NO. 42275-1-II

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

STEFANIE JEAN BENNETT (FKA STEFANIE XITCO),

Appellant,

v.

JOHN MICHAEL XITCO,

Respondent.

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

BRIEF OF APPELLANT

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INTRODUCTION

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

ASSIGNMENTS OF ERROR

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

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

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

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

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

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

STATEMENT OF THE CASE

1. *Factual History*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The Trial Court's Decision

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

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

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

In summary, the trial court found:

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

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

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

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

5. The emotional gamesmanship has to end.

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

6. The children are over counseled.

(CP 104-105, Order Re Modification)

3. The Appeal

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

STANDARD OF REVIEW

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

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

ARGUMENT

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

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

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

(a) The parents agree to the modification;

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

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

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

RCW 26.09.260(2).

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

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

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

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

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

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

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

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

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

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

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

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

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

(CP 104-105, Order Re Modification)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[10] *Id.*

factors."[11]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

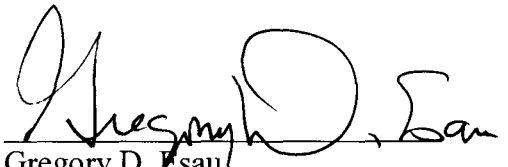
CONCLUSION

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

DATED this 5 day of March, 2012.

Respectfully submitted,

ELLIS, LI & McKINSTRY PLLC

By: 

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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 March 5, 2012, I caused to be served by ABC Legal Messenger, the following pleadings to the individuals identified in this certificate:

1. Brief of Appellant;

2. Certificate of Service.

Respondent's Counsel:

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DATED this 5th day of March, 2012.

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