No. 89315-2

SUPREME COURT OF THE STATE OF WASHINGTON

STEFANIE JEAN BENNETT,

Appellant,

v.

JOHN MICHAEL XITCO,

Respondent.

ANSWER TO PETITION FOR REVIEW

EISENHOWER CARLSON, PLLC
By P. Craig Beetham, WSBA #20139
Chrystina R. Solum, WSBA #41108
Attorneys for Respondent

EISENHOWER CARLSON, PLLC
1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, Washington 98402
Telephone: (253) 572-4500
Facsimile No.: (253) 272-5732

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I. RESTATEMENT OF THE ISSUES

1. Division II's holding that substantial evidence supports the trial court's finding that there was a substantial change in circumstances and that the present environment was detrimental to the children is not contrary to any decision of the Court of Appeals or this Court.

2. This Court should decline to review Stefanie's argument that the trial court "punished" her by modifying the parenting plan where she failed to raise the argument before the trial court and did not raise the argument before Division II until her reply brief, and her delay has prejudiced John.

3. This Court should award John his attorney fees when Stefanie's intransigence and meritless arguments have served only to drive up the costs of this litigation.

II. RESTATEMENT OF THE CASE

A. Procedural History.

John Xitco ("John") and Stefanie Bennett ("Stefanie") were married in 1997. They have two children, CX and NX, who are presently ages 12 and 14, respectively. Their marriage was dissolved in 2002.

The 2002 Parenting Plan, entered at the time of dissolution, essentially provided that the parties make their own arrangements as to residential time with the children. Clerk's Papers (CP) at 1-8. In March of 2007, after Stefanie improperly relocated the children to Seattle without notice or agreement as required by the relocation statute, John petitioned

for modification of the 2002 Parenting Plan. 1 Verbatim Report of Proceedings (VRP) at 57-58; Ex 29.

On March 31, 2008, Stefanie and John agreed to a new Parenting Plan. CP at 9-19. John and Stefanie were joint custodians under the Parenting Plan, with John having custody of the children every other week from 10:00 A.M. Sunday until Wednesday morning, and Stefanie having custody every Wednesday after school until Sunday at 10:00 A.M. CP at 10-14. During the alternating week, John had the children from 10:00 A.M. Sunday until school began on Tuesday morning. CP at 10.

Under the Parenting Plan, major decision making shall be jointly made and the children shall attend St. Patrick's Catholic School. CP at 16. Further, disagreements over non-emergency health care decisions shall be referred to Dr. Larry Larson "whose recommendation for care will be followed [sic], unless there is a disagreement." CP at 16. If there is a disagreement, the party disagreeing with Dr. Larson bears the burden of persuading the Court not to follow Dr. Larson's recommendation. *Id.*

On July 20, 2010, after nearly one year of Stefanie's repeated non-compliance with the Parenting Plan, undermining John's parental authority, and creating an environment detrimental to the children, John filed a Petition for Modification. CP at 20-26. Under the Petition, John sought to become the children's custodial parent due to Stefanie's abusive use of conflict, which significantly harmed the children. *Id.* John also requested modification to the Parenting Plan's decision making provisions. *Id.* On September 2, 2010, the parties stipulated to a finding

of adequate cause. CP at 29-31. As part of the Court's Temporary Order, entered on that same date, the Court recognized the parties' agreement as to the appointment of Guardian Ad Litem, James Cathcart, ("GAL") and the requirement that the parties engage in co-parenting counseling with counselor Jamie Kautz. CP at 32-36.

On April 27, 2011, after a trial on the merits with ten witnesses including the GAL, and admission of over fifty exhibits, the Honorable James R. Orlando issued his letter decision. CP at 67-70. On May 20, 2011, the trial court entered, *inter alia*, a Final Parenting Plan and an Order Re: Modification/Adjustment of Custody Decree/Parenting Plan/Residential Schedule. CP at 73 – 84, 103-107.

In Judge Orlando's written decision and the findings contained in the Order Re: Modification, he specifically articulated the following findings with respect to Stefanie's parenting and actions relating to the children.

- Unilaterally prohibiting the children from attending part of their school curriculum, namely Thursday morning Mass.
- Taking them "out of the norm" by refusing to send them to Mass although required by curriculum and that they are the only students not attending weekly Mass;
- Excessive tardiness and absences at school and facilitating such tardiness and absences as her "silent" protest over the children attending a parochial school, which she originally agreed they would attend;
- Repetitive use of conflict with John including calling the police for a well-child check for no good reason (over the motorbike incident). This is likely to cause long-term harm to the children;
- Unilateral decision to bring NX to non-emergency doctor appointment for second opinion without notice to father;

- Passive-aggressive behavior has damaged the children and their relationship with their Father;
- Evidence offered by the guardian ad litem showing a troubled psychological profile from psychological evaluation; and
- Two unfounded domestic violence petitions.

CP at 67-70; 104-05. Judge Orlando made clear that he based his ruling upon evidence of circumstances arising after entry of the 2008 Parenting Plan. CP at 69 ("I find that the petitioner has met his burden . . . based upon facts that have risen since the 2008 modification"); CP at 104 ("Father has met his burden to show that based upon facts that have arisen since the 2008 modification. . . "). The trial court adjusted the May 20, 2011 Parenting Plan and entered its Parenting Plan (Final). CP at 157-168. Stefanie timely appealed. CP at 114-15.

The Court of Appeals affirmed in an unpublished opinion. *Bennett v. Xitco*, No. 42275-1-II, Slip Op. at 1 (Wash. Ct. App. July 2, 2013). The Court of Appeals also denied Stefanie's Motion for Reconsideration.

B. Substantive Facts.

At the time John filed the July 2010 Petition for Modification, CX and NX were 9 and 11 years of age, respectively, and entering the fourth and sixth grades at St. Patrick Catholic School in Tacoma. John sought the modification based on Stefanie's actions, which were harmful to NX and CX, and created a detrimental environment. 1 VRP at 64 – 66. As described in greater detail below, Stefanie's actions included, but were not limited to, ignoring the plain language of the Parenting Plan and making unilateral decisions as to the children's non-emergency health care and

education, undermining John's parenting and his relationship with the children, and filing false domestic violence petitions against him.

Stefanie's Violation of the Parenting Plan Relating to Joint-Educational Decisions.

As its name suggests, St. Patrick Catholic School is a Catholic elementary school. St. Patrick's mission is to "nurture in its students an abiding Catholic faith while pursuing academic excellence and modeling honesty, respect, and service as dynamic members of our world community." 2 VRP at 192 – 193; Exs. 13, 45. As a Catholic school, all members of St. Patrick School attend weekly Mass at St. Patrick Church as a school community. Ex. 45. As stated in the 2010-2011 Student Handbook, attendance at weekly Mass is part of the school curriculum. 2 VRP at 194-195; Ex. 45. In fact, the Student Handbook addresses student behavior in church, and children through the fifth grade receive a grade on their report cards addressing the extent to which a student "displays respectful Mass and prayer service behavior." Ex. 15. Saint Patrick Principal, Mrs. Francis Jordan testified that Mass attendance is part of the school's curriculum and discussed several benefits to the children's weekly attendance at Mass, including participating in praise and prayer as a community, participating in the presentation of the Mass including public speaking, re flection on the readings, and an understanding and tolerance of religion. 2 VRP at 195-196.

St. Patrick's school hours are 8:30 A.M. to 3:00 P.M. Ex. 13. School policy provides that students must be in their seats every day at

8:30 A.M., or they will be marked tardy. 2 VRP at 198. Students who have over fifteen absences can be retained in their grade. 2 VRP at 198-99. Mrs. Jordan testified as to the importance of school attendance, including the fact that children who are not in school miss instruction, which can be difficult to "catch up" on. 2 VRP at 199. Mrs. Jordan also opined that students with fewer absences and tardies generally perform better in school. 2 VRP at 229.

The evidence at trial overwhelmingly supports that Stefanie was unable or refused to meet school requirements by disallowing the children's full participation in school curriculum. Stefanie did so by intentionally and unilaterally refusing to allow the children to attend Thursday school Mass and by routinely delivering them to school late or allowing excessive absences from school.

In April of 2010, despite the Parenting Plan's provision for joint decision making as to educational decisions, Stefanie unilaterally decided not to send the children to school on Thursday mornings for Mass. Ex. 17. Stefanie informed the school of her decision in writing, without notice to John, and delivered the children to school every Thursday at 10:00 A.M., after Mass concluded. 3 VRP at 459. Stefanie never discussed her decision with John or invoked the Parenting Plan's dispute resolution provision. 4 VRP at 545-46. Mrs. Jordan testified that no other parent had similarly requested that their child be pulled or prevented from attending weekly Mass. 2 VRP at 197, 207. John testified that NX's peers teased him for not attending Mass. 1 VRP at 135, 137; Ex. 29.

NX's 2009-2010 Fifth Grade Report Card reflects a grade of "N" for "Displays respectful Mass and prayer service behavior," meaning that he is not meeting grade-level expectations. Ex. 15. Although the children performed fairly well in school during the 2010-2011 school year, Mrs. Jordan testified as to the importance of attending school, being on time and attending Mass with the school community. 2 VRP at 195-96, 199-200. Being on-time and present at school, including Mass, instills in the children important values, and Stefanie's failure to meet those expectations harmed the children. The children were the only two left out of this school "event," NX's peers teased him, and they both missed out on moral and ethical lessons taught at Mass. 1 VRP at 135-137. The GAL opined that Stefanie refused to allow the children to attend Mass more out of a "competition rather than one that was based on the interests of the children." 2 VRP at 240. When the GAL asked Stefanie about her reasons for refusing Mass attendance, he "got the sense that she had cancelled Mass attendance [because] she could." *Id.*

With respect to school attendance, since the entry of the 2008 Parenting Plan, Stefanie routinely failed to deliver the children to school on time or at all, resulting in unexcused tardies and absences. Exs. 15, 16, 19, 30, 32, 33. The GAL's report calculates that during the 2009-2010 and 2010-2011 school years, John delivered the children to school 150 days. Of those 150 days, NX was absent for all or part of the day on only 5 occasions, and CX was absent for all or part of the days only 4 times. Ex. 30. During that same period, Stefanie delivered the children to school

102 days. While in Stefanie's custody, NX and CX were absent all or part of the day 38 and 31 times, respectively. Ex. 30. These statistics reflect that the children were late or absent only .033% (NX) and .026% (CX) of the time while in John's care and 37% (NX) and 30% (CX) of the time while in Stefanie's care. 1 VRP at 74-75; Ex. 30.

Curiously, although Stefanie claims that NX missed school due to his alleged poor health, school records show that CX was also absent nearly all of the days that NX was absent and in Stefanie's care. Ex. 30.

It is notable that in the fall of 2009, Stefanie suffered from a debilitating condition known as dysautonomia, or a breakdown of the autonomic nervous system. Ex. 30. Stefanie's illness required John to assume all parenting functions for the children, including full time care for approximately eight weeks, from late August/early September 2009 until mid-October 2009. 1 VRP at 97.

When the children lived with John during Stefanie's illness, John's mother traveled from Arizona to live with them and provide additional support and assistance. 3 VRP at 327-28, 330-31. Principal Jordan testified that during the period while exclusively in John's care, the children had very few absences or tardies. 2 VRP at 202; Ex. 30. Further, the GAL's interview with Mrs. Jordan reflects that during Stefanie's illness when John had sole custody, the children were "wonderful, healthy, on time and a real pleasure to have [at school]." Ex. 30; *see also* 1 VRP at 112. When Stefanie's health improved and the children returned to their

"regular" schedule under the Parenting Plan, the tardiness and absences commenced once again. 1 VRP at 97; Ex. 19.

Stefanie's Violation of the Parenting Plan as Related to Non-Emergency Medical Care.

Soon after entry of the 2002 Decree of Dissolution, the children were referred to counselor Joel Hellencamp to "assist them in adapting to and dealing with" the divorce. John and Stefanie agreed to the counseling. 1 VRP at 64. After a period of time, the children stopped attending counseling with Mr. Hellencamp. *Id.* In 2009, after Stefanie became ill, they returned to Mr. Hellencamp for additional counseling. 1 VRP at 88, 114. The children were doing very well in counseling with Mr. Hellencamp, yet once Stefanie's physical condition improved, she unilaterally cancelled one of CX's appointments with Mr. Hellencamp without obtaining John's agreement, or seeking mediation as required by the Parenting Plan. 1 VRP at 88-89; CP at 9-19. Stefanie next proceeded to take CX to a counselor of Stefanie's choice, again neither obtaining John's consent nor seeking mediation or court involvement as required by the Parenting Plan. 1 VRP at 65-66.

Since the 2008 Parenting Plan, Stefanie held to the belief that NX suffered from significant medical issues. During the 2009-2010 school year, Stefanie provided St. Pat's with a list of potential "symptoms to look for" in NX. Ex. 18. A sampling of symptoms included nausea, headaches, chest pains, light and noise sensitivity, vomiting, abdominal

pain, exercise intolerance, eye pain, generalized weakness, difficulty concentrating, lightheadedness and blurry vision. Ex. 18.

According to school officials, while in John's care, NX neither comes to school ill nor shows any physical signs or physical symptoms of discomfort. Ex. 30. Conversely, NX frequently complained of illness when with Stefanie. 1 VRP at 83, 87-88. In fact, John's mother, Mary Lou Xitco, testified that during her six weeks with the children, she did not observe any "real" medical problems with NX, although he "gives a lot of complaints." 2 VRP at 333. In fact, when Ms. Xitco informed NX that he would have to lay in bed without watching television if he left school early due to illness, NX never called in sick again while Mrs. Xitco was living with John and the children. *Id.*

The GAL also expressed concern as to Stefanie's tendency to project her illness upon NX. Ex. 29. Mr. Cathcart noted that "there is enough input from the children's therapists, from Dr. Larson, and from the St. Pat's staff to have a real concern over the possibility that Stefanie has, as Dr. Larson put it 'promoted' NX's physical symptoms and has enabled NX and to a slightly lesser extend CX to manipulate her." Ex. 30. When Mr. Cathcart asked NX about his physical condition, NX stated that in 2009 and 2010 he had problems with dizziness and feeling like he was going to pass out. *Id.* The GAL noted that these symptoms of ill health were markedly similar to Stefanie's symptoms. Ex. 29.

In 2009, once again, Stefanie violated the plain and unambiguous provision of the Parenting Plan requiring joint decision making for non-

emergency medical care by unilaterally taking NX to a naturopath in Seattle. 1 VRP at 85-89; CP 16-17. At trial, Stefanie acknowledged that she did not comply with the Parenting Plan and took this action because she became dissatisfied with Dr. Larson's opinions. 1 VRP at 85-86, 114. Stefanie also admitted that she could have cared less that her actions were in clear violation of the Parenting Plan. 3 VRP at 472; 4 VRP at 549-51, 557. Stefanie also subjected both NX and CX to intensive medical testing, which Dr. Larson opined placed significant stress upon the children. 2 VRP at 253-55; Exs, 20-21, 30.

Stefanie's Actions Significantly Undermined John's Parenting.

In the fall of 2010, just days after entry of the stipulated order finding adequate cause, John and several friends and family members celebrated NX's birthday. 1 VRP at 105-06. John instructed NX and his friend not to ride their motorbikes up a private driveway for safety reasons, but NX did so anyway and lied about his actions. 1 VRP at 105-10. John disciplined NX for disobeying him by taking away his motorbike for the remainder of the week end. 1 VRP at 107. NX ran away from John and called Stefanie to complain about John's actions. Instead of checking with John as to the turn of events, Stefanie immediately called the Pierce County Sheriff to report John's actions and request a well-child check, complaining to the Sheriff's office that NX was in danger. 1 VRP at 108-10. The Pierce County Sherriff arrived at the beach house to investigate Stefanie's complaint. 1 VRP at 109. After John relayed the

events to the Pierce County deputy, the deputy departed the scene, finding that NX was in absolutely no danger. 1 VRP at 109.

Further, Stefanie created conflict by setting different rules at her house, which confused the children and undermined John's ability to provide consistency in parenting. 3 VRP at 489 – 90; 1 VRP at 161 – 63. Stefanie also undermined John's visitation time by attempting to pick up CX after school from St. Patrick's during John's visitation. 1 VRP at 182-83; 2 VRP at 350-52. Additionally, Stefanie also involved NX in the litigation by allowing him to read court documents. 1 VRP at 105.

Stefanie's False Domestic Violence Petitions against John.

After entry of the 2008 Parenting Plan, Stefanie filed two false domestic violence petitions against John, in 2009 and 2010, respectively. 1 VRP at 98-100. Both of the petitions were dismissed. 1 VRP at 98-99, 103. Stefanie never served John with the first petition, and the second petition was dismissed after a court hearing on the merits. 1 VRP at 98-103. Ironically, the second petition arose from an incident where Stefanie yelled at John (in CX's presence) and proceed to run at him and punch him in the abdomen. 1 VRP at 100-103. Stefanie admitted that she hit John in the stomach with force sufficient to hurt her hand. 3 VRP at 496-97. Stefanie admitted that John had never hit her. 4 VRP at 567.

With regard to John's alleged "violence," after extensive psychological evaluation and testing with Dr. Daniel Rybicki prior to trial, Dr. Rybicki did not recommend any treatment whatsoever with respect to any anger management or domestic violence issues. 1 VRP at 56-57.

The Guardian Ad Litem Preliminary and Supplemental Reports Evidence Concern regarding Stefanie's Parenting.

The GAL's preliminary and final reports, admitted into evidence at trial, set forth a variety of findings supporting that Stefanie's actions amounted to an abusive use of conflict as she effectively engaged in passive/aggressive behavior using the children to undermine and deteriorate John's relationship with the children. The GAL reports reflect a variety of concerns with respect to Stefanie's parenting. These concerns include Stefanie's (1) psychological profile, (2) projection of illness onto NX, (3) actions in influencing the children to adopt her agenda, and (4) her lack of credibility. Exs. 20 – 21, 29 – 30; CP at 32 – 33; 1 VRP at 82.

At trial, the GAL recommended two options including designating John as the custodial parent with the children living with him from Sunday evening until Friday morning. His recommendation provided Stefanie residential time with the children from Friday after school until Sunday evening all but one weekend per month wherein they would be with John. Ex. 30. This recommendation reflected, in part, the GAL's concern about the children arriving at school and having a stable educational platform. 2 VRP at 265. The GAL's second recommendation was a one week on, one week off joint custody arrangement. *Id.*

The trial court listened to the testimony of the witnesses, observed their demeanor, made credibility determinations, and weighed all of the evidence. After doing so, Judge Orlando entered findings that support the elements necessary for modification. There was substantial evidence to

support these findings and the trial court, in exercising its discretion, properly granted John's Petition for Modification.

C. Court of Appeals Decision.

The Division II Court of Appeals affirmed, holding that the trial court did not abuse its discretion in finding a present detriment to the children under the 2008 Parenting Plan. The Court held that substantial evidence supported the trial court's finding that Stefanie's unilateral withdrawal of the children from mass caused a detriment because "Xitco testified that the children were teased. Principal Jordan testified that mass attendance was an important part of the curriculum and had important benefits for students. She testified that no other parents had unilaterally withdrawn their children from mass as Bennett had done. The trial court found that failure to attend mass made NX and CX 'out of the norm,' which would lead to negative consequences." *Bennett*, Slip Op. at 13.

Division II also held that the children's absences remained a problem at the time of trial. "Bennett argues that the attendance issues were resolved at the time of trial because NX's health had improved. But there was strong evidence that NX's health issues were not the true cause of the attendance problems. And Bennett could not explain why CX's absences generally overlapped with NX's." *Bennett*, Slip Op. at 13. The "evidence showed that Bennett's dislike of St. Patrick's existed at the time of trial. Thus there was evidence that the true reason for the children's attendance problems was not resolved." *Bennett*, Slip Op. at 13 – 14.

III. ARGUMENT

A. Standard of Review.

While there is a strong presumption in favor of custodial continuity, trial courts have broad discretion in matters dealing with the welfare of children. *In re Marriage of McDole*, 122 Wn.2d 604, 859 P.2d 1239 (1993). A trial court's decision as to custodial modification will not be reversed on appeal absent an abuse of discretion, that is, if its decision is untenable or manifestly unreasonable. *Marriage of McDole,* 122 Wn.2d at 610. A trial court's findings will be upheld if they are supported by substantial evidence. *Guarino v. Interactive Objects, Inc.,* 122 Wn. App. 95, 108, 86 P.3d 1175 (2004), *rev. denied*, 153 Wn.2d 1024 (2005).

A trial court may modify a parenting plan if a substantial change has occurred in the circumstances of the child or the custodial parent and modification is necessary to serve the best interests of the child. RCW 26.09.260(1). Modification is permissible when there is sufficient evidence to support a finding that, relevantly to this appeal the present environment is detrimental to the child's well-being. RCW 26.09.260.

The Court of Appeals will not substitute its judgment for that of the trial court, which takes testimony and observes and evaluates the demeanor and credibility of witnesses. *Marriage of McDole*, 122 Wn.2d at 610-11. Finally, a trial court's decision will be sustained if correct upon any ground set forth in the pleadings and supported by the evidence. *McDaniel v. McDaniel*, 14 Wn. App. 194, 539 P.2d 699 (1975).

B. The Court of Appeals' opinion is not in direct conflict with another decision of the court of appeals and Stefanie's petition does not involve an issue of substantial public interest.

Stefanie argues incorrectly that Division II's opinion conflicts with another Court of Appeals decision and involves an interest of substantial public interest because the Court supposedly did not find detriment at the time of trial. *Petition* at 3. However, Division II specifically held that detriment existed at the time of trial. "But here, even focusing on the children's environment at the time of trial, which is a more restrictive standard than required, substantial evidence supported the trial court's findings regarding their removal from mass and their attendance at school." *Bennett*, Slip Op. at 12. "The trial court properly found that the attendance problems were still part of the children's environment at the time of trial." *Bennett*, Slip Op. at 14.

Contrary to Stefanie's repeated arguments, *Ambrose*[1] does not require a court to consider the facts surrounding the children's environment *only* at the time of trial. Rather, the trial court must consider all relevant time periods, including that contemporaneous to trial. In *Ambrose*, the trial court refused to consider facts contemporaneous to trial and instead considered only those facts that occurred shortly before the father filed a modification petition. *Ambrose*, 67 Wn. App. at 108. The Court held that although "evidence regarding [the mother's] situation at or about the time the children were removed from her residence was certainly relevant on the question of the children's present environment, evidence

[1] *In re Marriage of Ambrose*, 67 Wn. App. 103, 834 P.2d 101 (1992).

regarding her circumstances at or about the time of trial was probative on that issue." *Ambrose*, 67 Wn. App. at 108.

This is the exact standard that the trial court and Division II applied in determining detriment to the children's present environment. As Division II noted, Stefanie did not believe that the children missing Thursday Mass was a problem. Additionally, she remained hostile to the children's attendance at St. Patrick's at the time of trial and this hostility, not NX's health, was the cause of their excessive absences and tardies. In fact, in its review, Division II explicitly limited its analysis to only those facts contemporaneous to trial, even though that is a "more restrictive standard than required." *Bennett*, Slip Op. at 12.

The trial court did not abuse its discretion in finding a present detriment to the children's environment and Division II's decision is not contrary to other Court of Appeals decisions or decisions of this Court.[2]

C. Stefanie cannot argue for the first time on appeal or in reply that the trial court "punished" her by modifying the Parenting Plan.

Case law is clear that new arguments may not be raised for the first time in a reply brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d

[2] Stefanie does not assign error to the Court of Appeals' holding that the modification addressed the change in circumstances or that the detrimental environment was sufficient to support modification. As such, Stefanie has waived these issues. This Court reviews on appeal "only the questions raised in the petition and in the answer to the petition, unless the court orders otherwise." *Staats v. Brown*, 139 Wn.2d 757, 785, 991 P.2d 615 (2000); *See also* ff(b). In failing to raise the issue in her Petition for Review, Stefanie waived the issue before this Court. *See Young v. Key Pharm., Inc.*, 130 Wn.2d 160, 166 n. 3, 922 P.2d 59 (1996) (refusing to consider an issue where plaintiff failed to raise it in his answer to the petition for review).

801, 809, 828 P.2d 549 (1992). Additionally, Stefanie failed to raise the issue at the trial court level. A party may not raise non-constitutional errors for the first time on appeal. RAP 2.5(a). Despite these well-settled rules, Stefanie argued in her reply brief for the first time that the trial court modified the parenting plan as a punishment for her behavior. Although Stefanie now argues that she raised the issue in her Appellate Brief because she cited to *Marriage of McDole* in her Appellate Brief, this is incorrect. *Petition for Review* at 6 n.1. Each of Stefanie's citations to *McDole* stood for another proposition than the fact that she was supposedly punished for her conduct. Stefanie cited *McDole* in her opening brief in two places for the claim that there is a strong presumption in favor of custodial continuity and against modification. *Brief of App.* at 15, 21. Stefanie cited *McDole* once more, but only for the idea that a parent's fitness is determined based on the child's total environment with the custodial parent. *Brief of App.* at 25. At no point in her opening brief did Stefanie raise even the specter that the trial court had allegedly modified the parenting plan as a punishment for Stefanie's conduct.

Additionally, RAP 1.2 does not support a consideration of this issue at this point. This Court has interpreted RAP 1.2 to mean that courts can depart from the rules of appellate procedure if there is "no discernible or practical prejudice flowing to respondent, no unfairness to the trial judge, and no inconvenience to [the] court." *Millikan v. Bd. of Dir. of Everett Sch. Dist. No. 2*, 92 Wn.2d 213, 216, 595 P.2d 533 (1979).

Here there was considerable prejudice to John, the trial court, and the appellate court by Stefanie's failure to timely raise this issue. Stefanie never raised this issue before the trial court, denying the court any chance to explain to Stefanie that she was not being punished for her conduct. John was prejudiced by her failure to raise the issue at the trial court level because he was unable to develop a record on the claim. John and the appellate court were further prejudiced by Stefanie's failure to raise the issue in her opening brief. John was denied the opportunity to provide argument demonstrating the fallacy of Stefanie's claim and the appellate court was denied full briefing on the issue. Stefanie's failure to raise the issue of her alleged punishment until her reply brief prejudiced the trial court, appellate court, and John. There is no basis for finding that RAP 1.2 supports consideration of the issue.

D. John is entitled to attorney fees and costs.

Stephanie repeatedly advances arguments that are without merit, frivolous, and designed only to drive up costs. This Court should award John his attorney fees associated with this appeal.

A court may award attorney fees to a prevailing party for having to defend against frivolous claims or arguments. RCW 4.84.185. An action or claim is frivolous when it cannot be supported by rational argument in fact or law. *Goldmark v. McKenna*, 172 Wn.2d 568, 582, 259 P.3d 1095 (2011). The court may award attorney fees on appeal in a dissolution proceeding "after considering the financial resources of both parties."

RCW 26.09.140. Intransigence is a basis for attorney fees in dissolution proceedings. *In re Marriage of Crosetto*, 82 Wn. App. 545, 564, 918 P.2d 954 (1996). "Intransigence" may be shown by "litigious behavior, bringing excessive motions, or discovery abuses." *In re Marriage of Wallace*, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002). "Intransigence" also describes parties motivated by their desire to delay proceedings or to run up costs. *Marriage of Wallace*, 111 Wn. App. at 710.

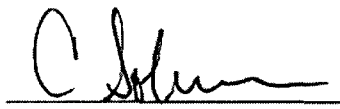
Stefanie's arguments are advanced without basis in law or fact and are simply a further attempt to drive up costs and delay the resolution of this matter. NX and CX deserve resolution of this dispute, and Stefanie's repeated attempts to advance meritless arguments deprive them of that finality and security.

IV. CONCLUSION

For the foregoing reasons, John requests that this Court deny review and affirm the trial court's order.

RESPECTFULLY SUBMITTED this 1st day of October, 2013.

EISENHOWER CARLSON, PLLC

By: 

P. Craig Beetham, WSBA # 20139
Chrystina R. Solum, WSBA # 41108
Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

Gregory D. Esau Ellis, Li & McKinstry, PLLC Market Place Tower 2025 First Avenue, Penthouse A Seattle, WA 98121-3125 gesau@elmlaw.com	☐ U.S. First Class Mail, postage prepaid ☐ Via Legal Messenger ☐ Overnight Courier ☑ Electronically via email ☐ Facsimile

DATED this 1st day of October 2013 at Tacoma, Washington.

Cindy C. Rochelle, Legal Assistant

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To: Rochelle, Cindy
Cc: gesau@elmlaw.com; Beetham, P. Craig; Solum, Chrystina R.; Penrod, Christa R
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Rec'd 10-1-13

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From: Rochelle, Cindy [mailto:CRochelle@eisenhowerlaw.com]
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Attached for filing: Answer to Petition for Review

Bennett v. Xitco - No. 89315-2

P. Craig Beetham, WSBA #20139
(253) 572-4500
cbeetham@eisenhowerlaw.com

Chrystina Solum, WSBA #41108
(253) 572-4500
csolum@eisenhowerlaw.com

Thank you,

Cindy C. Rochelle, Legal Assistant to Robert G. Casey, Garry G. Fujita and Chrystina R. Solum

1200 Wells Fargo Plaza | 1201 Pacific Avenue | Tacoma, WA 98402
phone 253.572.4500 | fax 253.272.5732 | www.eisenhowerlaw.com

avoiding any penalties that may be imposed on you or any other person or entity under the Internal Revenue Code or (ii) promoting or marketing to another party any transaction or matter addressed herein.