trial court could find that Joey’s environment while living with his mother was detrimental to his physical, mental, or emotional health. The court concluded that modification of custody cannot be used to punish a parent for wrongful conduct. Instead, interference with visitation should be grounds for contempt under RCW 26.09.160.

The Washington Supreme Court reversed the court of appeals and reinstated the trial court’s judgment. It held that the trial court did not abuse its discretion in finding that: 1) there had been a substantial change in circumstances; 2) the child’s environment was detrimental to his mental health; and 3) the modification was necessary to the child’s best interests. Thus, the court found sufficient evidence to order a modification of custody under RCW 26.09.260. The court failed to discuss, however, the balancing test required by the third prerequisite that the advantage of the change in environment must outweigh the harm.

The court listed the evidence supporting the trial court’s findings and ultimate ruling. It noted evidence that Cynthia had obstructed James’s visitation rights and left the state with Joey without notifying James. Additionally she had been slow to comply with the court’s orders to supply James with a telephone number for Joey. The court also noted that a counselor had testified that Cynthia’s behavior was harmful to Joey and that she would probably continue to interfere with visitation in the future. It noted that the trial court had orally warned the parties at the initial custody hearing that it would find continued conflict detrimental to the child’s best interests. Based on this evidence, the court held that the trial court did not abuse its discretion in modifying custody.

96. Id. at 889, 841 P.2d at 773.
97. Id. at 890, 841 P.2d at 774.
98. Id.
99. Id. at 890, 841 P.2d at 774.
101. Id. at 610–11, 859 P.2d at 1243.
102. Id.
III. THE SUPREME COURT ERRED IN MODIFYING THE PARENTING PLAN

The supreme court erred in affirming the trial court's modification of the parenting plan. Interference with visitation should not be considered a substantial change in circumstances. More importantly, by resting on the third prerequisite of the modification statute which requires finding a detriment in the child's present environment and a subsequent balancing of that harm against the advantage of the change, the court failed to read the modification statute as a whole and ignored the 1989 amendments, which offer a way to coerce and punish parents who do not comply with the residential provisions without affecting the child. By allowing modification in this case, the court undermined the important policy of promoting continuity and stability in the child's environment by maximizing finality in custody decrees. The court also undermined the policy that punishment of the parent should not be visited upon the child. Finally, the opinion has left Washington trial courts with little guidance on how to decide future modification cases.

A. The Court Erred in Finding That Resistance to Visitation Constitutes a Substantial Change in Circumstances.

To prevail in an action for a modification, the petitioner must first establish the existence of a substantial change in the circumstances of either the child or nonmoving parent since the original decree. Although it was not apparent from the supreme court opinion, the trial court findings clearly stated that Cynthia's "resistance" to James's visitation rights constituted the "substantial change in circumstances" that is required by the statute. Relying solely on interference with visitation as a substantial change in circumstances, however, is contrary to prior case law.

Although interfering with visitation arguably affects the welfare of the child by disrupting the child's relationship with the noncustodial parent, Washington courts have held that interference with visitation or violating a custody decree is not enough to show a substantial change in circumstances. In Anderson v. Anderson, the court of appeals reversed the trial court's transfer of custody from the mother to the father because there was no substantial change of circumstances in the environment of

103. Findings, supra note 88, at 2.
104. See supra note 26 and accompanying text.

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the custodial parent. The court found no substantial change even though there was evidence that the mother had interfered with the father's visitation rights. Furthermore, in Schuster v. Schuster, the supreme court held that violation of a custody decree does not constitute a substantial change in circumstances. While these courts held that interference with visitation or violating a decree may not alone constitute a change in circumstances, they implied that interference can be considered if there are other factors indicating a substantial change. The trial court in McDole, however, relied solely on Cynthia's resistance to visitation in finding a substantial change in circumstances. Thus, by reinstating the trial court judgment in McDole, the supreme court ignored these precedents.

B. In Finding that the Third Prerequisite Had Been Met, the Court Failed To Construe the Statute as a Whole.

In addition to finding a substantial change in circumstances, the court must find one of four prerequisites before granting a modification. The trial court found that the third prerequisite, detriment in the child's present environment that outweighs the harm of a custodial modification, had been met by finding that Cynthia's interference with visitation would be detrimental to Joey. In affirming the trial court's holding, the supreme court failed to construe the modification statute as a whole.

In determining that the third prerequisite had been met, the trial court found that Cynthia "is desirous of and will take actions that will limit the child's contact with the father to the extent that the environment for the child would be detrimental if the child were to remain with the mother." This finding seems to predict future behavior of Cynthia and thus recognizes a potential harm. The trial court did not explicitly find that her past actions caused any detriment to the child. Relying on potential harm rather than actual harm seems consistent with the supreme court ruling in Timmons. The supreme court, however, has never

107. See supra notes 31–33, 64–65 and accompanying text.
expressly held that potential harm is sufficient,\textsuperscript{110} and doing so would undercut the modification statute’s important policy of maximizing finality by discouraging modifications.\textsuperscript{111}

Even if it were proper to recognize potential harm under the modification statute, it was improper to consider interference with visitation absent any findings of contempt. Courts must construe statutes as a whole and read each provision in relation to the other provisions.\textsuperscript{112} Furthermore, courts must consider the entire sequence of statutes relating to the same subject matter.\textsuperscript{113} In 1989, the Legislature amended the modification statute to give courts guidance on when interference with visitation is proper grounds for modification.\textsuperscript{114} The third prerequisite, requiring a finding of detriment and a balancing of the harm of the change against the advantage of the change, must be read in conjunction with the fourth prerequisite, requiring two findings of contempt in three years for a modification.

The 1989 amendment strikes a balance between two competing policies. First, punishment for parental misconduct should not be visited on children,\textsuperscript{115} and second, repeatedly obstructing a child’s contact with the noncustodial parent is not in the best interests of the child.\textsuperscript{116} The 1989 amendment added the fourth prerequisite allowing interference with visitation as grounds for modification when a parent has been held in contempt of court at least twice in three years for noncompliance with the residential provisions. Thus, the amendment provides important guidance to trial courts so that they do not substitute punishment of a parent for the best interests of the child.

If Cynthia did in fact violate the residential provisions, the court should have used the contempt statute to coerce compliance\textsuperscript{117} before

\textsuperscript{110} See supra note 36 and accompanying text.
\textsuperscript{111} Heine, supra note 35.
\textsuperscript{113} In re Marriage of Little, 96 Wash. 2d 183, 189, 634 P.2d 498, 502 (1981).
\textsuperscript{114} Wash. Rev. Code § 26.09.260(1)(d) (1992). See supra notes 64–65 and accompanying text. The amendment specifies that a modification can be granted if the custodial parent has been held in contempt of court twice in three years for violating residential provisions.
\textsuperscript{115} See supra note 54–55 and accompanying text.
\textsuperscript{116} Lawrence A. Goldman, Tortious Interference with Visitation Rights: A New and Important Remedy for Non-Custodial Parents, 20 J. Marshall L. Rev. 307, 310 (1986); Watson, supra note 37, at 85.
\textsuperscript{117} Cynthia was never held in contempt. Supra note 86. Although she may have violated the residential provisions by preventing James from visiting Joey for the two weeks they were in Utah.
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modifying the residential schedule. The Legislature did not leave the courts without power to punish and coerce parents who interfere with visitation. As noted earlier, the Legislature in the same bill detailed how the courts should treat complaints of visitation interference. This is a sensible approach that instructs the courts to use the contempt proceedings outlined in RCW 26.09.160 to admonish the noncomplying parent and to warn that parent about the further consequences, for parent and child alike, of continued interference. Thus, the court is able to educate the parent and attempt to enforce compliance through less drastic means before resorting to modification, with its emotional consequences to the child. Furthermore, by demanding that lost time be made up and costs reimbursed, the statute attempts to place the noncustodial parent in the condition he or she was in before the interference occurred.

C. Removing the Child from the State Should Not Have Been Grounds for Modification.

In affirming the trial court’s order for modification, the supreme court relied in part on evidence that Cynthia left the state with Joey after denying that she was leaving. This was an inappropriate factor to consider in this case. Although the trial judge orally prohibited the parents from taking the child out of the state, the initial divorce decree contained no such prohibition. In In re Rankin, the supreme court recognized that absent an express prohibition in the decree, the custodial parent may remove the child from the state.

Furthermore, other cases have held that a judge’s oral opinion is not part of the decree or and did not immediately comply with the court order to provide a residential phone number, these incidents themselves do not constitute contempt. An order of contempt must be in writing to be in effect. State v. Judge Noe, 78 Wash. 2d 484, 488, 475 P.2d 787, 790 (1970). Thus, Cynthia cannot be considered to have been held in contempt as the modification statute requires.

118. Wash. Rev. Code § 26.09.160 (1992). See supra notes 60–63 and accompanying text. The courts can coerce the parent into compliance through imprisonment and fines. The statute also provides a remedy for the parent who has lost visiting time with the child by requiring that any lost time be made up through additional visitation and that the costs incurred from the misconduct be reimbursed by the noncomplying parent.

Accordingly, the supreme court should not have enforced the prohibition against removing Joey from the state.

If a trial court believes it necessary to prohibit parents from moving out of the state, it should do so explicitly in the written decree. A written decree ensures that parents have adequate notice of what is expected of them and that counsel have an accurate and rational basis for advising a client. Requiring parents to remember the oral opinions given at often emotional dissolution proceedings is unrealistic and unfair. Cynthia had her attorney examine the decree to determine whether she could legally move out of the state with the child. No case law obligates a party to follow an oral statement by the court rather than the decree. In fact, case law says precisely the opposite.121

Even if the court considered her action to be a violation of the decree, however, such a violation would not be an appropriate basis for a modification. Instead, as with any other violation, punishment should be sought through contempt proceedings rather than modification. Such treatment would accord with both the strong policy against using modification to punish a parent122 and Washington precedent. In In re Marriage of Murphy, the parents had joint custody with the child's residential time alternating weekly between the parents.123 In direct violation of the custody decree, the mother moved out of the state with the child without notifying the father of their whereabouts until several weeks later.124 The court of appeals found that the mother’s move with the child constituted a substantial change in circumstances and warranted a modification of the joint custody arrangement, which was unworkable given the increased distance between the parents’ homes.125 The court, however, did not change custody to punish the mother for removing the child from the state. To the contrary, the court granted the mother sole custody of the child even though she had left the state in violation of the

120. Marsh v. Commonwealth Land Title Ins. Co., 57 Wash. App. 610, 618, 789 P.2d 792, 796 (1990) (holding that the court’s oral opinion is not part of the judgment because it does not meet the requirements of CR 54(a) that it be reduced to writing and signed by the judge); In re Marriage of Pratt, 99 Wash. 2d 905, 910, 665 P.2d 400, 403 (1983) (“Courts speak through their judgments and decrees, not their oral statements or written opinions.”); Fosbre v. State, 70 Wash. 2d 578, 584-85, 424 P.2d 901, 904 (1967).
121. Marsh, 57 Wash. App. at 618, 789 P.2d at 796; Pratt, 99 Wash. 2d at 910, 665 P.2d at 403; Fosbre, 70 Wash. 2d at 584-85, 424 P.2d at 904.
122. See supra notes 118-19 and accompanying text.
124. Id.
125. Id. at 199, 737 P.2d at 1320-21.
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decree, because that result was in the child’s best interests. Thus, even in a case in which the court held that moving out of state with the child violated the decree and constituted a substantial change in circumstances, it maintained its policy of not letting the violation be a per se grounds for determining custody.

Furthermore, prior to the current modification and contempt statutes, courts adhered to the policy that modification should not be used to punish parents who moved in violation of the decree. The facts in Shaffer v. Shaffer, were similar to the facts in McDole, in that the mother was awarded custody of the child in the initial determination and later moved out of the state with the child to remarry. The father petitioned for a custody modification based on her violation of the decree. The court held that there was no basis for a modification, because a willful violation of a court decree cannot, per se, justify a change of custody. Since there was no evidence of any other harm to the child from living with his mother, the court held that it was in the best interests of the child to stay with his mother. Thus, even before the current statutes, the courts had held that violation of the decree by moving was not a sufficient basis for modification. The current statutes clearly reinforced the courts’ policy and were not intended to alter that policy.

While the supreme court in McDole seemed to have rested in part on Cynthia’s removal of the child from the state, it is important to note that the trial court did not find that she had violated the decree by moving. The trial court was concerned with her move to Utah only because it interfered with the father’s visitation by depriving him of contact with the child for ten days. As discussed above, however, evidence of interference with visitation that has not resulted in at least two contempt decrees in three years is an inappropriate basis for modification.

126. Id. 199, 737 P.2d at 1320-21.
128. Id.
129. Id. at 703, 379 P.2d at 997.
130. See supra notes 54–67 and accompanying text.
131. Findings, supra note 88 at 2. See supra notes 92–93 and accompanying text.
132. See supra notes 108–19 and accompanying text.
D. Parental Conflict Should Not Have Been Considered as a Basis for Modification.

In upholding the modification, the supreme court noted that the trial judge had orally warned the parents at the time of dissolution that continued parental conflict would be considered detrimental to the child’s best interests in any future custody proceedings.\textsuperscript{133} Thus, the court seemed to rely in part on the continued conflict between the parents and its harmful effects on the child.

Many experts agree that parental conflict is detrimental to children.\textsuperscript{134} It is difficult for children to maintain positive relationships with two parents who are in conflict with each other.\textsuperscript{135} Parental conflict creates loyalty conflicts within the child, causing the child to feel that he or she cannot be close to one parent without jeopardizing the relationship with the other parent.\textsuperscript{136} There is also evidence that continued conflict between parents creates greater difficulties in the child’s adjustment after the divorce.\textsuperscript{137}

Still, parental conflict should not have been considered in this case because it was known to the trial court at the time of the original custody decision. In a modification case, the court may consider only facts that have arisen since the initial custody decision and that were unknown to the trial court at the time of the initial decision.\textsuperscript{138} The fact that the trial judge was concerned about the parental conflict and warned about its effects in the initial proceeding indicates that he was aware of the ongoing conflict when making his initial custody determination.

Even if the parental conflict were a new fact in the case and were found to be detrimental to the child, it would not necessarily pass the balancing test. When conflict between parents is considered detrimental, it does not necessarily follow that living with the primary residential parent is detrimental, because the conflict is a result of the behavior of

\textsuperscript{133} In re Marriage of McDole, 122 Wash. 2d 604, 610–11, 859 P.2d 1239, 1243 (1993) (per curiam).


\textsuperscript{135} Goldstein, \textit{supra} note 38, at 38.

\textsuperscript{136} Berke, \textit{supra} note 134, at 505 n.301.

\textsuperscript{137} Wexler, \textit{supra} note 9, at 789–80.

\textsuperscript{138} See \textit{supra} notes 25–28 and accompanying text.
both parents. Changing the residential provisions will not necessarily alleviate the conflict and it will subject the child to a significant loss unless the two parents will have no contact and no relationship with one another. In fact, custody litigation may only serve to exacerbate the conflict between the parents, thus causing more harm to the child.

It is unclear what the trial court meant by “continued conflict.” The trial court may have used the term to refer to interference with the residential provisions. However, if continued conflict meant interference with visitation, the court should have used the contempt statute before resorting to modification.

E. The Supreme Court’s Failure To Explicitly Justify Its Decision Will Cloud Future Interpretations of the Modification Statute.

A major problem with the supreme court’s opinion is its lack of clarity regarding the basis for its decision. Although the court concluded there had been a substantial change in circumstances, it never stated what those circumstances were. The court summarized evidence relied on by the trial court, but did not expressly state which evidence, in its view or in the view of the trial court, showed a substantial change in circumstances. Similarly, the court did not specifically state why the child’s present environment was detrimental. The opinion cited evidence to support its decision, but did not make it clear how this evidence demonstrated that Joey’s present environment with Cynthia was detrimental.

The court also failed to consider how the trial court balanced the harm of the change in environment against the advantage of the change as required by the statute. The trial court did not analyze the child’s environment when living with his father and failed to examine the harm a three-year-old child was likely to suffer in being separated from his half-

140. Wexler, supra note 9, at 791.
141. See supra notes 108–19 and accompanying text.
142. “The (trial) court thus did not abuse its discretion when it held that there had been a substantial change in circumstances, that the child’s environment was detrimental to his mental health, and that a placement modification was necessary to serve the child’s best interests.” In re Marriage of McDole, 122 Wash. 2d 604, 611, 859 P.2d 1239, 1243 (1993) (per curiam).
143. See supra notes 102–03 and accompanying text.
144. “The [balancing test] is especially important because it compels attention to the real issue in modification cases. Any change in the child’s environment may have an adverse effect even if the non-custodial parent would better serve the child’s best interest.” Unif. Marriage and Divorce Act § 409, 9A U.L.A. 628, Commissioner’s Note (1987).
brother and his mother, who had been his primary caregiver since his birth. Although the trial court concluded that the advantage of the change outweighed the harm of the change, it did not make any findings about what those harms were, and the supreme court similarly disregarded this part of the analysis.

In order to uphold the statute's policy of maximizing finality in custody issues, the supreme court must give parents, their attorneys, and the trial courts clear guidance about what factors may be considered to meet each of the statutory requirements. If parents and their attorneys do not receive clear explanations from the court about how to satisfy each requirement in the statute, it will be hard for them to determine whether they can establish grounds for modification. Furthermore, the supreme court must provide guidance to trial courts in how to interpret the modification statute. If the court does not state how each requirement of the statute has been met or not met, trial courts will have insufficient guidance in how to apply the statutory requirements in future cases. This inability to predict outcomes of cases will result in more modification petitions and more litigation. Thus, lack of clarity undermines finality, the very purpose of the statute.

IV. CONCLUSION

By granting a modification in this case, the Washington Supreme Court has undermined the fundamental policy and language of the modification statute. The Washington Legislature enacted the modification statute to maximize finality in custody decisions by


146. Finality in custody decisions is further undermined by the lengthy appeals process in modification cases. Pursuant to a court order, Cynthia transferred Joey into James's custody on March 31, 1991 when Joey was three years old. By the time the supreme court decided this case in October 1993, Joey had been living with his father for over two years. Thus, at the time the supreme court was deciding this case, upholding the modification may have in fact provided stability for the child. To balance the harm of the change in environment against the advantage of the change becomes an analytical game not grounded in reality when the child has been in the custody of the nonmoving parent for a substantial period of time during the lengthy appeals process. This problem, however, should be corrected through legislative action and not judicial action. To ensure actual finality and stability in custody decisions, the legislature should provide a means to expedite the appeals process in modification cases.

147. See Watson, supra note 38, at 74 (arguing that judges should explicitly set down in the record why they reached a particular result).

148. See supra notes 10–11 and accompanying text.
discouraging modification and thereby providing stability for children. The supreme court failed to implement these important statutory goals in *McDole* by failing to read the modification statute as a whole. Furthermore, the court arguably relied on improper factors in upholding the modification decision. It is unclear after this case how much weight future trial courts in a modification proceeding will give or should give to such factors as interference with visitation, moving out of the state with the child, and conflict between the parents. In addition, the court also undermined the important policy of finality by failing to explicitly justify its decision. As a result, future courts will have little guidance and results will be unpredictable.