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STATE OF WASHINGTON

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

Gregory D. Esau, WSBA 22404
Ellis, Li & McKinstry PLLC
Market Place Tower
2025 First Avenue, Ph. A
Seattle, WA 98121
Attorney for 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

---

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. <u>She has filed unfounded domestic violence petitions</u>. There were <u>two</u>: 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. <u>She called the police for well-child checks for no good reason.</u> 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. <u>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.</u>

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).

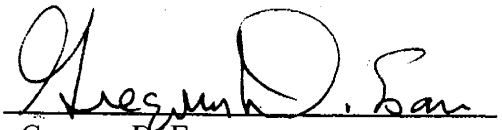
> "Any change in the conditions or the circumstances of either parent is of little moment in custody matters, unless the welfare of the children is directly and significantly affected thereby... the requirement that a change of conditions be shown in order to modify custody provisions is simply another 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: 

Gregory D. Esau
WSBA No. 22404
Attorney for Appellant

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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

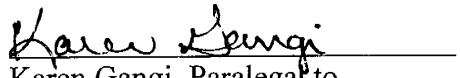
I certify that on July 5th, 2012, I caused to be served by ABC Legal Messenger, the following pleadings to the individuals identified in this certificate:

1. Reply Brief of Appellant;
2. Certificate of Service.

Respondent's Counsel:

P. Craig Beetham
1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, WA 98402

DATED this 5th day of July, 2012.



Karen Gangi, Paralegal to
Gregory D. Esau
Ellis, Li & McKinstry PLLC
Market Place Tower
2025 First Avenue, Penthouse A
Seattle, WA 98121
(206) 682-0565/phone
(206) 625-1052/fax