NO. 89315-2
COURT OF APPEALS NO. 42275-1-II

SUPREME COURT OF THE STATE OF WASHINGTON

STEFANIE JEAN BENNETT
Appellant,
v.
JOHN MICHAEL XITCO
Respondent.

PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF APPELLANT

Stefanie Bennett, Appellant below, asks this Court to accept review of the decision designated in Part B of this motion.

B. DECISION OF COURT OF APPEALS

Appellant seeks review of the decision of Court of Appeals affirming the trial court's decision in changing custody of her minor children.

A copy of the Court of Appeals' Decision is in the Appendix at A. A copy of the Court's Decision Denying Ms. Bennett's Motion for Reconsideration is in the Appendix at B. A copy of the briefs filed in Appellant's action are in the Appendix at C, D and E.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err when it found substantial evidence of detriment at the time of trial?

2. Did the Court of Appeals err by failing to consider the rule of law that a change in custody of a child shall not be used to punish the bad behavior of a parent.

D. STATEMENT OF THE CASE

On April 27, 2011, after a trial on the merits, the Honorable James Orlando in Pierce County Superior Court issued his letter decision. On May 20, 2011 Judge Orlando entered an Order Re: Modification

/Adjustment of Custody Decree/Parenting Plan/Residential Schedule and Final Parenting Plan changing the primary residence of the parties' two children from Ms. Bennett to Mr. Xitco. On June 17, 2011 the trial court entered its Order on Reconsideration and entered its Final Parenting Plan on June 17, 2011. Ms. Bennett filed a timely notice of appeal in Division II of the Court of Appeals on June 17, 2011. The Court of Appeals affirmed the trial court in an unpublished decision dated July 2, 2013. Ms. Bennett filed a motion for reconsideration which the Court of Appeals denied on July 30, 2013.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW SHOULD BE ACCEPTED UNDER RAP 13.4(b)(2) and (4) BECAUSE THE COURT OF APPEALS COMMITTED AN ERROR OF LAW BY REFUSING TO ANALYZW DETRIENT AT THE TIME OF TRIAL UNDER GEORGE V. HELLAR AND AMBROSE V. AMBROSE, AND APPLIED THE WRONG STANDARD ON REVIEW BECAUSE IT DID NOT COMPLY WITH THE STANDARD SET FORTH IN THE MODIFICATION STATUTE RCW 26.09.260 (2).

Interpreting the meaning of a statute is a question of law. The trial court's holding on a question of law is reviewed *de novo*. *Ambrose v. Ambrose*, 67 Wn. App. 103 (1992). The Court of Appeals incorrectly analyzed the record on review and did not follow long-standing Washington Appellate precedent. and committed an error of law. The

controlling authority that is the basis for Ms. Bennett's Petition for review is two court of appeals decisions— *George v. Hellar*, 62 Wn. App. 378, 386, 814 P.2d 238 (1991) and *Ambrose v. Ambrose*, 67 Wn. App. 103, 108 (1992). Both cases reasoned that detriment is determined at the time of trial. The following excerpt from Appellant's Opening brief explains succinctly the standard that must be applied under RCW 26.09.260 (2) when determining detriment:

> Under the modification statute the children's *present* environment is the standard set forth in the statute. Present environment within the meaning of 26.09.260 (2) means "the environment that the residential parent or custodian is **currently providing** or is capable of providing for the child..." *George v. Hellar*, 62 Wn. App. 378, 386, 814 P.2d 238 (1991); *Ambrose v. Ambrose*, 67 Wn. App. 103, 108 (1992). In *Ambrose*, at 108-109 the court notes that in those cases where there is a lengthy time involved the need to look at the "*current circumstances* of both parent is compelling." (emphasis added). Here the modification was filed in July 2010 and trial not held until April 20, 2011.

Opening Brief of Appellant at page 19.

The Court of Appeals and the trial court both relied on John Xitco and part of GAL Ron Cathcart's testimony to find that detriment had been established. It found that detriment did not have to exist at the time of trial but instead that all facts and circumstances (of the past) should be considered since the parenting plan was instituted. That is at odds with court of appeal precedent in *Hellar* and *Ambrose*, *supra* , which rely strongly on

the present environment not the past—which is relevant but not as persuasive as the present environment. Indeed, the *Hellar* Court held that if the mother's **present** environment was not detrimental the child was required to be returned to her as the primary residence. *Hellar,* supra, ("[upon remand] the [trial] court must focus solely on the suitability of Kimberly's present environment and **must return Danielle to Kimberly unless the court makes finding that Kimberly is not a fit parent consistent with RCW 26.09.") (emphasis added)**

The Court of Appeals and the trial court relied on unsupported facts to find detriment at the time of trial and abused its discretion. *In re Marriage of Zigler*,154 Wn. App. 803, 808, 226 P.3d 202 (2010). Substantial evidence did not exist to support a finding of detriment at the time of trial. Both the GAL and the Principal Jordon testified that there was no detriment for the 2010-2011 school year and trial was in April 2011. A summary of their testimony is as follows:

> For school year 2010 – 2011 the children's absences and tardies were within acceptable range and Ms. Jordan testified that upon review of attendance records, with the exception of the Thursday tardies, the absences and tardies for the children seemed to be distributed between both John and Stefanie. (RP 210 – 217; Exs. 56, 57) For the 2010 – 2011 school year the children's attendance was within **acceptable range** – less than five absences per trimester. (RP 214) The GAL was receiving attendance reports and noted that **there was no significant problem with**

> **attendance since the start of the year and the kids were reliably attending school.** (RP 275)
>
> Whatever the issues with the children's school attendance, ***there was no evidence of any academic, social or emotional harm.*** Ms. Jordan testified that both children were doing well in all documented respects in school and that nothing in their report cards gave her any cause for concern. (RP 222 – 225; 32) Children are graded on a scale of 1 – 5 with 5 the highest. On Chloe's most recent report card she received *23 5s and five 4s,* noted by the principal as "doing pretty good." (RP 230).

Brief of Appellant at 6.

There was not substantial evidence at trial that rose to the level of overcoming the strong presumption of custodial continuity as stated in *In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993). There are no cases where courts have found present environment detrimental that are even close to the present environment that Ms. Bennett provided—to whit, taking the kids out of Mass and having tardies and absences that were resolved by trial.

Under RAP 13.4 (b)(4), this Court should accept review to clarify the standard of present environment.

2. REVIEW SHOULD BE ACCEPTED UNDER RAP 1.2 (a) and (c), RAP 18.8 (a), and RAP 13.4(b)(1) BECAUSE THE APPELLATE COURT REFUSED TO CONSIDER JOHNSON V. JOHNSON, 72 Wn.2d 415. 419 (1967) AND ITS PROGENY BY ERRONEOUSLY STATING THAT THE RULE OF LAW FOR THIS DECISION WAS CITED FOR THE FIRST TIME IN THE REPLY BRIEF, WHEN IN FACT THE RULE OF LAW WAS CITED IN THE APPELLANT'S OPENING BRIEF IN *IN RE McDOLE*, 122 Wn.2d 604, 859 P.2d 1239 (1993)[1]. THIS LONG STANDING PRECEDENT WAS IGNORED WHICH, IF CONSIDERED, WARRANTED REVERSAL. AS A CONSEQUENCE, THE ENDS OF JUSTICE WERE NOT SERVED AND THE COURT OF APPEALS COMMITTED AN ERROR OF LAW.

The Court of Appeals ignored long standing precedent of this Court that "the established rule in this state; that punishment of a parent for contempt may not be visited upon the child in custody cases; **and that the custody of the child is not to be used as a reward or punishment for the conduct of the parents.** *Johnson v. Johnson*, 72 Wn.2d 415, 419 (1967), citing *Shaffer v. Shaffer*, 61 Wn.2d 699, 379 P.2d 995 (1963); *Malfait v. Malfait,* 54 Wn. (2d) 413, 341 P. (2d) 154 (1959); *Annest v. Annest,* 49 Wn. (2d) 62, 298 P. (2d) 483 (1956); *Norman v. Norman,* 27 Wn. (2d) 25, 176 P. (2d) 349 (1947).

In *Malfait*, a father had his visitation taken away because he had a bad attitude on the witness stand at trial. The Supreme Court held "In view

[1] Appellant's Opening Brief at p. 15, 21, and 25.

of these facts, the modification order appears to be more in the nature of a **penalty for appellant's behavior** on the witness stand than a change in visitation rights made in the best interests of the minor child." *Malfait* at 417. The *Malfait* Court also relied on the court's finding that the father was being punished for using the child as a pawn to harass the mother. Id. at 415. "The [trial] court further stated that from the attitude of the defendant on the stand he was arrogant and selfish and that with his attitude, his visiting with said child would be detrimental to her welfare." The *Malfait* Court reversed the order of the trial court holding that it is error to punish a parent by taking away visitation and custody for perceived bad behavior such as this. Id. At 418-419.

Here, both the trial court and the Court of Appeals made it clear that they were punishing Ms. Bennett for not sending the children to Mass and other "bad conduct" on Stefanie's part including violating joint decision making by unilaterally taking Nico (her son) to a doctor, and bringing the children to school late because the trial court believed that this was passive aggressive behavior toward her ex-husband. CP at 104-105. The trial court also found that "Ms. Bennett knows how strongly Mr. Xitco feels about school attendance and she has deliberately allowed this to become a weekly

source of contention, in large part to get back at him for his perceived slights towards her." CP 104-105.

The Court of Appeals agreed:

> [S]ubstantial evidence supports the trial court's finding that the true cause of the attendance problems was Bennett's "silent protest" over the children attending St. Patrick's. CP at 4. The evidence showed that Bennett's dislike of St. Patrick's existed at the time of trial.

Court of Appeals decision at 13-14

The trial court and Court of Appeals decision is nearly identical to the error in *Malfait* because the courts were punishing Stefanie for her behavior which was perceived as slighting Mr. Xitco in a passive aggressive manner through her decision to take the children out of Mass.

The Court of Appeals refused to analyze the argument that the trial court was punishing Ms. Bennett for her perceived bad conduct because it ruled that she raised this issue for the first time in her Reply brief. COA opinion at 22. To the contrary, Ms. Bennett cited the authority for this proposition in her opening brief at pp. 15, 21, and 25 by citing to *In re*

Marriage of McDole, 122 Wn.2d 604, 859 P.2d 1239 (1993)[2]. Ms. Bennett did not flesh out the argument until the Reply brief but she did cite the authority for it in the Opening Brief. Ms. Bennett was not inserting a new issue on Reply, she was merely fleshing it out in the Reply brief. The Court of Appeals refused to consider long standing Supreme Court precedent and failing to at least request supplemental briefing on the issue did not serve the ends of justice (RAP 18.8 (a) and conflicted with long standing Supreme Court precedent given that the Court of Appeals agreed with the trial court that Ms. Bennett was being passive aggressive and taking the children out of Mass as a silent protest to her dislike of the school. This was punitive. The Rules of Appellate Procedure in this State are to be "liberally interpreted to promote the ends of justice..." RAP 1.2 (a).

In this case, the ends of justice were not served because both the trial court and the Court of Appeals punished Stefanie for her behavior by taking away custody.

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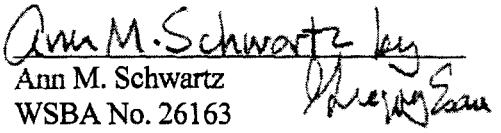
[2] In *McDole* , the mother had refused the father visitation and removed the child from the state in violation of the parenting plan and the trial court ruled that the parenting plan be modified to place the child with the father as primary parent. Chief Justice Anderson dissented and agreed with the Court of Appeals (reversing the trial court) that a court cannot punish a parent for perceived bad behavior by changing primary placement. *McDole*, 122 Wn.2d at 613 ("I agree with the Court of Appeals that change in the residential placement of a child cannot be used to punish a parent for wrongful conduct, as the controlling consideration in such a decision must be the best interests of the child.")

F. CONCLUSION

Appellant respectfully submits that her Petition for review should be granted and reverse the Court of Appeals decision or at least remand to determine whether or not Ms. Bennett's environment is detrimental to her children.

DATED this 29th day of August, 2013.

Respectfully submitted,



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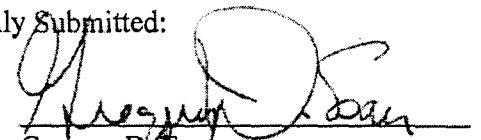
CERTIFICATE OF SERVICE

I , GREGORY ESAU, hereby certify that on August 29, 2013 I served a copy of the Petition for Discretionary Review and the Appendix on P. Craig Beetham, Attorney at Law, 1200 Wells Fargo Plaza, 1201 Pacific Avenue, Tacoma, WA 98402 via messenger and on Stefanie Bennett, via mail to 1012 N. Cushman, Tacoma, WA 98403.

DATED this 29th day of August, 2013.

Respectfully Submitted:



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APPENDIX

A Court of Appeals' Decision

B Court's Decision Denying Ms. Bennett's Motion for Reconsideration

C Appellant's Brief

D Respondent's Brief

E Appellant's Reply Brief

Appendix A

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STEFANIE JEAN BENNETT, f/k/a STEFANIE XITCO, Appellant, v. JOHN MICHAEL XITCO, Respondent.	No. 42275-1-II UNPUBLISHED OPINION

WORSWICK, C.J. — Stefanie Bennett appeals the trial court's parenting plan modification reducing her residential time with her children and increasing the residential time given to the children's father, John Xitco, and designating Xitco as the children's primary residential parent. Bennett argues that the trial court erred because (1) the trial court's findings that the children's environment was detrimental was an abuse of discretion, and (2) the trial court's findings do not support its conclusion that the benefits of modification outweighed the harm to the children. We affirm.

FACTS

A. *Procedural Facts*

Bennett and Xitco have two children: NX, age 12, and CX, age 10 at the time of trial. The parties divorced in 2002, and a court entered a parenting plan.

The parenting plan was modified in 2008, providing that the children would normally reside with Xitco from Sunday through Tuesday or Wednesday and with Bennett for the rest of the week. The 2008 plan called for the parents to jointly decide issues of non-emergency

medical care, with disagreements being resolved by Dr. Larry Larson. Issues of religious upbringing were also to be decided jointly. The plan also called for the children to remain enrolled at St. Patrick's School unless the parents mutually agreed otherwise.

Xitco filed a petition to modify the parenting plan in 2010. The case proceeded to a bench trial. The primary issues developed at trial were:

- Bennett's unfounded domestic violence petitions and her calling the police on Xitco without good cause;
- Bennett unilaterally pulling the children from Thursday morning mass at St. Patrick's;
- The children's excessive tardiness and absence from school during Bennett's residential time; and
- Bennett's unilateral medical decisions for the children.

Clerk's Papers (CP) at 104. The facts adduced at trial relevant to each of these issues are set forth below.

B. *Substantive Facts*

1. *Bennett's Domestic Violence Petitions and Calling the Police*

Bennett filed two petitions for domestic violence protection orders against Xitco. The only evidence regarding these petitions was the testimony of witnesses; documentary evidence was not submitted. Bennett filed for the first order in December 2009. Bennett claimed that Xitco "refused to give the children back and then [she] basically was fed up with being constantly threatened and [she] had had enough. And [she] felt like it was within [her] rights and in [her] best interest to stand up and say, you know, [she needed] protection from this person." 4 Report of Proceedings (RP) at 492. Bennett's petition for a protection order was denied, and Xitco was never served in connection with this petition.

Bennett petitioned for the second domestic violence protection order in February 2010. According to Bennett, she filed for the order after an incident where Xitco screamed at her in front of the children at her house. In that same petition, Bennett also described a different incident outside on her porch where Bennett thought Xitco was going to hit her. Bennett admitted that she had hit Xitco in the stomach during this incident, but she claimed that it was only because he frightened her by coming close with an upraised hand. Bennett obtained a temporary protection order, but the court denied her petition for a final order.

According to Xitco, Bennett had charged at him and punched him in the abdomen during the incident, leaving a bruise, after he mentioned her decision to unilaterally pull the children from mass at St. Patrick's. James Cathcart, the guardian ad litem who interviewed the parties, was unable to conclude that Xitco committed domestic violence.

Bennett also called the police on one occasion for a "well child check." 4 RP at 504-05. On that occasion, NX was having a birthday party at Xitco's house. NX drove his dirt bike up a one lane private road that he had been forbidden to ride on. Xitco confronted NX, and took NX's dirt bike away as punishment. NX threw a "fit" and called his dad an "asshole" and started to run away, but Xitco grabbed NX's wrist and told him not to talk to adults that way. 1 RP at 107. NX then ran away down the beach. Xitco immediately e-mailed Bennett to explain what had happened.

NX then called Bennett, and he hysterically told her that Xitco had called him an "asshole," and that Xitco had twisted his arm behind his back and hurt his shoulder. Bennett called the police. Bennett did not read Xitco's e-mail until later. The police, on arriving at Xitco's house, found nothing amiss.

2. *Unilateral Withdrawal from Mass*

NX and CX attended St. Patrick's, a Catholic school, in accordance with the 2008 parenting plan. St. Patrick's held weekly mass on Thursday mornings. According to the school's principal, Frances Jordan, the Thursday mass was part of St. Patrick's curriculum. Jordan testified that mass provided benefits for the children; the children had a chance to lead prayers, which improved their public speaking, the children heard bible readings and a homily and had the opportunity to reflect on the readings, and the children learned to stay quiet during the services. About 20 percent of St. Patrick's students were not Catholic, but they were still expected to attend mass to learn "about respecting the Catholic faith, [and] being tolerant of other religions." 2 RP at 196. Students were graded for mass attendance.

Bennett was unhappy with NX and CX attending St. Patrick's. In 2010, Bennett sent Jordan a letter informing her that NX and CX would no longer attend Thursday mass. Bennett stated in the letter that her lawyer advised her that the school could not force the children to attend. Jordan testified that in her ten years at St. Patrick's, no other parents had formally pulled their children from mass as Bennett had done. At trial, Bennett claimed that her reasons for pulling the children from mass were, "we're all covered by the First Amendment," and that she did not think the children should be taking a Catholic communion. 3 RP at 459-60. Bennett admitted that she did not follow the parenting plan when unilaterally pulling the children from mass. Bennett testified that she was not aware of the children being ridiculed for not attending mass.

Xitco, in contrast, testified that the children's failure to attend mass affected their grades and affected them socially. "They get teased by the other kids for not going to [m]ass," he

stated. 1 RP at 78. Xitco believed it was important for the children to attend mass because they should follow the same curriculum as the rest of the school.

Cathcart, the guardian ad litem, testified, "I never got a sense that [Bennett] had cancelled the [m]ass attendance for any reason other than she could." 2 RP at 240. Cathcart believed that Bennett's decision to pull the children from mass "sounded like competition rather than one that was based on the interests of the children." 2 RP at 240.

3. *Tardiness and Absences*

Although the parties and multiple witnesses testified about the children's tardiness and absences from school while living with Bennett, Cathcart presented the most complete analysis. Cathcart testified that in the 2009-10 school year, and in the first half of 2011, the children were absent one day for every three they attended when Bennett was responsible for delivering them to school. Although Bennett attempted to justify these absences based on medical problems NX was purportedly having, she could not explain why CX was usually absent on the same days as NX.

Based on his review of attendance records, Cathcart calculated that NX missed 3.3 percent of school days and that CX missed slightly less when Xitco was responsible for taking them to school. But Cathcart calculated that NX missed 37 percent of school days and CX slightly less when Bennett was responsible for taking them to school. Bennett disputed these numbers during her testimony, claiming that she wrote down the correct attendance figures in a notebook. But Bennett did not have her notebook at trial. Bennett submitted no documentary evidence to dispute Cathcart's assessment.

Xitco submitted a summary of the children's attendance records from 2008 to 2010 that he had prepared based on school attendance sheets, which he also submitted. Xitco calculated that CX was absent 30 times in the 2008-09 school year and tardy 15 times. Xitco calculated that NX was absent 31 times that year and tardy 14 times. For the 2009-10 school year, Xitco calculated that CX was absent 20 times and tardy 22 times. Xitco calculated that NX was absent 26 times and tardy 32 times.

The children's 2009-10 and 2010-11 report cards were also submitted, which reported their total days absent and tardy. NX's 2009-10 report card reported that he was absent 25 times and tardy 30 times. CX's 2009-10 report card reported that she was absent 17 times and tardy 20 times. This report card bore a notation that CX was not counted tardy for missing Thursday mass; NX's report card did not have such a notation. The 2010-11 report cards reflected the first two trimesters of that school year. NX's report card for that year listed 6 absences and 14 days tardy. CX's report card listed 17 absences and 17 days tardy.

4. *Health Decisions*

According to Bennett, NX had been complaining of chronic stomach pain for the past two years. Bennett acknowledged that Dr. Larson, the designated physician to resolve medical care disputes in the 2008 parenting plan, found NX to be perfectly healthy. In approximately 2009, Bennett then took NX to a naturopath without consulting Xitco. Bennett testified that she simply chose not to follow the parenting plan when she decided to consult the naturopath.

Later, Dr. Larson referred NX to Dr. Pickens, who found that NX had a bacterial overgrowth and stool impaction. NX's symptoms improved with vitamin D and probiotic supplements.[1]

Xitco testified that he believed NX was healthy but that NX carried a lot of stress. And aside from the infection that Dr. Pickens found, Xitco agreed with Dr. Larson that there was nothing physically wrong with NX.

According to Cathcart, NX's stomach problems were primarily stress related. He reported that both Dr. Larson and NX's psychologist agreed that Bennett was projecting her own symptoms onto NX. Bennett had a severe condition called dysautonomia.[2] Cathcart also believed the symptoms NX reported were reflective of his mother's condition rather than any condition of his own.

Moreover, Cathcart testified that although Bennett believed that Xitco was sending NX to school when he was sick, the school did not report seeing NX show any symptoms of illness. In fact, according to Maory Lou Xitco, NX's grandmother, on one occasion when NX asked to go home sick and she told him he would have to lay in bed and rest without television, NX went back to class rather than go home.

Furthermore, Cathcart reported that Bennett subjected both NX *and* CX to "an awesome list" of diagnostic medical tests, "both invasive and noninvasive." 2 RP at 254. There was no evidence that CX had ever displayed symptoms of any medical problem that would justify

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[1] Medical records from Dr. Pickens were not admitted and the record does not show when, precisely, NX visited him.

[2] Bennett testified that dysautonomia is an autonomic dysfunction. "Dysautonomia" is defined as the "[a]bnormal functioning of the autonomic nervous system." STEDMAN'S MEDICAL DICTIONARY 530 (26th ed.1995).

medical testing. Cathcart reported that Dr. Larson believed that the volume of tests was placing an "emotional or physical" burden on the children. 2 RP at 254.

C. *The Trial Court's Decision*

The trial court granted Xitco's petition to modify the parenting plan. The trial court issued a letter ruling, the substance of which was set forth in a subsequent order on modification. The trial court further issued a modified parenting plan.

In its order on modification, the trial court concluded:

> The children's environment under the custody decree/parenting plan/residential schedule is detrimental to the children's physical, mental or emotional health and the harm likely to be caused by a change in environment is outweighed by the advantage of a change to the children.

CP at 104. The trial court supported this conclusion with narrative findings and conclusions:

> Petitioner Father has met his burden to show that based upon facts that have risen [sic] since the 2008 modification, that a substantial change has occurred in the circumstances of the children and that the modification is in the best interest of the children and is necessary to serve their best interest.
>
> The limited psychological information about Ms. Bennett is troubling. She has refused to provide the full report to the court, but the Guardian ad litem summary shows a troubled profile on any of the tests given. She has used conflict in a manner that is likely to cause [long-term] harm to the children. She has unilaterally prohibited the children from attending a part of their school curriculum, namely Thursday morning mass. She has allowed them to miss an excessive number of days from school, which I believe is her "silent" protest over the children attending the parochial school which she originally agreed that they would attend. She has filed unfounded domestic violence petitions and called the police for well-child checks for no good reason. Her unilateral decision to [take "NX]" for a non-emergency doctor visit for a second opinion without notice to the Father is the other abuse.
>
> This passive-aggressive behavior has damaged the children and their relationship with the father. These two children are the only two at St. Pat's not attending mass. They are "out of the norm" and for developing children being "out of the norm" can have [long-term] negative consequences. Ms. Bennett knows how strongly Mr. Xitco feels about school attendance and she has deliberately allowed

> this issue to become a weekly source of contention, in large part I see as her way to get back at him for his perceived slights towards her.
>
> The emotional gamesmanship needs to end. These children are already using the parental fight to gain an advantage over their parents. The beach motorcycle incident is a prime example.

CP at 104-05.

The trial court accordingly issued a new parenting plan that placed the children with Bennett from Friday through Monday during school, and with Xitco for the rest of the week during school. The parenting plan further decreed that Bennett's residential time would be adjusted to end on Sunday if the children displayed a pattern of missing school on Mondays. The plan designated Xitco as the primary residential parent.

The trial court made several more significant findings in the parenting plan. The trial court found:

> [Bennett's] involvement or conduct may have an adverse effect on the children's best interests because of the existence of the factors which follow:
>
> The abusive use of conflict by the parent which creates the danger of serious damage to the children's psychological development, particularly, but not limited to filing frivolous petitions for protective orders against Father and calling police against Father for "well-child checks."
>
> Other: Failure to ensure children are to school on time: consistent pattern of getting children to school late, numerous absences, and failure to support the school objectives and mission, particularly withholding the children from school [m]ass which is part of th [sic] curriculum which in turn is detrimentally affecting the children in the school setting.

CP at 122. The trial court also found:

> The evidence has shown that should the father be primary caretaker the conflict issue will subside, and if the father's parenting plan is adopted he would be responsible for the school week transportation alleviating the absences and tardies

> that have historically occurred on days mother has visitation, and further alleviating the social academic problems at school for the children.

CP at 126. Bennett appeals.

ANALYSIS

I. STANDARD OF REVIEW

We review a trial court's decision to modify a parenting plan for abuse of discretion. *In re Marriage of Zigler*, 154 Wn. App. 803, 808, 226 P.3d 202 (2010). A court abuses its discretion if it relies on unsupported facts, if it applies the wrong legal standard, or if its decision is manifestly unreasonable. *Zigler*, 154 Wn. App. at 808-09. We review a trial court's findings of fact regarding modification for substantial evidence, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *In re Marriage of Chua*, 149 Wn. App. 147, 154, 202 P.3d 367 (2009); *In re Marriage of Akon*, 160 Wn. App. 48, 57, 248 P.3d 94 (2011). We further review whether the findings of fact support the conclusions of law. *In re Marriage of Rockwell*, 141 Wn. App. 235, 242, 170 P.3d 572 (2007). We review questions of law de novo. *Chua*, 149 Wn. App. at 154. We defer to the fact finder on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *In re Parentage of J.H.*, 112 Wn. App. 486, 493 n.1, 49 P.3d 154 (2002).

Because changes in residence are highly disruptive to children, we employ a strong presumption against modification of a parenting plan. *In re Custody of Halls*, 126 Wn. App. 599, 607, 109 P.3d 15 (2005). The moving party bears the burden to show that a modification is appropriate under RCW 26.09.260. Under that statute,

> [T]he court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the

> nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child.

In applying this standard, the trial court "shall maintain the residential schedule established by the decree or parenting plan" unless one of four factors is met. RCW 26.09.260(2). The factor pertinent to this case is: "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.". RCW 26.09.260(2)(c).

II. DETRIMENTAL ENVIRONMENT

Bennett argues that the trial court abused its discretion by concluding that the children's environment was detrimental because (1) the detrimental environment the trial court relied on no longer existed, (2) the modification did not address the changed circumstances that justified modification, and (3) the detrimental environment the court found was insufficient to support modification. We disagree on all points.

A. *Detrimental Environment Still Existed*

Bennett first contends that the trial court erred by concluding that the children's environment was detrimental because the detrimental conditions no longer existed at the time of trial. Bennett claims that (1) the unilateral withdrawal from mass was no longer an issue, and (2)

the children's attendance problems were no longer an issue.[3] Bennett's arguments on these points are premised on rearguing the facts, but substantial evidence supports the trial court's findings on these issues and Bennett's arguments fail.

As Bennett points out, RCW 26.09.260(2)(c) requires that the child's present environment be detrimental to support modification. This court has recognized that although evidence regarding the children's prior environment with a parent is relevant under RCW 26.09.260, the circumstances at the time of trial are "also probative." *In re Marriage of Ambrose*, 67 Wn. App. 103, 108, 834 P.2d 101 (1992). And a trial court errs by not considering "any and all relevant evidence," including the circumstances at the time of trial. *Ambrose*, 67 Wn. App. at 108-09. But here, even focusing only 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 of fact regarding their removal from mass and their attendance at school.

1. *Unilateral Withdrawal from Mass Was Still an Issue*

Bennett claims that the issue of mass attendance was "arguably" not an issue at the time of trial.[4] Br. of Appellant at 20, 22. But rather than supporting her apparent claim that the issue

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[3] Bennett also argues in her reply brief that the trial court erred by finding that "the children's environment," as opposed to the children's *present* environment, was detrimental. Reply Br. of Appellant at 14. But this technical omission does not show an abuse of discretion. As set forth below, the trial court's findings of fact adequately addressed the children's present environment; the record does not show that the trial court applied the wrong legal standard.

[4] Bennett also argues that whether her unilateral withdrawal of the children from mass constituted a detriment is "really a matter of law for the court to decide on appeal," but she cites no law on this point. Br. of Appellant at 20-22. We do not address arguments unsupported by legal authority. *Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003).

had been resolved at the time of trial, Bennett simply argues that it was never a problem in the first place. We disagree.

Bennett argues that her unilateral withdrawal of the children from mass was not detrimental to the children because it caused them no harm. But there was substantial evidence to the contrary. 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 also 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 could lead to negative consequences. CP at 104. Substantial evidence supports this finding. Bennett's argument on this point fails.

2. *Absence/Tardiness Issue Still Existed*

Bennett also argues that by the time of trial in 2011, the children's school attendance had improved and thus no longer constituted a detriment. We disagree.

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. This evidence permits the inference that health issues were not the true reason for the children's attendance problems.

Rather, substantial evidence supports the trial court's finding that the true cause of the attendance problems was Bennett's "'silent' protest" over the children attending St. Patrick's. CP at 104. 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. The trial court properly found that the attendance problems were still part of the children's environment at the time of trial. Bennett's argument to the contrary fails.

B. *Modification Addressed Change in Circumstances*

Bennett next argues that, because the attendance issues were resolved by the time of trial, the modified parenting plan was not relevant to the changed circumstances justifying the modification. We disagree.

A parenting plan may not be modified under RCW 26.09.260 unless (1) there has been a substantial change in circumstances, and (2) the modification is in the best interest of the child and is necessary to serve the best interest of the child. The basis for Bennett's argument is that there were no grounds for modification because the attendance issues had been resolved. But substantial evidence shows the attendance issues had not been resolved and Bennett's argument on this point fails.

C. *Detrimental Environment Was Sufficient To Support Modification*

Bennett additionally argues that the findings of detriment to the children are insufficient to support modification of the parenting plan. Although she cites legal authority, she makes no reasoned argument that the trial court's findings of fact are insufficient to support modification. Rather, once again, she relies on rearguing the facts. Because substantial evidence supported the trial court's findings of fact, Bennett's argument on this point fails.

1. *Bennett Failed To Object to Psychological Information*

Bennett challenges the trial court's finding that "[t]he limited psychological information about Ms. Bennett is troubling." Br. of Appellant at 28. But because Bennett failed to challenge the evidence supporting this finding below, we do not consider her argument on this point.

Cathcart reported the limited information at issue, which included a psychologist's opinion:

> There was a significat elevation for compulsive personality style [in Bennett] . . . . There were indications that [Bennett] may have limited ability to comfortably manage interpersonal relationships, [and] may have little interest or expectation of engaging in collaborative relationships with others . . . . [Bennett] made considerable effort to present a self-favorable image, [and] failed to offer a fully open or candid approach to the testing process.

2 RP at 259-60. As Bennett points out, the psychologist's report was not admitted, and Cathcart was not a psychologist. Bennett thus seems to argue that the psychological opinion, admitted through Cathcart, was inadmissible. But Bennett did not object to this evidence at trial. She cannot raise the admissibility of Cathcart's testimony on this point for the first time on appeal. RAP 2.5(a). Nor does Bennett cite authority related to the evidence's admissibility as required. *Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003). Thus, we do not consider Bennett's argument on this point.

2. *Bennett's Abusive Use of Conflict*

Bennett next argues that substantial evidence does not support the trial court's findings regarding her abusive use of conflict. We disagree.

A court may preclude or limit any provisions of the parenting plan if there is an abusive use of conflict by the parent that creates the danger of serious damage to the child's

psychological development. RCW 26.09.191(3)(e). This standard applies in parenting plan modification cases. *In re Marriage of Watson*, 132 Wn. App. 222, 232, 130 P.3d 915 (2006).

a. *Withdrawal from Mass*

Bennett claims that her withdrawal of the children from mass was not abusive use of conflict. But rather than make any legal argument on this point, she reargues her earlier claim that failure to attend mass did not harm the children. Bennett thus appears to be arguing that, because her actions were not detrimental, they could not constitute abusive use of conflict that was harmful to the children. This argument fails.

As we analyzed above, there was substantial evidence that the unilateral withdrawal from mass was detrimental to the children's environment. Bennett's attempt to reargue the facts on this point is unavailing.

b. *Attendance Issues*

Bennett next claims that the children's attendance problems were not abusive use of conflict because they were not detrimental to the children. But there was substantial evidence to support the trial court's findings to the contrary.

The trial court found that the children's poor school attendance caused them academic and social problems. The trial court also found that the school attendance was a source of conflict between the parents because of Xitco's strong feelings about school attendance, and found that this conflict posed a danger of serious psychological damage to the children. The trial court also found that the children's attendance issues put them "'out of the norm,'" which could lead to long-term negative consequences. CP at 104.

Xitco testified that tardiness harmed the children's values by failing to instill in them the value of timeliness and that it affected their grades. Principal Jordan testified that attendance was important because instructional time at school was the most important aspect of the curriculum and could not be replaced with homework. According to her, tardiness was a problem because the mornings are the best time for children to learn. Tardiness could also make a child the "odd man out," often leading to social problems. 2 RP at 200.

Bennett argues that, to the contrary, both children were doing well academically. But Jordan testified that NX's "attendance and dedication to study outside of school" had affected his grades. 2 RP at 223. She also testified that after CX's attendance in school had improved, there was a "positive effect." 2 RP at 224.

There was substantial evidence to support the trial court's findings that the attendance problems were detrimental academically and socially, as well as psychologically, because of the parental conflict that resulted. Bennett's argument on this point fails.

c. *Domestic Violence Petitions*

Bennett further claims that her petitions for domestic violence protective orders do not show abusive use of conflict. We disagree.

Bennett argues that her first petition could not constitute abusive use of conflict because she never served it on Xitco and, thus, it never led to any conflict. This argument is unavailing. Bennett failed to serve the first petition not because she wished to avoid creating conflict with Xitco, but because she was denied a temporary protective order. At trial, Bennett could provide only very vague reasons for having filed the petition, strongly supporting the trial court's finding that it was frivolous. Bennett cites no law and makes no reasonable argument that her filing a

frivolous petition fails to show abusive use of conflict simply because the petition was denied and she did not serve it. Although such a petition might not show abusive use of conflict in and of itself, it is certainly relevant.

Bennett further argues that the second petition, related to the porch incident, does not show abusive use of conflict because the petition was justified under her version of the facts. But Xitco gave a different version of the incident, wherein the only domestic violence was committed by Bennett. Cathcart was unable to conclude based on the parties' conflicting stories that any domestic violence had occurred. We defer to the trial court on conflicting evidence and questions of witness credibility, and the trial court had ample evidence from which to find that Bennett's second petition was unfounded. When viewed with the other findings, this finding properly supported the trial court's conclusion that Bennett engaged in an abusive use of conflict.

d. *Well Child Check*

Bennett next challenges the trial court's finding of fact that she called the police for well child checks "for no good reason." CP at 104; Br. of Appellant at 31. But the record shows that Bennett called the police based only on NX's account of what had happened. She did not attempt to contact Xitco about what had happened. There was substantial evidence that Bennett called the police for "no good reason" under these facts.[5]

[5] After arguing that the above facts did not support modification, Bennett claims that there was no evidence to support the trial court's finding that her passive aggressive behavior damaged the children and their relationship with their father. But Bennett's only argument on this point is to repeat the factual claims that we addressed above. Because substantial evidence supported the trial court's findings of fact, Bennett's argument on this point fails.

III. ADVANTAGES OUTWEIGHED HARM

Bennett next argues that the trial court's findings of fact do not support its conclusion that the benefits of modification outweighed the harm to the children. Bennett argues that the trial court failed to find that (1) the children wanted more time with Xitco or less time with Bennett, (2) her home was unfit or that she was an unfit parent, (3) the modification "was to the advantage of the children," (4) the children were more attached to Xitco than to Bennett or that they would better "thrive" at Xitco's residence, or (5) any specific emotional harm might befall the children in "being taken from their mother's home."[6] Br. of Appellant at 36. Bennett's arguments on this point are without merit and her claim fails.

A. *Desires of the Children*

Bennett argues that modification was not warranted because neither of the children wanted additional time with Xitco or less time with her. But Bennett cites no law that the trial court here was required to issue findings regarding the children's wishes. We do not consider Bennett's argument on this point. *Escude*, 117 Wn. App. at 190 n.4.

B. *Unfitness of Bennett's Home and Parenting*

Bennett further argues that there was no evidence that her home was unfit or that she was an unfit parent. Again, Bennett fails to cite any law that this finding was required. Moreover, her argument is contrary to case law.

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[6] Bennett also argues in passing that the evidence showed altercations between NX and Xitco. Bennett does not explain the relevance of this point within the context of her argument; she simply mentions the issue as if argument were unnecessary. We do not address issues raised with only passing treatment and without reasoned argument and do not address Bennett's argument on this point. *Stiles v. Kearney*, 168 Wn. App. 250, 266, 277 P.3d 9 (2012), *review denied*, 175 Wn.2d 1016 (2012).

We have held a finding that a parent is unfit is not required to modify a parenting plan under RCW 26.09.260. *In re Marriage of Velickoff*, 95 Wn. App. 346, 353, 968 P.2d 20 (1998). There is no rule that the trial court here was required to mention "fitness" in order to modify the parenting plan. The trial court's conclusion, that the children's environment was detrimental and that advantages of a change outweighed the harm, was sufficient.

C. *Advantage to the Children*

Bennett also argues that the trial court failed to make any findings as to why the modified residential schedule was "to the advantage of the children." Br. of Appellant at 36. Although Bennett does not cite authority on this point, she appears to be arguing that the trial court failed to make part of the finding required under RCW 26.09.260(2)(c), that "the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child."[7] But Bennett is incorrect; the trial court found that a change of environment would be to the advantage of the children.

The trial court found in the modification order that Bennett permitted excessive absence and tardiness on the children's part and that she did so as part of her abusive use of conflict, which was likely to cause long-term harm to the children. And in the new parenting plan, the trial court found that the basis for restricting Bennett's residential time included "abusive use of conflict . . . which creates the danger of serious damage to the children's psychological

[7] Bennett cites *In re Marriage of Mangiola*, 46 Wn. App. 574, 578-79, 732 P.2d 163 (1987), for the proposition that modification is inappropriate when the moving party alleges no facts "tending to show the advantages of a change in custody outweigh the harmful effects of a change of custody." Br. of Appellant at 35. But *Mangiola* addressed a preliminary question not at issue here: whether a petitioner for a parenting plan modification had shown adequate cause for a hearing under RCW 26.09.270. The trial court granted Xitco a hearing on modification and Bennett does not assign error to that decision. *Mangiola* does not support Bennett's argument.

development." CP at 122. Also, the trial court found that under the new parenting plan, the childrens' attendance and tardiness problem would be alleviated because Xitco would now be mostly responsible for school transportation.

Thus, the trial court found that removing school attendance from Bennett's control would reduce conflict between the parties, alleviating the affects of the conflict on the children, as well as alleviating the effects of the children's absences and tardiness. Bennett is incorrect that the trial court failed to find that the new residential schedule was to the children's advantage.

D. *Attachment*

Bennett additionally argues that the trial court failed to make any findings that the children were more attached to Xitco or that they would better "thrive" at Xitco's residence. Br. of Appellant at 36. Again, Bennett fails to cite authority that such findings were mandatory. Bennett's argument on this point fails.

E. *Emotional Harm of Relocation*

Finally, Bennett argues that the trial court made no findings as to the emotional harm that might befall the children "in being taken from their mother's home."[8] Br. of Appellant at 36. Bennett cites no law that such findings were required, but she appears to be arguing that the trial court failed to make another part of the finding required under RCW 26.09.260(2)(c), that "[t]he child's present environment is detrimental to the child's physical, mental, or emotional health." Bennett is incorrect.

[8] Bennett misrepresents the trial court's order on this point. The children were not "taken" from her home; they were already residing part time with each parent. The modification order simply adjusted the residential schedule to give Bennett less residential time during the school year.

The trial court made several findings regarding the children's emotional health. The trial court found that Bennett's behavior has damaged the children's relationship with their father. It found that her pulling them from mass made them "out of the norm." CP at 104. It also found that her abusive use of conflict created the danger of "serious damage to the children's psychological development." CP at 122. Bennett's argument on this point is simply contrary to the record.

Finally, Bennett argues for the first time in her reply brief that the trial court erred by ordering modification as punishment for her violating the previous parenting plan. We do not consider issues raised for the first time in a reply brief and therefore do not address this issue. *In re Marriage of Bernard*, 165 Wn.2d 895, 908, 204 P.3d 907 (2009).

We hold that the trial court's findings supported its conclusion that the advantages of modification outweighed the harm of a residential change. We accordingly affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, C.J.

We concur:

Penoyar, J.

Bjorgen, J.

Appendix B

Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STEFANIE JEAN BENNETT, f/k/a STEFANIE BENNETT, Appellant, v. JOHN MICHAEL XITCO, Respondent.	No. 42275-1-II ORDER DENYING MOTION FOR RECONSIDERATION

APPELLANT moves for reconsideration of the Court's **July 2, 2013** opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Worswick, Penoyar, Bjorgen

DATED this 30th day of July, 2013.

FOR THE COURT:

Worswick, cj

CHIEF JUDGE

FILED
COURT OF APPEALS
DIVISION II
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From: Karen Page [kpage@elmlaw.com]
Sent: Thursday, August 29, 2013 1:54 PM
To: Tac
Cc: Gregory Esau
Subject: SPECIAL: Bennett / Xitco 2 of 2
Attachments: Appendix C_001.pdf; Appendix D_001.pdf; Appendix E_001.pdf

ABC:

This is the Second and last of 2 emails.

Please make one document out of what I have sent you in these two emails: Petition, then Appendixes in order A-E. Thank you.

Please email me back and let us know you have received both emails.

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Appendix C

NO. 42275-1-II

IN THE COURT OF APPEALS DIVISION TWO
OF THE STATE OF WASHINGTON

STEFANIE JEAN BENNETT (FKA STEFANIE XITCO),

Appellant,

v.

JOHN MICHAEL XITCO,

Respondent.

APPEAL FROM THE SUPERIOR COURT
IN AND FOR PIERCE COUNTY
THE HONORABLE JAMES R. ORLANDO

BRIEF OF APPELLANT

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INTRODUCTION

Stefanie Bennett has been the primary parent of Nico Xitco (age 13) and Chloe Xitco (age 10) for nine years, since her divorce from John Xitco in 2002. The court below all but ignored the law in granting John's request for modification and granting him primary custody of the children. The Court based its order on detriment to the children without any evidence or even a finding that the children had suffered harm or that the mother was present environment was detrimental to her children. The order completely disregards the requirements for a major modification of a parenting plan under RCW 26.09.260.

ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law when, without legal justification, it disrupted the original parenting plan that designated the mother as the primary custodian for her two children and instead named the father as the primary custodian.

2. Relying on its modification of the residential schedule, the trial court erred in ordering the adjustment of child support.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Do the facts of this case support a finding of a "substantial change of circumstances" within the meaning of RCW 26.09.260(1) when The primary issues were resolved by the time of trial, there was no

demonstrable detriment to the children, and the remaining issues did not rise to the level of contempt or abusive use of conflict?

2. May a court modify a parenting plan based on detriment when the mother had been the primary caretaker for the children's entire lives including since the parents' 2002 divorce, the mother's present environment was not detrimental to the children, and there was no evidence or finding that the harm of removing the children from the mother's home was outweighed by the benefit to them?

STATEMENT OF THE CASE

1. *Factual History*

Stefanie Bennett married John Xitco in 1997 and they were separated in 2001. The parties were divorced in August 2002 by an agreed decree and including an agreed parenting plan for the parties' two children – Nico (age 13) and Chloe (age 10) that designated the mother as the children's primary custodial parent. Stefanie had always served as the children's primary caretaker. The 2002 parenting plan was modified by agreement in March 2008 to provide, in part, for a residential schedule providing the father with 4 overnights every two weeks consisting of Sunday – Tuesday morning start of school every week. The parents also agreed that the children would attend St. Patrick's School in Tacoma.

Stefanie was described by one witness, Roxanne Tompter, as "one of the best parents she knows. She is there for her kids." She goes on to say that from what she witnessed the children do better when they spend more time with their mother. They do better in school, they are emotionally more stable and they are more vibrant. (Ex. 30, G.A.L. Supp. Report, p. 9) Another witness notes "Stefanie is great with the kids and a wonderful mom although the kids are a little spoiled." (Ex. 30, G.A.L. Supp. Report, p. 11)

Stefanie's brother, David Bennett, who lived with the parties for a time prior to their separation and divorce, and again with Stefanie for some months in 2010, shared his observations with the G.A.L., noting the difficulties in the parties' communication. David noted:

> They have always been pretty emotionally charged. Stefanie doesn't like being yelled at and John was condescending and berated Stefanie. He said that John was not violent but it would be easy to perceive it that way because of his aggressive "in your face" attitude and way of arguing. (Ex. 30, G.A.L. Supp. Report, p. 10)

David shared an example of what concerned him the previous summer when he took Nico to football practice and John was unhappy with the way Nico handled the conflict between his football and baseball practices that same day. David described the situation:

> ...John was at the baseball practice yelling in Nico's face, waving his finger in Nico's face as Nico was trying to walk away...The berating went on a significant amount of time...John was being extremely aggressive. He had not seen that with the kids but he had observed John being that way with Stefanie...Nico was in tears.

(Ex. 30, G.A.L. Supp. Report, pp. 10 - 11)

At trial, there was no testimony of any significant issues relevant to this case until the 2009 – 2010 school year. The lower court based its modification on three primary issues: (1) Stefanie's decision not to send the children to Mass at school; (2) the children's absences or tardies from school; and (3) Stefanie's efforts to seek protection through a protection order. None of these issues supports a finding of detriment, as discussed below.

In about December 2009 Stefanie stopped sending the children to Mass Thursday mornings, instead dropping them off at school at 10:30 when Mass ended. Stefanie made this decision after consulting with an attorney who advised her that if she had religious objections she was not obligated to take her children to Mass. Stefanie's reason was that she and the children are not Catholic and although John was raised Catholic he has never taken the children to Mass even though he has them every Sunday. The children do continue to attend Catholic services at school on Mondays.

Stefanie, per her attorney's advice, took a note to Francie Jordan, the principal at St. Patrick's, to inform her that the children would not be attending Mass on Thursday. (Trial Ex. 18) Ms. Jordan testified that she told Stefanie that she would not require the children to attend the Thursday Mass. (RP 207) The school handbook encourages but does not require attendance at Mass. (RP 208; Ex. 45) Ms. Jordan testified that both children received satisfactory grades for religion and prayer service related subjects and that missing Mass did not appear to harm their grades. (RP 210,219) There was no court order to attend Mass and the G.A.L. did not make a recommendation that the children attend Mass. (RP 279 – 280) No evidence was presented that the children wanted to go to Mass or suffered any consequences, social or academic, for missing Mass and this was supported by the G.A.L. (RP 279) Stefanie testified that when dropping the kids off after Mass on Thursdays many other parents are doing the same thing. (RP 459)

There was testimony that the children had a higher than average record of school absences and tardies in the 2009 - 2010 school year. (RP 202) School policy is that five tardies equals a half day absence and more than five absences in a trimester results in a letter home that the school wants the children to have better attendance. (RP 199) The children were always at least tardy on Thursdays because they came to school after

Mass. In 2009 the children were with the father during much of the Fall due to the mother's illness, from which she no longer suffers.

For school year 2010 – 2011 the children's absences and tardies were within acceptable range and Ms. Jordan testified that upon review of attendance records, with the exception of the Thursday tardies, the absences and tardies for the children seemed to be distributed between both John and Stefanie. (RP 210 – 217; Exs. 56, 57) For the 2010 – 2011 school year the children's attendance was within acceptable range – less than five absences per trimester. (RP 214) The GAL was receiving attendance reports and noted that there was no significant problem with attendance since the start of the year and the kids were reliably attending school. (RP 275)

Whatever the issues with the children's school attendance, there was no evidence of any academic, social or emotional harm. Ms. Jordan testified that both children were doing well in all documented respects in school and that nothing in their report cards gave her any cause for concern. (RP 222 – 225; 32) Children are graded on a scale of 1 – 5 with 5 the highest. On Chloe's most recent report card she received 23 5s and five 4s, noted by the principal as "doing pretty good." (RP 230)

John made an issue of the fact that Nico often complained of being ill with stomach aches, vomiting, diarrhea and nausea. The GAL reported

that while there was no proof, there was "concern" that Nico was not really sick but was reflecting symptoms of his mother's illness. (Ex. 29, GAL Report p. 7, RP 241 - 242) Independent witnesses verified that Nico complained of stomach pains. (RP 289)

Dr. Larson was the children's pediatrician and a personal friend of John. Dr. Larson subjected Nico to testing to determine whether his stomach complaints had a physiological basis. He did not find a physiological basis for Nico's stomach pain and suspected that there might be a relation to the stress between parents, although this was a concern and not a diagnosis or conclusion. (Ex. 30, G.A.L. Supp. Report, p. 6) Stefanie was not satisfied with the results because she felt Nico was sick too much and missing too much school and therefore could not be healthy. (RP 471) Stefanie took Nico to a naturopath for a "second opinion" on Dr. Larson's lab work, without consulting John. The naturopath did not treat Nico but did review the lab work and discovered that Nico had a stomach infection and vitamin D deficiency. She recommended a stool test but John was angry and refused. (RP 466, 473) After this Dr. Larson made a referral to a gastroenterologist, Dr. Pickens. By this time Nico had blood in his stool and Dr. Larson then discovered that Nico had a severe stool impaction that was causing a lot of his nausea, vomiting and stomach problems. Dr. Pickens found a bowel bacterial overgrowth and said that,

coupled with chronic stool compaction would cause the complaints and physical misery Nico had been going through. (RP 466, 473 – 474) Nico now takes a probiotic and vitamin D supplement and is doing much better.

Stefanie filed for a DV protection order in 2009 based on John's threats against her and obscenities, and she "feared for my life." She went to the Crystal Judson Family Justice Center and filed after getting advice from them. She was denied the temporary order on her pro se petition and John was never served. (RP 492 – 493) The existence of this filing was discovered during the pendency of this case.

Stefanie filed for a second DV protection order in February 2010 Stefanie reported that John came to pick up Chloe, was extremely loud and "yelling horrible things at me" including "you are definitely not a human being." Chloe intervened on her mother's behalf. Nico was present and ran out of the car and hid. Stefanie obtained a temporary protection order for herself but was denied a permanent order, being told by the Justice Center that she did not "word it right." (RP 492 – 494)

Another incident that the G.A.L. refers to as the "porch incident" (Ex. 30, G.A.L. Supp. Report, p.8) occurred shortly thereafter in December 2009. Stefanie called the police but did not file any actions. Stefanie reports that John came to her house and came onto the porch by the front door. John asked to speak with Chloe and wanted to discuss his

upcoming trip to Arizona. John began threatening Stefanie and approached her with his hands in the air, walking right into her. She crouched down, he was yelling and she put her hand out and hit him, hurting her hand. Stefanie was trying to keep John off of her and has previously asked him not to come on her property for this reason. (RP 495 – 497)

Roxanne Tomter was present during this "incident" and reported that the problem was Chloe didn't want to go with her Dad and began crying and shaking. John was screaming angrily while Stefanie was responding in a calm and firm tone, and Chloe was screaming as if she were terrified. Chloe shouted "don't you do that to my mommy!" Stefanie called the police. (Ex. 30, G.A.L. Supp. Report, pp. 8 - 9) Roxanne testified she was worried and Chloe was terrified. (RP 407) Stefanie did nothing to make Chloe not want to go but was very firm in urging Chloe to go with her Dad. John was screaming and Chloe was cowering. (RP 408 – 409)

In July 2010 the father petitioned the court for a modification of the parenting plan alleging that the mother:

1. Engaged in abusive use of conflict;
2. Was in contempt for making unilateral decisions involving important aspects of the children's lives;

3. Was in contempt for undermining the children's education by interfering in their schooling; and
4. Did not ensure that the children went to school regularly or on time to their detriment.

Temporary orders were entered that gave father the children from Sunday morning until start of school Wednesday -- one additional overnight per week (3 overnights each week).

The G.A.L. requested psychological evaluations of both parties. Dr. Rybicki performed the evaluations but the results remained confidential. Dr. Rybicki did not testify at trial and his reports were not introduced as evidence. (Ex. 30, G.A.L. Supp. Report, p. 13)

Stefanie was diagnosed in August 2009 with dysautonomia (autonomic dysfunction) after she collapsed on a football field and was taken to the emergency room. (RP 463, 467) Stefanie asked John to take care of the children for about 6 weeks thereafter in order for her to receive treatment. (RP 468) Stefanie has received appropriate treatment and is now as healthy as she was before the disease. She runs, does yoga and feels great. (RP 465) Stefanie's physician certifies that her health now is fine and there is no negative impact on her ability to parent the children. (RP 466 – 467) Trial Ex. 27 (Dr. Arden letter; Northwest Cardiology).

2. The Trial Court's Decision

Despite never finding that Stefanie was unfit as a parent or that the issues raised in the petition for modification were existing at the time of trial, the trial court granted John's motion to modify the parenting plan. ("Order Re Modification"). In his holding, the court failed to even mention the strong presumption that favors the original plan and Stefanie's continued custody. Moreover, the court did not consider whether the harm likely to be caused by removing the children from their mother's home was outweighed by the advantage of a change to the child.

The court's findings are set forth in the Order Re Modification and are based on the following factors:

> The children's environment under the custody decree/parenting plan/residential schedule is detrimental to the children's physical, mental or emotional health and the harm likely to be caused by a change in environment is outweighed by the advantage of a change to the children.

In summary, the trial court found:

a. A substantial change of circumstances since the 2008 modification. As required by RCW 26.09.260, the trial court did not weigh whether the harm of the change was outweighed by the advantage to the children.

2. Referring to the G.A.L.'s summary only, the Court explained that it was troubled by the "limited psychological information about Ms. Bennett" in the Guardian ad litem's summary. The court did not review the psychological report.
3. The court found that "Ms. Bennett has used conflict in a manner that is likely to cause long term harm to the children" based on the alleged following facts:
    a. She has unilaterally prohibited the children from attending a part of their school curriculum – Thursday mass.
    b. She has allowed them to miss an excessive number of days from school.
    c. She has filed unfounded domestic violence petitions.
    d. She has called the police for well-child checks for no good reason.
    e. She took Nico for a non-emergency doctor visit for a second opinion without notice to the father.
4. Ms. Bennett's passive aggressive behavior has damaged the children and their relationship with the father.
    a. The Bennett children are the only two at their school not attending mass.

b. The Bennett children are "out of the norm" which for developing children can have long term negative consequences.

c. Ms. Bennett knows how strongly Mr. Xitco feels about school attendance and she has deliberately allowed this to become a weekly source of contention, in large part to get back at him for his perceived slights towards her.

5. The emotional gamesmanship has to end.

a. The children are using the parental fight to gain an advantage over their parents.

6. The children are over counseled.

(CP 104-105, Order Re Modification)

3. The Appeal

Not surprisingly, Stefanie filed her appeal on June 17, 2011. CP 114.

STANDARD OF REVIEW

The standard of review is whether the trial court's decision is supported by substantial evidence and whether the trial court made an error of law. Substantial evidence supports a factual determination if the record contains sufficient evidence to persuade a fair minded, rational

person of the truth of that determination. *In re Marriage of Stern*, 68 Wn. App. 922, 928-29, 846 P.2d 1387 (1993); *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

ARGUMENT

The trial court erred by granting John's motion to modify the 2008 parenting plan. In so doing, the court disregarded the strong presumption in favor of Stefanie's continued custody. More important, the court failed to apply or even articulate how the "changes" were substantial rather than merely annoying, or how the children were being harmed by the mother's conduct. The court's ruling imposes an incredibly harsh result on a mother who was merely acting in what she believed to be her children's immediate best interests.

I. THE MOTHER SHOULD BE THE PRIMARY CUSTODIAL PARENT BECAUSE OF THE STRONG PRESUMPTION IN FAVOR OF ORIGINAL PLAN.

In Washington, the court may only modify a parenting plan under RCW 26.09.260 if (1) there has been a substantial change in the circumstances of the child or the nonmoving party **and** (2) the modification is necessary to serve the child's best interests. The discretion of the court is narrowly tailored and the statute is written in mandatory terms. The court **must** retain the custodian established by the prior decree unless:

(a) The parents agree to the modification;

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

(c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child; or

(d) The court has found the nonmoving parent in contempt of court at least twice within three years....

RCW 26.09.260(2).

Absent a finding of one of the above four circumstances, a court has **no discretion** to modify a parenting plan. Moreover, a petitioner for modification bears a heavy burden: to prevail, petitioner must prove one of these four factors with **substantial evidence**. *Stern*, 68 Wn. App. at 928-29. As our Courts have explained, there is a "strong presumption in favor of custodial continuity and *against modification.*" *See In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993) (emphasis added). The trial court's discretion is limited and must be exercised with caution and within the bounds of legal principles. *Id. See George v. Hellar*, 62 Wn. App. 378, 382-83, 814 P.2d 238 (1991); *Stern*, 57 Wn. App. 707, 712, 789 P.2d 807, *review denied*, 115 Wn.2d 1013 (1990); *In re Marriage of Roorda*, 25 Wn. App. 849, 851, 611 P.2d 794 (1980). *See also,* RCW 26.09.002 (defining "best interest of the child");

RCW 26.09.260 (establishing the standard for modification); RCW 26.09.270 (providing that a modification action may not even be pursued unless the trial court initially finds "adequate cause" to proceed).

The presumption in favor of the parent granted custody in the original parenting plan exists because "children and their parents should not be subjected to repeated relitigation of the custody issues determined in the original action. Stability of the child's environment is of utmost concern." *Schuster v. Schuster*, 90 Wn.2d 626, 628, 585 P.2d 130 (1978). "A court's preference for one parent over the other is not a basis for ordering a modification." *George*, 62 Wn. App. at 382-83.

Here, John argued that one of the four statutory criteria applied. He alleged that Stefanie's actions amounted to an abusive use of conflict that created a detrimental environment under RCW 26.09.260(2)(c). However, the evidence presented at trial was that the primary issues raised by the father had ceased to be an issue by the time of trial and none of the mother's issues complained of, either singly or taken all together, can be construed as "substantial" or "detrimental" within the meaning of the statute.

Again, to justify a ruling that modified the original parenting plan, John needed to prove by "substantial evidence" that Stefanie's actions created a detrimental environment that was harmful to the children, and

that the harm of changing their primary residence was outweighed by the advantage to them of the change. For the court to modify the plan, the judge had to ignore the presumption in favor of Stefanie, and if anything, placed the burden of proof on Denise to show why the court should return the children to her.

II. THE TRIAL COURT'S FINDING THAT THE CHILDREN'S ENVIRONMENT IS DETRIMENTAL IS AN ABUSE OF DISCRETION AND IS MANIFESTLY UNJUST.

The lower court erred in finding detriment. As a matter of law, the facts presented at trial do not support a major modification based on detriments under RCW 26.09.260(2)(c). The court held:

> The following facts, supporting the requested modification, have arisen since the decree or plan/schedule or were unknown to the court at the time of the decree or plan/schedule:
>
> **On April 27, 2011, the Court finds the following:**
>
> Petitioner/Father has met his burden to show that based upon facts that have risen since the 2008 modification, that a substantial change has occurred in the circumstances of the children and that the modification is in the best interest of the children and is necessary to serve their best interest.
>
> The limited psychological information about Ms. Bennett is troubling. She has refused to provide the full report to the court, but the Guardian ad litem summary shows a troubled profile on any of the tests given. She has used conflict in a manner that is likely to cause long term harm to the children. She has unilaterally prohibited the children from

attending a part of their school curriculum, namely Thursday morning mass. She has allowed them to miss an excessive number of days from school, which I believe is her "silent" protest over the children attending the parochial school which she originally agreed that the would attend. She has filed unfounded domestic violence petitions and called the police for well-child checks for no good reason. Her unilateral decision to "Nico" for a non-emergency doctor visit for a second opinion without notice to the Father is the other abuse.

This passive-aggressive behavior has damaged the children and their relationship with the father. These two children are the only two at St. Pat's not attending mass. They are "out of the norm" and for developing children being "out of the norm" can have long term negative consequences. Ms. Bennett knows how strongly Mr. Xitco feels about school attendance and she has deliberately allowed this issue to become a weekly source of contention, in large part I see as her way to get back at him for his perceived slights towards her.

The emotional gamesmanship needs to end. These children are already using the parental fight to gain an advantage over their parents. The beach motorcycle incident is a prime example.

These children have been over counseled and will soon believe that they are not normal. They need to be children and participate in normal activities, develop normal friendships, get into normal child "trouble."

(CP 104-105, Order Re Modification)

A. The Detrimental Environment Related to the Modification No Longer Existed at the Time of Trial

The "child's present environment" within the meaning of RCW 26.09.260(2)(c) means "the environment that the residential parent or custodian is currently providing or is capable of providing for the child..." *George v. Hellar*, 62 Wn. App. 378, 386, 814 P.2d 238 (1991); *Ambrose v. Ambrose,* 67 Wn.App.103,108. In *Ambrose*, at 108-109 the court notes that in those cases where there is a lengthy time involved the need to look at the "current circumstances of both parents is compelling." Here the modification was filed in July 2010 and trial not held until April 20, 2011.

1. ***The school attendance issues are insufficient to support modification, but even so, they were mostly resolved by the time of trial.*** At the time of filing the children were habitually late or absent from school, often due to Nico's illness. (RP 202, Ex. 29,GAL Report) But for school year 2010 – 2011 commencing September 2010 through the end of March 2011 the children's absences and tardies were within acceptable range and the school principal verified that with the exception of the Thursday tardies, that the absences and tardies for the children seemed to be distributed between both John and Stefanie. (RP 210 – 217; Exs. 56, 57) For the 2010 – 2011 school year the children's attendance was within acceptable range – less than five absences per trimester. (RP 214) The

GAL was receiving attendance reports and noted that there was no significant problem with attendance since the start of the year and the kids were reliably attending school. (RP 275) So by the time of trial the whole issue of conflict over school tardies and absences was in the past.

2. ***Stefanie's persistence led to the resolution of Nico's health issues and any issues related to his health were mostly resolved by trial.*** A significant factor in resolving the tardy / absence issue was the improvement in Nico's health after he was finally seen by a gastroenterologist and properly diagnosed. Dr. Pickens found a bowel bacterial overgrowth and said that, coupled with chronic stool compaction would cause the complaints and physical misery Nico had been going through. (RP 466, 473 – 474, 587) Nico now takes a probiotic and vitamin D supplement and is doing much better.

3. ***The issue of attendance at mass on Thursdays was also arguably no longer an issue by the time of trial.*** Whether mother's refusal to take the children to mass on Thursdays represents a violation or an abusive use of conflict is really a matter of law for the court to decide on appeal. Stefanie, per her attorney's advice, took a note to Francie Jordan, the principal at St. Patrick's, to inform her that the children would not be attending Mass on Thursday. (Trial Ex. 18) Ms. Jordan testified that she told Stefanie that she would not require the children to attend the

Thursday Mass. (RP 207) The school handbook encourages but does not require attendance at Mass. (RP 208; Ex. 45) The school principal testified that both children received satisfactory grades for religion and prayer service related subjects and that missing Mass did not appear to harm their grades. (RP 210,219) There was no court order to attend Mass and the G.A.L. did not make a recommendation that the children attend Mass. (RP 279 – 280) No evidence was presented that the children wanted to go to Mass or suffered any consequences, social or academic, for missing Mass and this was supported by the G.A.L. (RP 279) Stefanie testified that when dropping the kids off after Mass on Thursdays many other parents are doing the same thing. (RP 459)

Modifying custody of children requires proof of detriment by substantial evidence and must overcome the strong presumption for custodial continuity. *Stern*, 68 Wn. App. at 928-29. *See In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993) The trial court's discretion is limited and must be exercised with caution and within the bounds of legal principles. *Id. See George v. Hellar*, 62 Wn. App. 378, 382-83, 814 P.2d 238 (1991). Modification of custody should be a drastic last resort and avoided where possible. John never sought a contempt order on the issue and even though there was a temporary hearing the mother's choice not to attend mass was not disturbed. The mother went

through appropriate channels, as set forth above, in (a) consulting an attorney, (b) giving written notice, and (c) receiving permission from the school principal. In fact Stefanie was advised by an attorney that she had a constitutional right to keep her child out of mass. The Guardian ad litem did not recommend that the children be forced to go to mass.

Given the conflicting evidence as to whether the mass is even a part of the regular school curriculum, it is not established that going to mass even falls within the educational requirement for joint decision making.

By the time of trial, arguably the two most significant factors relied on by the court in finding detriment were no longer major issues.

B. The Modification Ordered Was Not Required to Protect the Best Interests of the Children Based on the "Substantial Change of Circumstances" Found by the Court.

A custody modification must be based on a substantial change of circumstances that require a modification to protect the best interests of the child. *In re Marriage of Roorda*, 25 Wn. App. 849, 851, 611 P.2d 794 (1980); *George v. Hellar*, 62 Wn. App. 378, 382-83, 814 P.2d 238 (1991) The substantial change must also be relevant to the grounds for modification. *Roorda,* 25 Wn. App. at 852. In other words the basis for the modification must actually be relevant to the modification. In this case

the modification gave the father majority residential time such that he brings the children to school 4 days a week and mother has weekends, presumably to deal with the findings regarding school attendance, plus mother has sanctions if she brings the children to school late ever. (Final Parenting Plan, CP 157 – 168) But as is outlined above, the issues relating to the children's school attendance were no longer existing as of the time of trial, thus begging the questions: (1) "how does this parenting plan benefit the children?" and (2) "how is the modification related to the change in circumstances?" The answer to both is that it does not.

Neither the evidence presented nor the findings establish that the mother is in any way an "unfit mother" or that being around their mother is harmful to the children, or that being around their mother less benefits the children in any way. In fact no findings or evidence support this. In fact the only logical relation between the new parenting plan and the facts of the case would be based on the no longer applicable school attendance issues. In fact the parenting plan allocates half of the summer time with the mother and virtually all of the weekends so that in some respects they are spending more time with her now than before. (Final Parenting Plan, CP 157 – 168)

C. The Change of Circumstances Was Not Sufficiently Detrimental Or Substantial to Support a Major Modification.

Ambrose, 67 Wn. App. at 104 discusses the purpose of the modification statute as being to "...promote stability for children and ensure that 'existing patterns of interaction between parent and child' are changed only to the extent necessary 'to protect the child from physical, mental or emotional harm.' RCW 26.09.002.

In *Marriage of Rooda,* 25 Wn. App. 849, at 851-852 the court discussed the high standards applicable in a modification proceeding pursuant to RCW 26.09.260 as follows:

> There is a strong presumption in the statutes and the case law in favor of custodial continuity and against modification. RCW 26.09.260 and .270; *Anderson v. Anderson,* 14 Wn. App. 366, 541 P.2d 996 (1975); 9A U.L.A., Uniform Marriage and Divorce Act, § 409, Comm'rs Note at 212 (Master ed. 1979). We observe a related policy expressed in the statute of preventing harassment of the custodial parent and providing stability for the child by imposing a heavy burden on a petitioner which must be satisfied before a hearing is convened. Another purpose of the statute is to discourage a noncustodial parent from filing a petition to modify custody. The oft-repeated touchstone of any custody decision is "the best interests of the child." *Schuster v. Schuster,* 90 Wn.2d 626, 585 P.2d 130 Page 852 (1978). Litigation over custody is inconsistent with the child's welfare. [emphasis added]

The presumptions and policies of this State are designed to promote consistency and recognize the high value of stability and

continuity for a child, and therefore sets a high bar to the modification of a parenting plan.

The facts of this case do not support a finding of either substantial change or detriment.

In *Marriage of Mangiola,* 46 Wn. App. 574, 578 (1987) the Court of Appeals reversed a trial court finding of adequate cause and remanded to the trial court with directions to enter an order dismissing the petition for modification where the "problems" were not specifically caused by the environment in the custodial parent's home and the petitioner had not alleged facts tending to show that the advantages of a change in custody outweigh the harmful effects of a change of custody..."

While *Mangiola* was an adequate cause case, the principle is the same: the facts were insufficient to show the requisite substantial change and detriment for a modification.

In examining detriment, the Court reviews "the 'fitness' of the child's total environment" with the custodial parent.[1] The inquiry extends far beyond the physical attributes of a structure to whether the placement will be detrimental to the child's

[1] *Id.* at 354. *See also In re Marriage of McDole*, 122 Wn.2d 604, 610-11 (1993).

physical, mental, and emotional well-being. RCW 26.09.260(2)(c).

In making a detriment determination, the Court should consider "all relevant evidence about the custodial parent's performance as a parent."[2] This includes the mother's past and present environment.[3] Courts have also considered relevant a parent's emotional stability, a history of introducing the child to other men, how the child has fared in the parent's care, and whether the parent has attempted to interfere in the child's relationship with the other parent.[4]

Specifically, courts have found detriment in the following situations where:

- The mother permitted the child to accompany her on visits to see her husband in prison, she moved five times within the last year 11 months, and the child was bonding with prisoners *(Frasier)*;[5]
- The mother made false allegations allegation sexual abuse by the father to Child Protective Services and

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[2] *Ambrose v. Ambrose*, 67 Wn. App. 103, 104 (1994)(Trial court found that the mother's present environment was not detrimental (110, n. 3.) and that the court should consider past parenting history and present environment of mother).
[3] *Ambrose,* 67 Wn. App. at 104.
[4] *See infra* fn. 13-19.
[5] *In re Marriage of Frasier,* 32 Wn. App. 445 (1982).

refused to permit the father to have residential time with the child for an extended period *(Velickoff)*;[6]

- The mother was engaged three within the last year, had attempted suicide, and was unstable *(Timmons)*;[7]
- The mother had failed to adequately provide for the child's diet and medical care on a regular basis and had exposed the child to marijuana smoking in the home, and permitted a man to live with the child and the mother *(McDaniel)*;[8]
- The mother provided a chaotic, dysfunctional home environment *(Zigler)*;[9] and
- There had been several serious incidents of domestic violence involving family members in the mother's home presenting a danger to the child. *(Zigler)*.[10]
- Alcohol abuse and mother was "incarcerated and 'other

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[6] *In re Marriage of Velickoff,* 95 Wn. App. 346, 355 (1998)(The mother made serious and repeated allegations of child abuse against the father.).

[7] *In re Marriage of Timmons*, 94 Wn.2d 594, 600 (1980)(Trial court found that mother had "some instability" in that she had been engaged three times and remarried in the year prior to trial and had attempted suicide. Appellate court deferred to trial court's "great advantage of personally observing the parties...").

[8] *McDaniel v. McDaniel,* 14 Wn. App. 194, 198 (1975).

[9] *Zigler,* 154 Wn. App. at 812-13 (The court held that there were two independent bases for detriment).

[10] *Id.*

factors."[11]

The facts of this case as set forth in the evidence and the findings do not support a modification. The primary facts of this case are set forth in more detail above and in the Clerk's Transcript, but in summary, the primary issues are summarized below, as presented in the trial court's findings. (Order Re Modification, pp. 2 – 3)

1. ***The limited psychological information about Ms. Bennett is troubling based on the Guardian ad litem's summary.***

As in *Mangiola* 46 Wn. App. 574, 578 cited above, in this case the record likewise does not even include a report of the psychologist upon whom the trial court apparently relied upon very heavily. The troubling psychological profile is simply an opinion of a G.A.L. who is an attorney who does not claim to have expertise to render psychological opinions.

2. ***Ms. Bennett has used conflict in a manner that is likely to cause long term harm to the children.***

The court's Order Re Modification sets forth five supporting facts for this finding.

a. She prohibited the children from attending mass on Thursdays. This is discussed in detail above. In summary, the principal, Ms. Jordan, testified that she told Stefanie that she would not require the

[11] *Ambrose v. Ambrose*, 67 Wn. App. 103 (1994)

children to attend the Thursday Mass. (RP 207) The school handbook encourages but does not require attendance at Mass. (RP 208; Ex. 45) Ms. Jordan testified that both children received satisfactory grades for religion and prayer service related subjects and that missing Mass did not appear to harm their grades. (RP 210,219) There was no court order to attend Mass and the G.A.L. did not make a recommendation that the children attend Mass. (RP 279 – 280) No evidence was presented that the children wanted to go to Mass or suffered any consequences, social or academic, for missing Mass and this was supported by the G.A.L. (RP 279) Stefanie testified that when dropping the kids off after Mass on Thursdays many other parents are doing the same thing. (RP 459)

b. She has allowed them to miss an excessive number of days from school. As set forth above, this issue has been resolved and is no longer applicable. Many of the "absences" were simply tardies because of missing Mass and those tardies add up and convert to absences under school rules. In addition, even so, the children did not suffer from either this issue or the non-attendance of mass. The principal verified that there was no evidence of any academic, social or emotional harm to the children. Ms. Jordan testified that both children were doing well in all documented respects in school and that nothing in their report cards gave her any cause for concern. (RP 222 – 225; Ex. 32) Children are graded on

a scale of 1 – 5 with 5 the highest. On Chloe's most recent report card she received 23 5s and five 4s, noted by the principal as "doing pretty good." (RP 230)

c. She has filed unfounded domestic violence petitions. There were two: one never served and the other based on reasonable cause - this is not an abuse use of conflict. The first is not applicable because it was never served on John and was not even discovered until after the modification cased was filed, and thus could not have been a source of conflict. The second incident resulted in a temporary order but Stefanie was denied a permanent order after two hearings. Seeking help when afraid cannot in and of itself be considered "abusive use of conflict." Conflict? Of course, the facts of the situation support that:

Stefanie filed for a second DV protection order in February 2010 Stefanie reported that John came to pick up Chloe, was extremely loud and "yelling horrible things at me" including "you are definitely not a human being." Chloe intervened on her mother's behalf. Nico was present and ran out of the car and hid. Stefanie obtained a temporary protection order for herself but was denied a permanent order, being told by the Justice Center that she did not "word it right." (RP 492 – 494)
It is not always easy to get a protection order when there are no witnesses but the two parties who have a history of not getting along. But there was

a witness at the "porch incident" that had similarities to this situation although it did not result in a protection order.

In the porch incident John began threatening Stefanie and approached her with his hands in the air, walking right into her. She crouched down, he was yelling and she put her hand out and hit him, hurting her hand. Stefanie was trying to keep John off of her and has previously asked him not to come on her property for this reason. (RP 495 – 497) Roxanne Tomter was present during this "incident" and reported that the problem was Chloe didn't want to go with her Dad and began crying and shaking. John was screaming angrily while Stefanie was responding in a calm and firm tone, and Chloe was screaming as if she were terrified. Chloe shouted "don't you do that to my mommy!" Stefanie called the police. (Ex. 30, G.A.L. Supp. Report, pp. 8 - 9) Roxanne testified she was worried and Chloe was terrified. (RP 407)

This is not a sufficient basis to justify taking the children away from their mother, their primary caretaker for their entire lives.

d. She called the police for well-child checks for no good reason. This is one incident that cannot rationally be described as "without good reason." As reported by the G.A.L. Nico had a birthday party at his father's house and Stefanie was home. Nico rode his bike where he wasn't supposed to and his dad got mad and Nico "called her in

hysterics and said that his dad was yelling in his face...and had pulled and twisted his arm and had really hurt him." Stefanie called the police for a "well child check" and they reported back that Nico was OK. (Ex. 29, G.A.L. Report, p. 12) Another incident was reported by David Bennett as follows:

> "...John was at the baseball practice yelling in Nico's face, waving his finger in Nico's face as Nico was trying to walk away...The berating went on a significant amount of time...John was being extremely aggressive. He had not seen that with the kids but he had observed John being that way with Stefanie...Nico was in tears"

(Ex. 30, G.A.L. Supp. Report, pp. 10 - 11)

Under these circumstances, it cannot reasonably be said that Stefanie, as a mother seeking the best for her children, did what she did with "no good reason."

e. She took Nico for a non-emergency doctor visit for a second opinion without notice to the father. Stefanie did not take Nico for treatment, but for a second opinion on Dr. Larson's written test results. This second opinion led directly to Nico being properly diagnosed and getting relief from the stomach symptoms that had plagued him and that his father believed were faked. Stefanie was not satisfied with the results because she felt Nico was sick too much and missing too much school and

therefore could not be healthy. (RP 471) Stefanie took Nico to a naturopath for a "second opinion" on Dr. Larson's lab work, without consulting John. The naturopath did not treat Nico but did review the lab work and discovered that Nico had a stomach infection and vitamin D deficiency. She recommended a stool test but John refused. (RP 466, 473) After this Dr. Larson made a referral to a gastroenterologist, Dr. Pickens. By this time Nico had blood in his stool and Dr. Larson then discovered that Nico had a severe stool impaction that was causing a lot of his nausea, vomiting and stomach problems. Dr. Pickens found a bowel bacterial overgrowth and said that, coupled with chronic stool compaction would cause the complaints and physical misery Nico had been going through. (RP 466, 473 – 474) Nico now takes a probiotic and vitamin D supplement and is doing much better.

Even if Stefanie technically violated the joint decision making provisions, she did so only after seeking alternatives and John refusing to cooperate. She took the minimum action and resolved a major health problem for Nico. She does not have a pattern of violating non-emergency health care decision making.

The above five factual findings do not establish a pattern of using conflict in a manner likely to cause long term harm to the children and such a finding is a manifest abuse of discretion.

3. *Ms. Bennett's passive aggressive behavior has damaged the children and their relationship with the father.*

None of the three supporting statements of fact support a finding of passive aggressive behavior. In fact as set forth in detail above these issues were undertaken in good faith as to mass and the school attendance issue was no longer an issue by the time of trial. There was no testimony from any mental health professional or the G.A.L. that Stefanie was "passive aggressive." More importantly, there was no evidence presented that established that any of these alleged actions by Stefanie damaged either the children or their relationship with their father.

a. **The court incorrectly suggested that the Bennett children are the only two at their school not attending mass.** This was not an established fact at trial. No evidence was presented that the children wanted to go to Mass or suffered any consequences, social or academic, for missing Mass and this was supported by the G.A.L. (RP 279) Stefanie testified that when dropping the kids off after Mass on Thursdays many other parents are doing the same thing. (RP 459)

b. **The court incorrectly suggested that the Bennett children are "out of the norm" which for developing children can have long term negative consequences.** There was no evidence

produced on this issue and in particular no evidence that the children felt uncomfortable in any way as a result of not attending mass.

c. The issue of school attendance and Mass was resolved prior to trial. The trial court's finding that these issues warranted a modification is not supported. The mother's present environment was not harmful to the children and the attendance issues were resolved. They certainly were not an ongoing source of conflict between the parties nor did they establish a pattern of abusive use of conflict.

Further, nothing set forth in this section supports damage either to the children or their relationship with their father.

III. THE TRIAL COURT'S MODIFICATION OF THE PARENTING PLAN WITHOUT A FINDING THAT "THE HARM OF A CHANGE OF ENVIRONMENT IS OUTWEIGHED BY THE ADVANTAGE OF THE CHANGE TO THE CHILD IS AN ABUSE OF DISCRETION.

In *Marriage of Mangiola*, 46 Wash. App. 574, 578-79, 732 P.2d 163, 165 (1987), the Court of Appeals reversed a trial court finding of adequate cause and remanded to the trial court with directions to enter an order dismissing the petition for modification, holding in part that the petitioner alleged no facts "tending to show that the advantages of a change in custody outweigh the harmful effects of a change of custody..." That is the case here.

Neither of the children wanted to change the residential schedule although Nico wanted some one-on-one time with his father. Chloe wanted less time with her father and more with her mother. (Ex. 29, G.A.L. Report, p.15, 16). Both children have expressed fear of their father. No findings were made addressing the harm to the children of being taken out of their mother's primary custody after having been with her for their entire lives.

No evidence was presented that the mother's home is not appropriate or that the children are not well taken care of by her.

No findings were made as to why the schedule imposed by the court was to the advantage of the children. As set forth above the change in schedule does not appear to be logically related to the supposed change of circumstances.

No evidence was presented or findings made that suggested the children were more attached to their father (rather the contrary) or that they were more likely to thrive there.

No findings were made or evidence presented as to what emotional harm might befall the children in being taken from their mother's home. All of the evidence regarding conflict between parent and child involved altercations between the father and the children: Nico (Ex. 30, G.A.L.

Supp. Report, pp. 10 – 11; RP 492 – 494; Ex. 29, G.A.L. Report, p. 12); Chloe: (RP 407; Ex. 30, G.A.L. Supp. Report, pp. 8 – 9)

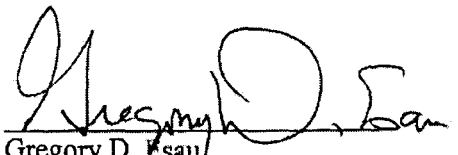
CONCLUSION

Because the trial court erred as a matter of law and there is no substantial evidence to support the court's factual findings, Stefanie respectfully requests that this court reverse the trial court's decision without a remand and reinstate the original parenting plan. She also asks this court to award her attorney fees under RCW 26.09.140, RCW 26.09.260, and RAP 18.1.

DATED this 5 day of March, 2012.

Respectfully submitted,

ELLIS, LI & McKINSTRY PLLC

By: 

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Appendix D

NO. 42275-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STEFANIE JEAN BENNETT (FKA STEFANIE XITCO),

Appellant,

v.

JOHN MICHAEL XITCO,

Respondent.

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

The trial court did not abuse its discretion in granting Father's Petition for Modification where there was substantial evidence presented at trial to support the elements of modification, including that, since entry of the 2008 Parenting Plan: (1) there has been a substantial change in circumstances of the children or the nonmoving party; (2) the best interests of the children will be served (and it is necessary to serve their best interests) by the modification; (3) the present environment is detrimental to the children's well-being; and (4) the harm caused by the change is outweighed by the advantage of the change. The trial court's findings support modification.

Further, the trial court did not abuse its discretion when it adjusted Father's child support transfer payment. There was substantial evidence to support that Mother was voluntarily underemployed. Also, given the trial court's modification of the Parenting Plan awarding primary custody to Father, it was not an abuse of discretion to give Father a downward deviation in the child support transfer payment.

II. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. The evidence presented to the trial court

overwhelmingly supports the court's finding that there was a substantial change in circumstances within the meaning of RCW 26.09.260(1) when the elements of the statute were met, including that the present environment was detrimental to the children. The evidence supports Mother's abusive use of conflict. This includes, but is not limited to (i) Mother's repetitive and calculated violations of the Parenting Plan, which were not fully resolve by the time of trial; (ii) Mother's passive-aggressive behavior to undermine Father's relationship with the children; (iii) Mother unilaterally subjecting the children to invasive medical testing, which created stress to them; and (iv) Mother's filing of two, false domestic violence petitions against Father.

. 2. The trial court may modify a parenting plan based upon a detrimental environment even when Mother had been the children's custodian for a period of time, where the Mother's present environment was detrimental to the children and where there was evidence and/or a finding that the harm caused by the change in custody is outweighed by the advantage of the change.

III. RESTATEMENT OF THE CASE

A. Procedural History.

John Xitco ("John") and Stefanie Bennett ("Stefanie") were married in 1997.[1] They have two children, Chloe and Nico, who are presently ages 11 and 13, respectively. Their marriage was dissolved, by agreement, in 2002. From the date of dissolution up until the trial relating to John's 2010 Petition for Modification, John provided financially for the majority of the children's needs, including paying for their private school tuition, clothing, extra curricular expenses and health care coverage. RP 35, 42-46.

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. 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. RP 57-58; Ex 29.

On March 31, 2008, Stefanie and John agreed to a new Parenting Plan ("Parenting Plan"). CP at 9-19. Under the Parenting Plan, Paragraph 3.12, John and Stefanie were designated as joint custodians, with John having custody of the children every other Sunday at 10:00 a.m. until Wednesday morning, and Stefanie having custody of the children every Wednesday after school until Sunday at 10:00 a.m. CP at 10-14. During

[1] Throughout Respondent's brief, the parties are referred to as John and Stefanie. No disrespect is intended to the parties by this informal reference.

the alternating week, John had the children from Sunday at 10:00 a.m. until school began on Tuesday morning. CP at 10. The Parenting Plan contemplates that days will be exchanged from time to time. *Id.* The Parenting Plan also set forth a schedule for school vacations, summer vacation, holidays and special occasions. CP at 11-13.

Under the Parenting Plan, major decision making is designated as follows:

- Non-emergency health care: joint
- Nico's psychological health care: joint
- Educational decisions: St. Patrick's unless agreed otherwise
- Religious upbringing: mother/father

CP at 16. Further, the Parenting Plan provides that if the parties do not agree regarding non-emergency health care decisions, the decision 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.* Section V of the Parenting Plan is entitled "Dispute Resolution" and requires that all disputes (other than child support) be resolved by mediation. CP at 17.

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.* John sought a modification of child support. *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 the following orders:

- Final Parenting Plan (CP at 73-84);
- Order of Child Support with supporting worksheets (CP at 85-102);
- Order Re: Modification/Adjustment of Custody Decree/Parenting Plan/Residential Schedule (CP at 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 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 Nico 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. . . ").

After entry of the final documents, John filed a Motion for Reconsideration seeking a slight adjustment to the Court's decision with respect to John's custody if the children. CP at 108-113. Specifically, John sought adjustment of the Parenting Plan to allow him time with both children on the last week-end of the month (as opposed to only having time with Nico during that week-end and having Chloe spend the week-end with Stefanie).

Id. On June 17, 2011, the trial court entered its Order on Reconsideration. CP at 155-56. The trial court adjusted the May 20, 2011 Parenting Plan as John requested and entered its Parenting Plan (Final). CP at 157-168. On June 17, 2011, Stefanie filed her Notice of Appeal. CP at 114-15.

B. Substantive Facts.

At the time John filed the July 2010 Petition for Modification, Chloe and Nico 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 upon Stefanie's actions, which were harmful to Nico and Chloe, and created a detrimental environment. RP 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.

Saint Patrick Catholic School Curriculum and Policies and 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." RP 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. RP 194-195; Ex. 45. In fact, the Student Handbook addresses student behavior in church, and report cards for the children in its lower grades, that is, up to and including fifth grade, provides a category addressing the extent to which a student "displays respectful Mass and prayer service behavior." Ex. 15 (Nico's report card). 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, reflection on the readings and an understanding and tolerance of religion. RP 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 everyday at 8:30 a.m., or they will be marked tardy. RP 198. Students who have over fifteen absences can be retained in their grade. RP 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. RP 199. Mrs. Jordan also opined that students with fewer absences and tardies generally perform better in school. RP 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.

With respect to attendance at Mass, 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 the all school 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. RP 459. Stefanie never discussed her decision with John or invoked the Parenting Plan's dispute resolution provision. RP 545-46. Mrs. Jordan testified that no other parent had similarly requested pulling their children from weekly Mass and no other families prevented their children from

attending weekly Mass. RP 197, 207. John testified that Nico was teased by his peers for not attending Mass. RP 135, 137; Ex. 29.

Nico'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. RP 195-96, 199-200. John also testified that being on-time and present at school, including Mass, instills in the children important values, and Stefanie's failure to meet those expectations was harming the children. The children were harmed socially as the children were the only two left out of this school "event", Nico was teased by his peers and they both missed out on moral and ethical lessons taught at Mass. RP 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." RP 240. When the GAL asked Stefanie about her reasons for refusing Mass attendance, he "never got the sense that she had cancelled Mass attendance for any reason other than she could." *Id.*

With respect to attendance and tardiness at school, 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 was responsible for

delivering the children to school 150 days. Of those 150 days, Nico was absent for all or part of the day on only 5 occasions, and Chloe 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, Nico and Chloe 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% (Nico) and .026% (Chloe) of the time while in John's care and 37% (Nico) and 30% (Chloe) of the time while in Stefanie's care. RP 74-75; Ex. 30. John's testimony supports that while in his care, the children are on time to school and extra curricular activities. RP 116.

Curiously, while Stefanie contends that many of Nico's absences were due to his alleged poor health, school records reflect that Chloe was also absent nearly all of the days that Nico 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. RP 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. RP 327-28; RP 330-31. Principal Jordan testified

that during the period while exclusively in John's care, the children had very few absences or tardies. RP 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. John testified that during this period, the children were on time to school and healthy. RP 112. When Stefanie's health improved and the children returned to their "regular" schedule under the Parenting Plan, including staying with Stefanie at her home, the tardiness and absences commenced once again. RP 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. RP 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. RP 88; RP 114. The children were doing very well in counseling with Mr. Hellencamp, yet once Stefanie's physical condition improved, she unilaterally cancelled one of Chloe's appointments with Mr. Hellencamp without obtaining John's agreement, or seeking mediation as required by the Parenting Plan. RP 88-89; CP 9-19. Stefanie next proceeded, in direct violation of the Parenting Plan, to take Chloe 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. RP 65-66.

Since entry of the 2008 Parenting Plan, Stefanie held strong to the belief that Nico suffered from significant medical issues. During the 2009-2010 school year, Stefanie provided St. Patrick School administration a list of potential "symptoms to look for" in Nico. Ex. 18. A sampling of these symptoms included nausea, headaches, chest pains, light and noise sensitivity, vomiting, abdominal pain, exercise [sic] intolerance, eye pain, generalized weakness, difficulty concentrating, lightheadedness and blurry vision. Ex. 18.

School officials' perceptions as to Nico's health and his behavior at school while in John's care are markedly different than their perceptions of Nico's alleged ill health and the manner in which Nico acts when at school under Stefanie's care. School officials report that Nico neither comes to school ill nor shows any physical signs or physical symptoms of discomfort when under John's care. Ex. 30. Conversely, Nico frequently complained of illness when with Stefanie. RP 83, 87-88. In fact, John's mother, Maory Lou Xitco, testified that during her six weeks with the children, she did not observe any "real" medical problems with Nico, although he "gives a lot of complaints." RP 333. Mrs. Xicto testified that on one occasion, she was called to school because Nico was complaining that he was sick. When she arrived at school, she observed that Nico did not have a fever. *Id.* She informed Nico that if he went home sick, he would be required to lie in bed and rest without watching television. *Id.*

At this statement, Nico voluntarily returned to class instead of going home sick. RP 333. Nico 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 Nico. 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' Nico's physical symptoms and has enabled Nico and to a slightly lesser extend Chloe to manipulate her." Ex. 30. When Mr. Cathcart asked Nico about his physical condition, Nico 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 (without John's knowledge or agreement) taking Nico to a naturopath in Seattle. RP 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. RP 85-86; RP 114. Stefanie also admitted that she could have cared less that her actions were in clear violation of the Parenting Plan. RP 472; RP 549-51; RP 557. Stefanie also subjected both Nico and Chloe to intensive medical testing, which Dr. Larson opined placed significant stress upon the children. RP 253-255; 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 Nico's birthday at their family beach house. RP 105-06. While at the beach house, John instructed Nico and his friend not to ride their motorbikes up a private driveway for safety reasons, but Nico did so anyway and lied about his actions. RP 105-110. John disciplined Nico for disobeying him by taking away his motorbike for the remainder of the week-end. RP 107. Nico 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 Nico was in danger. RP 108-10. The Pierce County Sherriff arrived at the beach house to investigate Stefanie's complaint. RP 109. After John relayed the events to the Pierce County deputy, the deputy departed the scene, finding that Nico was in absolutely no danger. RP 109. Stefanie's actions severely undermined John's parenting and supported Nico's effort in manipulate his parents against each other.

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. For example, Nico's counselor, Dr. Anton, John and Stefanie agreed that Nico was to achieve a 2.75 grade point average in order participate in sports. RP 489-90. However, after Nico achieved a 2.75, Stefanie decided that the grade point was not

sufficiently high enough for Nico's participation in sports. Stefanie changed the rules without consulting John or Dr. Anton and demanded that Nico obtain a 3.0 grade point average in order to participate in his sporting activity. RP 161-63.

Stefanie also attempted to pick up Chloe after school from St. Patrick's during John's visitation. When John arrived to pick up Chloe, he saw Stefanie picking her up and informed Stefanie it was his day to pick up Chloe. A verbal confrontation between John and Stefanie ensued and, as a result of this confrontation on school property, St Patrick's School officials required Chloe and Nico to be picked up by a parent in the school office. RP 182-83; RP 350-52.

Stefanie also involved Nico in the litigation by allowing him to read court documents. RP 105. This necessarily placed John in a compromised position as, on one hand, he needed to pursue a decision in the children's best interest that would be accomplished only by relaying the truth as to Stefanie's parenting, yet, on the other hand, he did not want to unnecessarily expose the children to parent issues that should be of no concern to the children.

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. RP 98-100. Both of the petitions were dismissed. RP 98-99; RP 103. Stefanie never served John with the first petition resulting in dismissal, and the second petition was dismissed after a court hearing on the merits.

RP 98-103. Ironically, the second domestic violence petition arose from an incident on or near Stefanie's porch wherein Stefanie yelled at John (in Chloe's presence) and proceed to run at him and punch him in the abdomen. RP 100-103. At trial, Stefanie admitted that she hit John in the stomach with force sufficient to hurt her hand. RP 496-97. Significantly, Stefanie also admitted that at no time during the extensive history of the parties' dissolution proceedings did she ever mention abuse in any pleading. RP 559. She also admitted that John had never hit her. RP 567.

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

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

GAL James Cathcart'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.

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i. *Stefanie's Physiological Profile Supports The Trial Court's Concerns As To Her Ability To Provide An Appropriate Environment To Parent.*

Both John and Stefanie were subject to psychological evaluations by Dr. Daniel Rybicki as part of the 2010 modification action. After reviewing Stefanie's physiological evaluation, the GAL noted various "issues of interest", as to Stefanie's physiological profile including: (i) elevation on the bi-polar manic scale; (ii) significant elevation for compulsive personality style; (iii) elevations in the truthfulness scale in the DVI; (iv) indications that she may have limited ability to comfortably manage interpersonal relationships and little interest in engaging in collaborative relations with others; and (v) the existence of several measures on which Stefanie produced guarded and defensive response sets, with a failure to offer a fully open or candid approach to the testing process. Ex. 30.

Perhaps this is not surprising as Stefanie experienced a difficult and challenging childhood. For example, when Stefanie was fifteen, her mother, believing that Stefanie was pregnant through an immaculate conception with the second coming of Jesus Christ, had Stefanie married to a young LDS boy. Stefanie's mother believed that the young boy was destined to fulfill the role of Joseph. Ex. 30. Without notice to anyone, including his family, Stefanie's mother brought the couple to Washington and ensconced them in her basement until the marriage was annulled six months later. Ex. 30.

Stefanie's twin sister, Stacey Bennett, testified that over the past five to seven years, Stefanie's behavior had not been rational in that she exhibited the same behavior that their mother exhibited, namely, taking irrational positions including cutting off contact with those with whom Stefanie does not agree or who disagree with Stefanie. *Id.* Despite Stacy's extremely strong bond with Nico and Chloe, Stefanie cutoff contact between Stacy and the children because Stacy submitted a declaration in the litigation in John's favor. Ex. 30. As a result of Stefanie's actions, Stacy only has contact with the children when they are in John's custody. *Id.* Like the GAL, the trial court was also concerned about the troubled profile reflected on Stefanie's psychological tests. CP at 67-70, 74.

ii. *Stefanie's Projection Of Her Illness Upon Nico*

The GAL also interviewed the children's pediatrician, Dr. Larry Larson, as well as Nico's counselor, Dr. Barry Anton, and Chloe's counselor, Dr. Naomi Huddlestone. Dr. Larson described a laundry list of tests that had been administered to both Nico and Chloe at Stefanie's insistence and noted that the testing process placed a considerable burden and stress on the children. Exs. 20- 21, 30. Dr. Larson opined that Nico's physical complaints were "functional" and were caused by the ongoing battles between Stefanie and John, with Nico and Chloe caught in the middle. Ex. 30. Dr. Larson expressed concerns that Stefanie may be projecting or promoting Nico's alleged physical condition. *Id.*

Dr. Anton informed the GAL that he saw little to no hope that the parents could engage in parallel parenting and that the acrimony "makes

Nico a fragile kid." Ex. 29. Dr. Anton also expressed concern about the similarity between Nico's alleged symptoms and Stefanie's issues and opined that she may be projecting her illness on Nico. *Id.*

Likewise, Dr. Naomi Huddlestone also voiced to GAL Cathcart that she had little faith that Stefanie was a dependable reporter. Ex. 29. Dr. Huddlestone reported that John was the more consistent parent and that instead of being consistent and following through with consequences as John does, Stefanie "negotiates" with Chloe. *Id.* Dr. Huddlestone also reported to Mr. Cathcart her concern that Stefanie is "invested in being ill" and is "dragging the kids into it." *Id.* John affirmed these doctors' and counselor observations in testifying about his observations and belief that Stefanie projects her illness upon the children. RP 111-13.

iii. *Concerns Regarding Stefanie's Actions In Influencing The Children To Adopt Her Agenda.*

The GAL's interviews with Nico and Chloe reflected that the children often adopted their mother's opinions and wishes about major components of their lives, but could not articulate reasons why they held those beliefs. Specifically, when Mr. Cathcart asked Nico and Chloe why they no longer wished to attend St. Patrick's neither of them could articulate a specific reason. Ex. 29. In fact, Nico expressed an interest in attending Annie Wright and thought they might get a discount there because of his mother's role in occasionally substituting at the school. Ex. 29. Given John's financial success, money has never been an issue with respect to schooling. RP 44-46.

iv. *Stefanie Lacked Credibility With The Guardian Ad Litem And The Trial Court*

In interviewing Stefanie, the GAL noted numerous inconsistent statements or unexplained circumstances regarding a variety of topics involving her and the children, which were introduced at trial and were before the trial court for its consideration. For example, Stefanie could not explain why Chloe missed most of the same school days that Nico missed due to Nico's alleged illness. Ex. 30. Further, the GAL was skeptical when Stefanie attributed to her former lawyer(s) two unilateral decisions that were directly contrary to the Parenting Plan, including her prior move to Seattle and her decision to cancel the children's attendance at school Masses. Ex. 30. Curiously, Stefanie also expressed to the GAL her desire to move to Seattle with the children, yet during trial, Stefanie testified that she had no interest in moving to Seattle. RP 452-53; Ex. 29.

Stefanie was also neither clear nor credible with regard to the required co-parenting counseling with Jamie Kautz in which John and Stefanie were required to engage pursuant to the trial court's Temporary Order. CP at 32-33. John regularly attended counseling with Ms. Kautz and continued to do so as of the date of the trial. RP 81-82; RP 115-16. As of the date of trial, John had attended at least twelve counseling sessions with Ms. Kautz. RP 82. The GAL's interview with Ms. Kautz supports that she believes John is one of her most hard working clients. Ex. 30. Stefanie, on the other hand, attended only one introductory appointment with Ms. Kautz. RP 501-02. Stefanie testified that after the

initial appointment with Ms. Kautz, Ms. Kautz referred her to another counselor, namely Jackie Parkes. RP 502. However, Stefanie never followed up or attended counseling with Ms. Parkes and Stefanie's testimony at trial was confusing as to whether she actually attempted to contact Ms. Parkes for an appointment or left voice messages with her. RP 502-03.

Stefanie also complained that the children were routinely sent home sick when in John's care, but could produce no records of this at trial. RP 547. Stefanie's explanation as to her tax records was inconsistent and confusing. RP 525-530, 533, 569-570; Ex. 43, 44, 43. Stefanie testified at trial that Mass was not part of the St. Patrick School curriculum, but was impeached with her deposition testimony wherein she conceded that Mass was part of St. Patrick's curriculum. RP 543-44.

At trial, the GAL recommended two options including designating of 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 week-end 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. RP 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.

IV. 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) *citing In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993); *In re Marriage of Cabalquinto*, 100 Wn.2d 325, 327-28, 669 P.2d 886 (1983).

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. *In re Marriage of McDole*, 122 Wn.2d at 610. A trial court's findings will be upheld if they are supported by substantial evidence. Substantial evidence is evidence exists for a factual holding "when there is a sufficient quantum of proof to support the trial court's findings." *Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 108, 86 P.3d 1175 (2004). The evidence required must be believable evidence of a kind and quantity that will persuade an unprejudiced

thinking mind of the existence of the fact to which the evidence is directed." *Hewitt v. Spokane, Portland & Seattle Ry. Co.*, No. 66 W.2d 285, 286, 402 P.2d 334 (1965).

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 (1) there has been a change in circumstances as described above; (2) the best interests of the child will be served; (3) the present environment is detrimental to the child's well-being; and (4) the harm caused by the change is outweighed by the advantage of the change. 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. *In re: Marriage of McDole*, 122 Wn.2d at 610-11; *In re Marriage of Timmons*, 94 Wn.2d 594, 617 P.2d 1032 (1980)("in matters dealing with the best interests of children, a trial court enjoys the great advantage of personally observing the parties, and we are reluctant to disturb a custody disposition"). 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). For the reasons set forth below, John respectfully requests that this Court affirm the trial court.

B. The Trial Court Did Not Abuse Its Discretion In Granting John's Petition For Modification.

i. *There is substantial evidence supporting the trial court's finding of a substantial change in circumstances in the children's lives and that those changes were detrimental to the children's well being.*

Stefanie contends that there was no substantial change in circumstances occurring after entry of the 2008 Parenting Plan to warrant modification, and even if there were changes, they were not detrimental to the children's well being. She first argues that any changes in the children's circumstances no longer existed at the time of trial.[2] Stefanie focuses upon three of the trial court's findings in this regard, namely: (1) school tardiness and absences; (2) her repeated violations of the parenting plan in attending to Nico's alleged health issues and both children's counseling; and (3) refusing to allow the children to attend Thursday school Masses.

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[2] Despite this assertion, Stefanie acknowledges that the school attendance, Nico's health issues and Mass attendance were not fully resolved by the time of trial. *See Brief of Appellant*, p. 19-20 ("school attendance issues . . . mostly resolved by the time of trial"; "any issues related to his health were mostly resolved by trial"; "attendance of Mass on Thursdays was also arguably no longer an issue by the time of trial")(underline added)).

Stefanie cites to *In re Marriage of Ambrose*, 67 Wn.App. 103, 834 P.2d 101 (1992) to support her argument that the trial court erred in failing to consider the children's "present environment" when finding that their environment had substantially changed, and that their environment was detrimental to their well being. Stefanie appears to contend that so long as she was exhibiting appropriate parenting immediately prior to trial there would be no basis for finding a substantial change in circumstances, and thus no basis for modification. However, her argument fails because neither the facts nor the law support her contention.

In *Ambrose, supra*, this Court held that the trial court was required to consider any and all relevant evidence to determine if the custodian was presently a fit parent capable of providing a suitable home for the children. *Id.* at 108-09 ("we do not suggest by our holding here that the trial court may not consider the children's environment while they were in [mother's] custody prior to the entry of the temporary order"). The *Ambrose* court did not hold that the trial court was precluded from considering evidence of the custodial parent's circumstances at the time of filing the petition for modification, but only that the court must also consider the children's environment at the time of trial. With respect to the weight of the evidence of environment, the *Ambrose* court also made

clear that in rendering its findings and decision, "it is for the trier of fact to determine the relative weight of such evidence." *Id.* at 108.

It would not be surprising for a parent to hurriedly alter or "clean up" their behavior prior to trial to avoid modification of a Parenting Plan. However, it would be illogical to limit the trial court's consideration of a custodial parent's actions to the months or days leading up to trial. Accordingly, *Ambrose* requires the trial court to consider any and all evidence relevant to Stefanie's parenting and the children's environment including their physical, mental or emotional health to determine whether she was providing and could provide the children with an environment not detrimental to their well being. The trial court then exercises its discretion in assigning relative weight and importance to the evidence presented. Judge Orlando fulfilled his duty in applying this factor, and substantial evidence supports his findings of a substantial change that was detrimental to the children's well being. As set forth above, Judge Orlando specifically articulated the following findings as to Stefanie's actions in parenting:

- 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 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 Nico 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; CP at 104-05.

The record supports these findings, which, in turn, supports the trial court's determination that the children's environment with Stefanie had changed and was detrimental to the children's physical, mental or emotional health.

School attendance records reflect that the children were habitually late for school and/or absent when in Stefanie's custody and care, thereby missing critical school instruction, which was detrimental to their learning of school subjects and life lessons of timeliness and respect. RP 97, 195-6;

199-200; 299; Exs. 15, 16, 19, 30, 32, 33. Further, Stefanie's clear violation of the parenting plan in repetitive, unilateral, non-emergency visits to health care professionals, including a counselor and naturopath as well as the children's pediatrician for intensive medical testing subjected the children to increased stress. Exs. 20, 21, 30; RP 253-255. Stefanie's decision not to allow the children to attend Thursday school Mass resulted in the children being singled out from their peers and Nico being teased. RP 136-37. Additionally, Nico received a grade of "N" (or "is not meeting grade level expectations") on his report card for his failure to participate in this aspect of the curriculum. Ex.15. Further, the message impressed upon the children by frequent late arrivals and absences at school is that it is acceptable to "show up" when they want without regard to the school's rules or requirements. RP 158-59. This behavior is detrimental to them with respect to their commitment to following through with school, extra curricular activities and other areas of their lives. *Id.* Stefanie's failure to manage and follow through with school projects also had a detrimental impact upon the children for the same reasons. RP 159-161. Stefanie's responses to Nico's efforts to play one parent against the other undermined John's ability to parent and develop his relationship with his son. Exs. 29, 30. Stefanie's call to law enforcement for a well child check as to Nico's safety created conflict and undermined John's

ability to parent and was detrimental to his relationship with Nico. Finally, Stefanie's insistence that the children were "ill" resulted in extensive, invasive and noninvasive medical testing, which caused the children emotional and physical burdens. RP 253-55.

The trial court's findings and its determination that these incidents support a substantial change in circumstances that is detrimental to the children's physical, mental or emotional health are supported by substantial evidence.

Stefanie also cites to numerous cases wherein trial courts have found detrimental circumstances warranting modification. Apparently, this recitation of cases reflects Stefanie's attempt to compare and contrast the circumstances in this case to other cases, thereby hoping to diminish the circumstances in this case and to weigh against a finding of detriment. *See Brief of Appellant*, p. 26-28. Instead of accomplishing this result, Stefanie's recitation of case law highlights the fact that there is a wide array of circumstances supporting this element of modification and that there is no "cookie-cutter" formula to apply to a detrimental environment finding.

This case is similar to *In re Marriage of Velickoff*, 95 Wn.App. 346, 968 P.2d 20 (1998) wherein this Court affirmed the trial court's custody modification. In *Velickoff*, the Court recognized that mother's

continuous concerted efforts to undermine father's parental relationship with their child supported the trial court's finding that the child's present environment was detrimental to her. *Id.* at 355. Specifically, in that case, the custodial parent used tactics such as interfering with telephone calls, asserting false allegations of abuse, and prohibiting the other parent's access to the child's medical records to interfere with the other parent's relationship with the child. *Id.* at 355-56. Further, there was no evidence in the record that the custodial parent would cease the destructive behavior. *Id.* at 356-57.

On review, this Court recognized the "clear policy of the Washington legislature to foster post dissolution relationships with each parent" and that interference with such relationship with detrimental to the child's best interest. *Id.* at 357. An effort by one parent to terminate the other parent's relationship with a child can be considered detrimental to the child and a modification based on such behavior is appropriate. *Id.* at 355.

Stefanie also contends that the trial court erred in failing to articulate how the children were being harmed by her conduct. This assertion is incorrect. The trial court did, in fact, find that the children had been harmed socially, mentally, physically and/or emotionally, in terms of being singled out from their peers with respect to school participation,

unilaterally and unnecessarily subjected to medical testing, and subject to Stefanie's continued actions to undermine the children's relationship with John. Even if the trial court did not make such a finding, Stefanie ignores the fact that in a custody modification, the trial court is not compelled to wait until damage to a child from an unstable living environment actually occurs before taking corrective action. *In re Marriage of Frasier*, 33 Wn.App. 445, 655 P.2d 718 (1982). The *Frasier* court affirmed the trial court's custody modification where the mother moved numerous times prior to trial and the child was exposed to an unstable home life. *Id.* at 447, 451.

Further, the *Fraiser* court, citing *McDaniel v. McDaniel*, 14 Wn.App. 194, 539 P.2d 699 (1975), articulated that "[a] living environment can be found to be detrimental to the physical, mental or emotional health of a child without proof that damage or impairment caused by that environment exists and is demonstrable at the time of trial. Such an environment may be demonstrable even thought its deleterious effects have not yet appeared." *Id.* at 451. In *McDaniel, supra*, the court found a detrimental environment where the children's environment reflected an irregular diet, poor dental care and school attendance and exposure to marijuana smoking though none of such circumstances proved present damage to the child. *Id.* at 198.

Thus, even if the trial court did not articulate specific and actual harm to Nico and Chloe due to Stefanie's actions, the fact that the environment Stefanie provided to the children was negative and unstable, supports the trial court's findings and determination even if their environment had not yet resulted in actual harm.

Stefanie also raises the issues of her reliance upon her alleged attorney's advice in defense of her unilateral decision to disallow the children from attending Mass. Stefanie's reliance upon the fact that she allegedly consulted with an attorney as to the Mass issue is misplaced and bears no weight regarding the propriety of the decision, its compliance with the Parenting Plan or whether it was detrimental to the children.

Finally, Stefanie argues that the modification must be erroneous because there is no evidence that she is an unfit parent or that she is a harmful influence on the children. With respect to unfitness, a finding of unfitness is not necessary to support a parenting plan modification. *See In re Marriage of Velickoff, supra,* at 353.

In sum, Stefanie's attempt to distinguish her case from a multitude of modification cases and to proffer excuses for her behavior is unpersuasive. There is substantial evidence supporting the trial court's determination that there was a substantial change in circumstances since entry of the 2008 Parenting Plan and that the changes were detrimental to

the children's well being. Accordingly, these modification factors are met and support the trial court's decision.

ii. *Substantial Evidence Supports that the Best Interests of the Children Will be Served by the Parenting Plan Modification.*

The major modification of a parenting plan also requires that the modification is in the child's best interest and is necessary to serve those best interests. RCW 26.09.260(1). Whether a parenting plan is in a child's best interest depends upon a variety of factors weighed by the trial court. *See* RCW 26.09 et seq. In determining best interests, the trial court considers the policy provisions of RCW 26.09.002, the parenting function provisions of RCW 26.09.004, and the considerations listed in RCW 26.09.184 and RCW 26.09.187(3). RCW 26.09.002 provides, in relevant part: "the best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care."

While Stefanie inquires as to the potential benefits to the children by a modification of the Parenting Plan, the record is clear as to the children's best interest under a modified parenting plan with John as primary custodian. The custody modification ensures that the trial court's parenting plan is followed as John has and will abide by the court's orders. The modification is in the children's best interest as it facilitates the

children's timely and consistent attendance at school, ensures their involvement and participation in all school curriculum including Mass, minimizes Stefanie's ability to promote passive-aggressive behavior against John and stops Stefanie from subjecting the children to unnecessary and unapproved medical appointments. All of this reduces stress upon the children.

As described in detail above, when the children are with John during the school week, they are happy and arrive at school and extracurricular activities on time. RP 91. He provides structure for them to focus on and complete their school homework and projects. RP 116-117. John's work allows him the flexibility of taking the children to school and picking them up, transporting them to their activities and attending to all of their needs. RP 91-92; RP 95. The children receive consistent parenting and John instills in them important life values and lessons. John has a strong bond with the children and a parenting plan with him as their custodian benefits their emotional growth, health and stability and physical well being. RP 67-69; RP 92.

In contrast, when the children are in Stefanie's care and custody, they are routinely late or absent from school, forced not to participate in school curriculum, fail to complete homework projects, and subjected to her whims with respect to medical treatment and care. RP 65-66; RP 253-

255; Exs. 15-16, 19-21, 30, 32-33. The children are caught in the middle of Stefanie's passive-aggressive behavior towards John, which causes them stress and anxiety.

Overall, the modification with John as the primary custodial parent provides the children with an environment that is loving, positive and consistent, resulting in a significant reduction in conflict between parents. In sum, substantial evidence supports that the custody modification is in the children's best interest and is necessary to serve their best interests.

iii. *Substantial Evidence Supports The Trial Court's Finding That The Harm likely To Be Caused By A Change In The Children's Environment Is Outweighed By The Advantage Of A Change To The Children.*

In order to support a major modification, the harm caused by the change in custody must be outweighed by the advantage of the change. RCW 26.09.260. Section 2.2 of the trial court's Order Re: Modification/Adjustment of Custody Decree/Parenting Plan/Residential Schedule specifically articulates the trial court's finding that the "harm likely to be caused by a change in environment is outweighed by the advantage of a change to the children" thereby demonstrating that the trial court considered and specifically entered a finding as to this element. CP at 104. While Stefanie contends that the Court abused its discretion in

failing to make such a finding, the record clearly indicates that the trial court's Order contains the required finding.

Simply stated, Stefanie provides the children an environment filled with unilateral non-compliance with the Parenting Plan resulting in school tardiness and absences, missing important curriculum and frequent changing of trained counselors and medical providers. These actions create instability in the children's lives and can result in long term negative consequences. Stefanie's parenting facilitates or results in conflict between her and John. The children are well aware of the conflict and it causes them stress. Stefanie's parenting undermines the relationship between John and the children, and has resulted in Nico pitting John and Stefanie against each other as evidenced by the motorbike incident. The environment Stefanie provides is detrimental to the children.

In contrast, John provides an environment with appropriate structure and stability. He sets boundaries and follows through with them, delivers the children to school and activities on time, allows full participation in school curriculum, does not undermine Stefanie's parenting, and puts the children and their needs first. Any risk of harm caused to the children in the change in custodial parent is outweighed by the consistency and stability of parenting demonstrated by John's parenting.

Significantly, the record also contains evidence of the children's growth and stability with John as custodial parent, when he, for nearly two months in 2009, acted as custodial parent during Stefanie's illness. The record reflects that the children adjusted to the change, were in and on time to school, were happy and healthy in John's care and custody. RP 112; RP 202; Ex. 30. In sum, the trial court considered the substantial evidence in favor of John as primary custodian versus the detriment of the change, and made a specific finding addressing this element. The evidence supports the trial court's determination as to this factor as well as the modification of the Parenting Plan.

Finally, even if the trial court did not expressly weigh the detriment versus the advantage of the proposed change, the balancing was implicit in the trial court's modification analysis. See In re Marriage of Velickoff, supra, at 357-58 (affirming parenting plan modification despite trial court's failure to explicitly weigh detriment versus advantage of proposed change). At a minimum, Judge Orlando carefully analyzed the evidence presented and weighed numerous factors regarding the children's placement making a determination regarding detriment and proposed change implicit in his decision.

iv. *The Trial Court did not Abuse Its Discretion in Entering its Order of Child Support.*

Finally, Stefanie assigns error to the trial court's Order of Child Support, which adjusted child support based upon its parenting plan modification. However, Stefanie presents neither legal argument nor authority in support of her assignment of error. It is well established that without argument or authority to support it, an appellant waives an assignment of error. RAP 10.3(a)(4) and (6); *Bercier v. Kiga*, 127 Wn.App. 809, 103 P.3d 232 (2004), *rev. denied*, 155 Wn.2d 1015, 124 P.3d 304 (2005)(citations omitted). Given Stefanie's failure to provide argument or authority in support of her assigned error, this Court should not consider her argument.

Even if this Court considers the propriety of the trial court's Order of Child Support, the record supports that the trial court properly applied the law in ordering a monthly transfer payment of $518.51 from John to Stefanie. CP 85-97; CP 98-102. In determining the child support transfer payment, the trial court utilized John's actual income and imputed income to Stefanie given its finding that she was voluntarily under employed at the time of trial. Exs. 1-5, 7-11, 23-26, 28, 43- 44; CP at 87. *See* RCW 26.19.071(6); *In re Marriage of Goodell*, 130 Wn.App. 381, 122 P.3d 929 (2005)(imputed income). Stefanie's voluntary under employment is supported by her testimony at trial wherein she could not articulate any effort to obtain or maintain employment and testified that she choose not to work so that she could focus on the litigation. RP 451-52; RP 525-534.

After arriving at a transfer payment based upon the parties' income figures, the trial court ordered a downward deviation due to the significant amount of time the children would spend with John under the modified parenting plan. CP at 88-89; *See* RCW 26.19.020; *See also* RCW 26.19.075(1)(d)(permitting downward deviation based upon residential schedule); *In re Booth*, 114 Wn.2d 772, 791 P.2d 519 (1990) (appellate court's review of trial court's imposition of downward deviation is abuse of discretion). The court entered findings of fact supporting its decision, and in so doing, did not abuse its discretion. Given John's income, the trial court ordered him to pay 100% of all educational expenses and extracurricular activities as well as all of children's health insurance coverage costs. CP at 90-91. The trial court also allocated to Stefanie all of the federal tax exemptions. CP at 90. In sum, the record supports the trial court's findings and corresponding Order of Child Support.

V. CONCLUSION

The Superior Court's decision modifying the parties' 2008 Parenting Plan is sustainable as John met his burden under RCW 26.09.260(1). Stefanie fails to demonstrate that the Superior Court erred in finding that there was substantial evidence to support the elements of a major modification, and in entering the Final Parenting Plan and the Order Re: Modification, Adjustment of Custody Decree/Parenting Plan/Residential Schedule. Further, as set forth above, the Superior Court

properly entered the Order of Child Support. Accordingly, this Court should affirm the Superior Court's Final Parenting Plan, the Order Re: Modification, Adjustment of Custody Decree/Parenting Plan/Residential Schedule and the Order of Child Support. Stefanie's requested relief should be denied.

RESPECTFULLY SUBMITTED this 12th day of June, 2012.

EISENHOWER & CARLSON, PLLC

By: _____
Jennifer A. Wing, WSBA # 27655
P. Craig Beetham, WSBA #20139
Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that I caused to be served a true and correct copy of the foregoing Brief of Respondent on the 4th day of June, 2012 by facsimile, and also via legal messenger for delivery on the 4th day of June 2012, to the following counsel of record:

Gregory D. Esau, WSBA #22404
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On the 4th day of June, 2012, I deposited with ABC Legal Messengers a true and correct copy of the foregoing Brief of Respondent, to be delivered to The Court of Appeals Division II at the following address:

Court of Appeals Division II
Attn: Cheryl, Case Manager
950 Broadway, Suite 300
Tacoma, WA. 98402

I do hereby declare under penalty of perjury and in accordance with the laws of the State of Washington that the foregoing is true and correct.

DATED this 4th day of June, 2012, at Tacoma, Washington.

Julie M. Hawless, Paralegal

Appendix E

NO. 42275-1-II

IN THE COURT OF APPEALS DIVISION TWO
OF THE STATE OF WASHINGTON

STEFANIE JEAN BENNETT (FKA STEFANIE XITCO),

Appellant,

v.

JOHN MICHAEL XITCO,

Respondent.

APPEAL FROM THE SUPERIOR COURT
IN AND FOR PIERCE COUNTY
THE HONORABLE JAMES R. ORLANDO

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The trial court abused its discretion in modifying the parenting plan changing the primary residence of the children from the mother to the father for four reasons, any of which support Stefanie's request to set aside the trial court's Order Re Modification:

1. The trial judge did not determine detriment at the time of trial—he determined detriment based on the time of the petition for modification and Stefanie requests this Court to set aside the trial court's conclusions of law.

2. Substantial evidence does not support the finding of detrimental environment at the mother's home.

3. The court failed to weigh the harm likely to be caused by the children's change in environment against the advantage to the children.

4. The trial court's ruling improperly uses custody of the children to punish the mother's conduct. *Shaffer v. Shaffer*, 61 Wn.2d 699, 379 P.2d 995 (1963).

The overwhelming evidence at trial was that by the time of trial Stefanie had no longer been tardy with the children in the 2010-2011 school year,[1] and the children were absent or tardy about the same with

[1] Excluding the technical tardies for Thursday Mass, the children were not tardy at all during Stefanie's residential time during the third trimester of the 2010-2011 school year—while the kids were tardy three times during John's residential time. RP 210-215.

both parents for the 2010 – 2011 school year. RP 210-215. Numerous witnesses, including the GAL, testified that Stefanie provided a loving stable environment for the children and that she was an "intelligent, successful, and loving parent and the children were adamant in not wanting to change primary residence." RP 367; 394; 269; 306. Substantial evidence does not support a finding that Mass is part of the school curriculum and the school principal could not conclusively say that Mass was part of the Saint Patrick School curriculum, and gave permission for the children to skip Thursday Mass. RP 197, 207, 208. John was abusive and Chloe was frightened of him. RP 365, 396, 409,492-93, 568; Ex 29 at 15. The children were doing very well in school, RP 219, and missing Mass did not harm them academically, behaviorally, socially, or emotionally. RP 197; 204, 225, 280. Chloe was "well liked by all the students." Ex 32. And, John was an admitted drug user who refused to stop. RP 123, 341, 342, 343. Therefore, the trial court's finding and conclusion that the environment at Stefanie's home is detrimental to the children and that the harm to the children of the new parenting plan outweighs the benefit to the children, must be set aside

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Stefanie had only one tardy for the children the entire 2010-2011 school year. RP 20-215. As for absences during Stefanie's residential time, Nico was absent once and Chloe was absent five times in the third trimester. RP 210-215. As for John, Nico was absent twice during the third trimester. RP 210-215.

because the decision was unreasonable and not supported by substantial evidence.

Conclusions reached by trial courts will be set aside if there is a clear showing of abuse of discretion. *Sweeny v. Sweeny*, 52 Wn.2d 337, 324 P.2d 1096 (1958).

In *Anderson v. Anderson*, the appellate court overturned a trial court's modification of a custody decree on grounds that the trial court's decision was not supported by the evidence. In reversing the trial court, the *Anderson* Court held that the provisions of RCW 26.09.260 were not satisfied and that the evidence did not support a finding of changing custody:

> [t]here was no showing that Karen Anderson is not a fit parent. There was no evidence of any material change in the maternal environment which would compel a change of custody. Nor was there any showing that the maternal home was detrimental to the children's well-being. The children were comfortable in their mother's home, preferred living there, and were doing well in school. The only advantage that would result from a custodial change would be the alleviation of Jack Anderson's visitation problem. This, by itself, is not a sound reason for the modification of the decree. *Shaffer v. Shaffer*, 61 Wn.2d 699, 379 P.2d 995 (1963). *But cf. Selivanoff v. Selivanoff*, 12 Wn. App. 263, 529 P.2d 486 (1974). Because the criteria of RCW 26.09.260 were not satisfied, the court erred in awarding custody to Jack Anderson. The order from which this appeal has been taken is reversed and the cause is remanded to the superior court with instructions to dismiss the petition for modification and reinstate the provisions of

the original divorce decree. *Anderson*, 14 Wn. App. at 368-369.

FINDINGS AND FACTUAL SUMMARY

Set forth below are the factual findings of the trial court supporting the legal conclusion at paragraph 2.2 of the Order Re Modification that there has been a substantial change of circumstances and modification is necessary to serve the best interests of the children based on a detrimental environment. The court found:

> The following facts, supporting the requested modification, have arisen since the decree or plan/schedule or were unknown to the court at the time of the decree or plan/schedule:
>
> **On April 27, 2011, the Court finds the following:**
>
> Petitioner/Father has met his burden to show that based upon facts that have risen since the 2008 modification, that a substantial change has occurred in the circumstances of the children and that the modification is in the best interest of the children and is necessary to serve their best interest.
>
> The limited psychological information about Ms. Bennett is troubling. She has refused to provide the full report to the court, but the Guardian ad litem summary shows a troubled profile on any of the tests given. She has used conflict in a manner that is likely to cause long term harm to the children. She has unilaterally prohibited the children from attending a part of their school curriculum, namely Thursday morning mass. She has allowed them to miss an excessive number of days from school, which I believe is her "silent" protest over the children attending the parochial school which she originally agreed that they would attend. She has filed unfounded domestic violence petitions and called the police for well-child checks for no good reason. Her unilateral decision to take "Nico" for a non-emergency

> doctor visit for a second opinion without notice to the Father is the other abuse.
>
> This passive-aggressive behavior has damaged the children and their relationship with the father. These two children are the only two at St. Pat's not attending mass. They are "out of the norm" and for developing children being "out of the norm" can have long term negative consequences. Ms. Bennett knows how strongly Mr. Xitco feels about school attendance and she has deliberately allowed this issue to become a weekly source of contention, in large part I see as her way to get back at him for his perceived slights towards her.
>
> The emotional gamesmanship needs to end. These children are already using the parental fight to gain an advantage over their parents. The beach motorcycle incident is a prime example.
>
> These children have been over counseled and will soon believe that they are not normal. They need to be children and participate in normal activities, develop normal friendships, get into normal child "trouble." (CP 104-105, Order Re Modification)

These findings are examined in light of the trial record and in this case are individually of particular significance since both the court and the G.A.L. rely on the different facts in combination as forming the basis for finding detriment. RP 311 - 312. If no single finding of fact supports detriment to the children, the question becomes whether the conclusion of detriment stands without one or more of the underlying facts.

1. ***The limited psychological information about Ms. Bennett is troubling.... the Guardian ad litem summary shows a troubled profile on any of the tests given.***

This is not a proper "fact" and is not relevant to the modification or finding of detriment. The psychologist, Dr. Rybicki's opinion was that further assessment "may be worthy of consideration" but did not find his psychological testing as a basis for "any 26.09.191 restrictions against either party." Exhibit 30, Supp. G.A.L. Report. The G.A.L. testified that "I am not qualified to tell whether or not the results of Ms. Bennett's psychological evaluation called for a psychiatric intervention or a psychiatric evaluation...I don't know. That's not my expertise." RP 273 The psychologist did not testify and the G.A.L. is a lawyer. There is no competent evidence that Stefanie suffers from any psychological impairment relevant to parenting and thus this finding is speculation but not a finding based on any substantial evidence. Even if a "troubled psychological profile" is a fact, there is no nexus between that "fact" and any of the parenting issues in the trial record. Significantly, the court did not order any psychological follow up, counseling or treatment, nor did it make a finding under RCW 26.09.191 (1) regarding psychological impairment.

"She has used conflict in a manner that is likely to cause long term harm to the children" was the second finding of the court but as it is based

on the factors which follow, they are dealt with separately as being the factual finding supporting the conclusion that she used conflict in a manner likely to cause harm to the children.

2. ***Ms. Bennett has used conflict in a manner that is likely to cause long term harm to the children.***

The court's Order Re Modification sets forth five supporting facts for this conclusion.

a. She prohibited the children from attending Mass on Thursdays. Stefanie, per her attorney's advice, took a note to Francie Jordan, the principal at St. Patrick's, to inform her that the children would not be attending Mass on Thursdays and Ms. Jordan agreed the children would not be required to attend the Thursday Mass. (RP 207) (Trial Ex. 18) Ms. Jordan testified that the school handbook encourages but does not require attendance at Mass. (RP 208; Ex. 45) The trial court's finding that Mass was part of the school curriculum was thus an abuse of discretion. If not a part of the school curriculum then whether to attend mass was Stefanie's decision during her residential time.

Ms. Jordan testified that both children received satisfactory grades for religion and prayer service related subjects and that missing Mass did not appear to harm their grades. (RP 210,219) There was no court order to attend Mass and the G.A.L. did not make a recommendation that the

children attend Mass. (RP 279 – 280) No evidence was presented that the children wanted to go to Mass or suffered any consequences, social or academic, for missing Mass and this was supported by the G.A.L. (RP 279)

b. <u>She has allowed them to miss an excessive number of days from school</u>. For school year 2010 – 2011 the children's absences and tardies were within acceptable range based on the testimony of the school principal and Exhibits 56 and 57 – the children's actual attendance records for the previous school year (3 trimesters). Ms. Jordan testified that upon review of attendance records, with the exception of the Thursday tardies (late because not at Mass), the absences and tardies for the children seemed to be distributed between both John and Stefanie. (RP 210 – 217; Exs. 56, 57) For the 2010 – 2011 school year the children's attendance was within acceptable range – less than five absences per trimester. (RP 214) The GAL was receiving attendance reports and noted that there was no significant problem with attendance since the start of the year and the kids were reliably attending school. (RP 275) Children signed out early for doctor's appointments in 2009-2010 were counted absent for the day - analysis of the early release sign out sheets documents that most absences for the Xitco children were early sign outs for medical appointments, not "silent protest" over the parochial school. Ex. 19, Ex. 33

There was no evidence of any academic, social or emotional harm associated with school attendance. Ms. Jordan testified that both children were doing well in all documented respects in school and that nothing in their report cards gave her any cause for concern. (RP 222 – 225; 32)

There was incorrect information presented to the court by John in presenting his own summaries of tardies and absences that were objected to by Stefanie's counsel on the basis that they were incorrect and that the actual records would be introduced through the school principal, Francie Jordan. RP 74 – 75; RP 264. John also falsely testified that when the children were with him "they did not miss any school." RP 91 Based on the actual school records this is simply not true and John had more trouble getting the children to school on time that Stefanie did. In fact, when excluding the technical tardies for Thursday Mass, during Nico's 2010-2011 school year, John had five tardies compared to Stefanie's one tardy. RP 210-217; Ex. 33. And for Chloe's 2010-2011 school year, John had three tardies compared to one tardy for Stefanie. RP 210-217; Ex. 33.

There is no substantial evidence that school attendance for the children was an issue for the school year immediately preceding the trial and if the school attendance ever was detrimental, it was not at the time of trial.

c. **She has filed unfounded domestic violence petitions.** There were two: one never served and the other based on reasonable cause - this is not an abusive use of conflict. It is germane to this court's analysis the dates of the petitions—in 2009 and early 2010—they were not contemporaneous with the time of trial. RP 99, 100. Further, there is no evidence of improper motive or design to interfere with John's parental rights – neither petition asked for restraints applicable to the children. There was substantial evidence of reasonable fear on Stefanie's part and that the petitions, while unsuccessful, were filed in good faith. In fact, ***four*** witnesses testified to John's abusive behavior toward Stefanie. RP 365, 396, 409,492-93, 568. The court does not make a finding of bad faith on her part or that the petitions were false – only that they were legally unfounded

d. **She called the police for well-child checks for no good reason.** Nico "called her in hysterics and said that his dad was yelling in his face...and had pulled and twisted his arm and had really hurt him." Stefanie called the police for a "well child check" and they reported back that Nico was OK. (Ex. 29, G.A.L. Report, p. 12) Another incident was reported by David Bennett as follows:

> "...John was at the baseball practice yelling in Nico's face, waving his finger in Nico's face as Nico was trying to walk away...The berating went on a significant amount of

> time...John was being extremely aggressive. He had not seen that with the kids but he had observed John being that way with Stefanie...Nico was in tears"

(Ex. 30, G.A.L. Supp. Report, pp. 10 - 11)

Under these circumstances, it cannot reasonably be said that Stefanie, as a mother seeking the best for her children, did what she did with "no good reason." There may have been better alternatives but there is not substantial evidence that the call was made "without good reason" or that it was done by Stefanie with ill intent. It was also a unique, isolated incident that was not repeated or part of any pattern.

e. <u>She took Nico for a non-emergency doctor visit for a second opinion without notice to the father</u>. Stefanie took Nico to a naturopath for a "second opinion" on Dr. Larson's lab work, without consulting John because she felt Nico was sick too much and missing too much school and therefore could not be healthy. (RP 471). The naturopath did not treat Nico but did review the lab work and discovered that Nico had a stomach infection and vitamin D deficiency. She recommended a stool test but John refused. (RP 466, 473) After this Dr. Larson made a referral to a gastroenterologist, Dr. Pickens. By this time Nico had blood in his stool and Dr. Larson then discovered that Nico had a severe stool impaction that was causing a lot of his nausea, vomiting and stomach problems. Dr. Pickens found a bowel bacterial overgrowth and said that, coupled with

chronic stool compaction would cause the complaints and physical misery Nico had been going through. (RP 466, 473 – 474) Nico now takes a probiotic and vitamin D supplement and is doing much better.

Stefanie acted only after seeking alternatives and John refusing to cooperate, and then took the minimum action to resolve a major health problem for Nico.

In conclusion on this issue, Nico's physical issues were largely resolved after treatment by Dr. Picken's *in 2009* and are not an ongoing issue. RP 86. This issue was not contemporaneous with the time of trial and in any event it was not detrimental to Nico because it led to his healing. This is also evidenced by Exhibits 56 and 57, the attendance records showing that Nico was no longer regularly taken out of school for medical issues after the 2009 – 2010 school year.

3. *This passive-aggressive behavior has damaged the children and their relationship with the father.*

No substantial evidence was presented to support the finding that Stefanie's behavior damaged the relationship between the father and his children. The facts supporting this conclusion were stated by the court as follows:

a. These two children are the only two at St. Pat's not attending mass. They are "out of the norm" and for developing children being "out of the norm" can have long term negative consequences.

It is not clear what relation this finding might have to damaging the father's relationship with the children. There was no substantial evidence of harm. John never took the children on his Sundays. RP 135 The school principal, presumably understanding the social dynamics at St. Pats, gave permission to skip Mass. The children were doing well socially and academically, and were happy children. RP 210-215 and RP 197; 204, 224-225, 280

b. Ms. Bennett knows how strongly Mr. Xitco feels about school attendance and she has deliberately allowed this issue to become a weekly source of contention, in large part I see as her way to get back at him for his perceived slights towards her.

There is no clear relation between this finding and any present harm or detriment to the relationship between father and children. The attendance issue was not applicable in the preceding school year (RP 210-215) and the children were doing very well in school.

There is evidence that Stefanie has been cooperative over time in allowing John extra time with the children and she did not say derogatory things about him. RP 370, 411

LEGAL ARGUMENT

1. ***The Finding of Detriment was not Based on Stefanie's Environment at the Time of Trial and is Therefore Unreasonable and a Manifest Abuse of Discretion.***

The court's finding regarding detriment to the children was defective because (a) the court failed to make the necessary finding at all and (b) even if a finding of detriment was made, the court applied an incorrect legal standard.

a. <u>The court did not make a finding that the children's "present environment" is detrimental and therefore the decision of the trial court must be reversed and remanded for supplemental findings</u>.

The court based its decision to modify the parenting plan on the following finding at paragraph 2.2 of the Order Re Modification:

> The ***children's environment*** under the custody decree/parenting plan/residential schedule is detrimental to the children's physical, mental or emotional health and the harm likely to be caused by a change in environment is outweighed by the advantage of a change to the children. (CP 104-105, Order Re Modification) **[emphasis added]**

This finding is facially deficient in failing to find that the "child's present environment" is detrimental as required by RCW 26.09.260(2)(c) which provides as follows:

> ...
>
> (2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:
>
> ...
>
> (c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child; or ...

RCW 26.09.260(2)(c)

"The absence of a finding on an issue is presumptively a negative finding against the person with the burden of proof." *Taplett v. Khela,* 60 Wn. App. 751, 759, 807 P.2d 885 (1991). Thus, the failure of the trial court to enter a finding that Ms. Bennett's *present* environment was detrimental to the children is a negative finding against the Petitioner—John Xitco.

Remanding for further consideration of "present environment" was the ruling in *Ambrose* where the court held, at p. 109 as follows:

> "The decision of the trial court is reversed and the case is remanded to the trial court for supplemental findings and determination..."

The same result should prevail in this case – it should be remanded for further determination of whether there is present detriment. *George*, 62 Wn. App. at 386. And, the trial court should take evidence on the environment of Ms. Bennett's home since the Order on Modification.

> **b. If the trial court did make a finding of present detriment then it applied the incorrect legal standard because the findings were based on factual circumstances no longer applicable at the time of trial and therefore the decision of the trial court must be reversed and remanded for supplemental findings.**

Even if the trial court did find present detriment it was a manifest abuse of discretion because the finding was not based on the then present

environment. [2] The "child's present environment" within the meaning of RCW 26.09.260(2)(c) means "the environment that the residential parent or custodian is currently providing or is capable of providing for the child..." *George v. Hellar*, 62 Wn. App. 378, 386, 814 P.2d 238 (1991); *Ambrose v. Ambrose,* 67 Wn.App.103,108. In *Ambrose*, at 108-109 the court notes that in those cases where there is a lengthy time involved the need to look at the "current circumstances of both parents is compelling." In *Velicoff,* the court held that "'present environment of the child' means the environment contemporaneous with the time of trial." *Velicoff*, 95 Wn. App. at 24, citing *Ambrose*, 67 Wash.App. at 107, 834 P.2d 101.

Here the modification was filed in July 2010 and trial not held until April 20, 2011. The trial court in Ms. Bennett's case abused its discretion when determining detriment. *George v. Helliar,* 62 Wn. App. 378, 384-85, 814 P.2d 238 (1991). In *George,* the Court of Appeals reversed and remanded the case for trial, in part because there was no factual finding that the child's present environment was detrimental to the child. *George*, 62 Wn. App. at 386. Regarding the "child's present environment," the court said:

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[2] Detriment is a finding of fact but "present environment" is a question of law reviewed de novo. *Ambrose v. Ambrose*, 67 Wn.App. 103, 106 (1992).

> Consequently, on remand, the trial court is to review Kimberly's current situation and conduct any hearings necessary to determine if she is presently a fit parent capable of providing a suitable home for Danielle. We emphasize that the trial court is not to review de novo the original decree by comparing the circumstances of each parent's household. Instead, the court must focus solely on the suitability of Kimberly's present environment and must return Danielle to Kimberly unless the court makes findings that Kimberly is not a fit parent consistent with RCW 26.09.

George, 62 Wn. App. at 384-85 (1991).

In *Ambrose* v. *Ambrose*, Division II of the Court of Appeals relied on the *George* case in instructing lower courts on present environment:

> We do not mean to suggest by our holding here that the trial court may not consider the children's environment while they were in Robin's custody prior to the entry of the temporary order. We are simply saying that the trial court must consider any and all relevant evidence to determine if Robin is *presently* a fit parent capable of providing a suitable home for the children.

Ambrose v. Ambrose, 67 Wn. App. 103, 109 (1992) (emphasis added).

As is set forth below, not only did the trial court fail to find the children's "present environment" is detrimental, the record would not support a finding of present detriment even if that was a finding of the court.

The trial court found detriment based on issues that were no longer part of Stefanie's home environment. The DV petitions were filed in 2009

and early 2010, before the case was even filed, and were already legally resolved by the time of trial, and no similar behavior had occurred. RP 99 – 100. Stefanie taking Nico for a "second opinion" to a naturopath was in 2009 – two years before the modification order (RP 86) and Nico's medical issues had been resolved and were no longer issues between the parties. RP 83, 86 – 87. In the 2010 – 2011 school year, Stephanie got both children to school on time according to the official school records and testimony of the principal. RP 210 - 215

2. Substantial evidence does not support the finding of detrimental environment at the mother's home.

This court's review of a trial court's findings of fact and conclusions of law is a two-step process. *Landmark Dev., Inc. v. City of Roy,* 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). First, the court must determine if the trial court's findings of fact were supported by substantial evidence in the record. If so, the court must then determine whether those findings of fact support the trial court's conclusions of law. *Landmark,* 138 Wash.2d at 573, 980 P.2d 1234. "'Substantial evidence' exists when there is a sufficient quantum of proof to support the trial court's findings of fact." *Org. to Preserve Agricultural Lands v. Adams County,* 128 Wash.2d 869, 882, 913 P.2d 793 (1996).

The next inquiry is "whether the findings as a whole sustain the challenged conclusion of Law." *In re Sego*, 82 Wn.2d 736, 743, 513 P.2d 831 (1973) "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise. *Holland v. Boeing Co.*, 90 Wash.2d 384, 390-91, 583 P.2d 621 (1978); *In re Snyder*, 85 Wn.2d 182, 532 P.2d 278 (1975)." In reviewing the record for substantial evidence, courts have looked to evidence "which would indicate that [the judge]...acted unfairly, irrationally, or in a prejudicial manner in reaching his conclusion."

The following factual findings are all discussed in more detail above and are not supported by substantial evidence:

A. Troubled psychological profile (see discussion above) – there was no competent professional testimony and the information from the psychologist given through the G.A.L. was that Stefanie had no mental health issues that were diagnosable under DSM IV and only suggested the possibility of further investigation. Exhibit 30. Dr. Rybicki did not find any psychological issues that warranted RCW 26.09.191 restrictions on either party. There is no substantial evidence for a factual finding of psychological issues supporting a conclusion of present detriment.

B. Tardies and absences as a "present environment" of the mother is discussed in more detail above and the trial court's finding that Ms.

Bennett had excessive tardies and absences—when compared to John—is not supported by a sufficient quantum of evidence that would convince a fair minded person.

C. Missing Mass as an issue harming the children or damaging their relationship with their father. Other than annoying John, there is not substantial evidence that this circumstance caused any harm to the children or their relationship with their father, or that Stefanie intended it to.

D. That the DV petitions filed by Stefanie were in bad faith, designed to harm John's relationship with the children, or that the action created a detriment to the children is not supported by substantial evidence.

3. The court failed to weigh the harm likely to be caused by the children's change in environment against the advantage to the children.

In *Marriage of Mangiola*, 46 Wash. App. 574, 578-79, 732 P.2d 163, 165 (1987), the Court of Appeals reversed a trial court finding of adequate cause and remanded to the trial court with directions to enter an order dismissing the petition for modification, holding in part that the petitioner alleged no facts "tending to show that the advantages of a change in custody outweigh the harmful effects of a change of custody..." That is the case here.

Neither of the children wanted to change the residential schedule although Nico wanted some one-on-one time with his father. Chloe wanted less time with her father and more with her mother. (Ex. 29, G.A.L. Report, p.15, 16).

No evidence was presented that the mother's home is not appropriate or that the children are not well taken care of by her. No findings were made as to why the schedule imposed by the court was to the advantage of the children. The change in schedule is not logically related to the supposed change of circumstances.

No findings were made or evidence presented as to what emotional harm might befall the children in being taken from their mother's home. All of the evidence regarding conflict between parent and child involved altercations between the father and the children: Nico (Ex. 30, G.A.L. Supp. Report, pp. 10 – 11; RP 492 – 494; Ex. 29, G.A.L. Report, p. 12); Chloe: (RP 407; Ex. 30, G.A.L. Supp. Report, pp. 8 – 9) There is no evidence of conflict between the mother and children and the uncontradicted evidence is that the children are happy, successful and thriving at mother's home.

Respondent relies on *Marriage of Frasier*, 33 Wn. App. 445, 655 P.2d 718 (1982) and *McDaniel v. McDaniel,* 14 Wn. App. 194, 539 P.2d 699 (1975).

for the proposition that no proof of actual harm is required but these cases are not similar to the present case in that the threatened harm is significant and the harm likely to result is obvious.

In *Frasier,* the court held that "An environment may be detrimental even though its deleterious effects have not yet appeared" and went on to hold that the court is not required to wait until demonstrable damage has already occurred. *Id.* at 451. In this case the child was a 4 year old girl living with her mother who shortly after the divorce married an inmate in state prison. The mother went to visit her new husband 5 days each week, two times each day and 3 – 4 times a week took her 4 year old along for 2 ½ hour visits. At these visits male inmates were involved in sexual behavior with female visitors. The mother and daughter had moved 5 times in 11 months, primarily living with people associated with prison inmates. That this is a harmful environment is obvious and the child at age 4 may not show signs yet.

In *McDaniel* the custodial mother was living with a man (in 1974), the child was exposed to marijuana smoking, and had irregular school attendance, dental care and medical attention. This is a case by the standards of the time of neglect and exposure of the child to immoral and criminal behavior. The harm of neglect is obvious and the court so ruled.

It is not clear what benefit there is to the children in the new parenting plan. The issues of conflict – DV issues, well child checks, "emotional gamesmanship" – are not affected by the new schedule. Either party may precipitate conflict, file petitions, call police, etc. just as well now as before. The only potential advantage to this schedule would be to get the children to school on time which surely fails to overcome the strong presumption in favor of custodial continuity.

4. The trial court's ruling improperly uses custody of the children to punish the mother's conduct.

There is an additional ground upon which this Court must reverse the lower court's determination of custody. Here, the trial court made it clear that it was punishing Stefanie for not sending the children to Mass and other "bad conduct" on Stefanie's part including violating joint decision making by unilaterally taking Nico to a doctor, and bringing the children to school late because the court believed that this was passive aggressive behavior toward John. This was a manifest abuse of discretion. "The custody of the child is not to be used as a reward or punishment for the conduct of the parents." *Shaffer v. Shaffer*, 61 Wn.2d 699, 379 P.2d 995 (1963); *Malfait v. Malfait,* 54 Wn.2d 413, 341 P.2d 154 (1959); *Annest v. Annest,* 49 Wn.2d 62, 298 P.2d 483 (1956); *Norman v. Norman,* 1947, 27 Wn.2d 25, 176 P.2d 349 (1947). In *Shaffer v. Shaffer, supra,* the

Washington Supreme Court reversed a trial court's determination of modifying custody when it appeared from the record that the trial court was punishing the custodial parent for failing to comply with court orders. That is precisely what the trial court did in Ms. Bennett's case—it punished her for what it deemed as passive aggressive behavior in not sending the children to Mass:

> This [Ms. Bennett's] passive-aggressive behavior has damaged the children and their relationship with the father ...Ms. Bennett knows how strongly Mr. Xitco feels about school attendance and she has deliberately allowed this issue to become a weekly source of contention, in large part I see as her way to get back at him for his perceived slights towards her.
>
> CP 104-105, Order Re Modification (emphasis added).

Given the absence of any meaningful weighing of harm to the children versus benefit of the change in custody, and the lack of substantial evidence of a present detriment, where is the nexus between the harm to be avoided and the remedy? *Klettke v. Klettke,* 48 Wash.2d 502, 505, 294 P.2d 938 (1956).

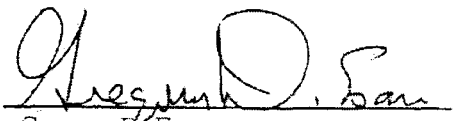
> "Any change in the conditions or the circumstances of either parent is of little moment in custody matters, unless the welfare of the children is directly and significantly affected thereby... the requirement that a change of conditions be shown in order to modify custody provisions is simply another way of stating that a showing must be made that the welfare and the best interests of the children clearly require a change in custody."

The factual findings used to support the conclusion of detriment can all be more easily resolved with contempt or modification of decision making and using a change in custody to punish the mother violates "...the established rule in this state; that punishment of a parent for contempt may not be visited upon the child in custody cases; and that custody of the children is not to be used as a reward or punishment for the conduct of the parents." *Johnson v Johnson*, 72 Wn.2d 415,419 (1967), citing *Shaffer v. Shaffer*, 61 Wn.2d 699, 379 P.2d 995 (1963); *Malfait v. Malfait*, 54 Wn.2d 413, 341 P.2d 154 (1959); *Annest v. Annest*, 49 Wn.2d 62, 298 P.2d 483 (1956); *Norman v. Norman*, 1947, 27 Wn.2d 25, 176 P.2d 349 (1947).

DATED this 5th day of July, 2012.

Respectfully submitted,

ELLIS, LI & McKINSTRY PLLC

By: 

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STEFANIE BENNETT, Appellant vs. JOHN XITCO, Respondent	NO. 42275-1-II CERTIFICATE OF SERVICE

I certify that on July 5th, 2012, I caused to be served by ABC Legal Messenger, the following pleadings to the individuals identified in this certificate:

1. Reply Brief of Appellant;

2. Certificate of Service.

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