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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 resolved 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 of 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. Xitco 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 extent 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 Sheriff 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 Huddleston. 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.

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 though 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.

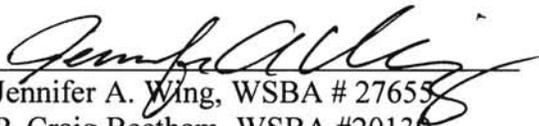
V. CONCLUSION

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 4th day of June, 2012.

EISENHOWER & CARLSON, PLLC

By: 
Jennifer A. Wing, WSBA # 27655
P. Craig Beetham, WSBA #20139
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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:

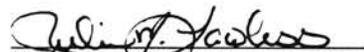
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On the 4th day of June, 2012, I deposited with ABC Legal Messengers a true and correct copy of the foregoing Brief of Respondent, to be delivered to The Court of Appeals Division II at the following address:

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. Lawless, Paralegal