NO. 89984-3

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of:

ELIZABETH KIM,
Respondent

and

ANATOLE KIM,
Petitioner

ANSWER OF RESPONDENT TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Respondent Elizabeth (Betsy) Kim (now Akiyama) is the prevailing party in the trial court and on appeal at Division III of the Court of Appeals, and makes her Answer requesting this Court to deny the Petition for Review.

II. COURT OF APPEALS DECISION

The decision of the Court of Appeals is attached to the Petition for Review. We will refer to the written decision in the same manner as Petitioner, as "Slip Op" or "Decision." A cursory review if its opinion shows that the appellate review by the Court of Appeals was without error. The two parties thoroughly briefed the case to the Court of Appeals; exclusive of tables, covers, and appendices, the Petitioner's Opening Brief is 50 pages, Respondent's Brief is 48 pages, and the Reply is 20 pages. The absence of error is shown in at least three obvious general ways

First, in its unanimous decision, the Court of Appeals made a thorough review of the facts regarding relocation as found by the trial court, and concluded that substantial evidence supported each challenged finding in the trial court's findings of fact. Slip Op at 13 - 20.

Second, it determined that the trial court granted Betsy Kim permission to relocate with the three minor children to Southern California, "[a]fter considering the appropriate statutorily mandated relocation factors and entering detailed findings of fact for each . . ."
Slip Op at 6.

Third, the Court of Appeals analyzed the legal issues of the case in each category raised by the Petitioner: Relocation; Relocation — Best Interests of Children; Cultural Factors; Property Division; Child Support; and Attorney Fees. Slip Op, *passim.*

The Petition for Review might make it appear that the Court of Appeals found that the relocation would cause the children to have "extremely limited visitation with their father during the school year, and would have a largely absent single parent (Respondent) without assistance . . . ." Pet. for Rev. at 1. This statement bears little resemblance to the Decision and is purely argument of an alleged fact which was not found credible by the trial court. The remainder of the description in Section II of the Decision is the same - Petitioner's contrary factual perspective, and argument.

III. RESTATEMENT OF ISSUES PRESENTED FOR CONSIDERATION

A. Is the Court of Appeals Decision in *In re Marriage of Kim*, Case No. 314260-III, in conflict with any relevant decision of the Washington Supreme Court or the Washington Court of Appeals?

B. Does the Decision present a significant question of law under the Constitution of the State of Washington or of the United States?

C. Does the decision involve an issue of substantial public interest that should be determined by the Washington Supreme Court?

D. Were the Supreme Court to grant review of the child relocation matters raised in the Petition for Review, should the Supreme Court grant review of the Court of Appeals' decisions regarding division of property, award of attorney fees to the Respondent Betsy Kim, or any other issues raised below?

IV. STATEMENT OF THE CASE

This is a dissolution of marriage case with permanent parenting plan and child relocation issues. Petitioner seeks review of the Court of Appeals

Decision regarding relocation of the minor children to Southern California. We have not found any reference in the Petition for Review to the trial court's decision about the initial parenting plan for primary child placement with Respondent Betsy Kim under RCW 26.09.002, 26.09.184, and 26.09.187(3). Therefore, primary placement of the children is not before this Court. His only references to the general parenting act are to RCW 26.09.184(3) in footnote 3 and to RCW 26.09.002, which are limited to his argument that the "bests interests of the children" override all the other factors contained in the relocation act, RCW 26.09.406 - .560.

The Petitioner's Statement of the Case (Pet. for Rev. at 5 - 12) is fraught with wholly subjective assertions which do not fairly characterize the Decision or its procedural or factual posture. The procedural state of the case is sufficiently outlined in the Decision; *see, esp.*, Slip Op at 2-3 and 5-6. As for the summary of facts, the Court of Appeals in its introductory summary and throughout its decision meticulously reviewed the evidence and placed several quotes from the testimony and evidence of the parties, experts, and the trial court in its opinion. It reviewed the trial court's treatment of each RCW 26.09.520 statutory factor. Slip Op at 13 - 20. The

Decision concerning questions of fact is due considerable deference, just as the appellate court defers to the trial court regarding facts supported by substantial evidence and judgments about credibility of witnesses and parties. The function of ultimate fact finding "is exclusively vested in the trial court." *Edwards v. Morrison-Knudsen Co.*, 61 Wn.2d 593, 598, 379 P.2d 735 (1963); *In re Marriage of Rich,*, 80 Wn.App. 252, 259, 907 P.2d 1234 (1996); *In re Marriage of Fahey,* 164 Wn.App. 42, 262 P.3d 128 (2011), *review denied,* 173 Wn.2d 1019, 272 P.3d 850 (2012). *Cf. In re Personal Restraint of Coats*, 173 Wn.2d 123, 267 P.3d 324 (2011) (review under RAP 13.4(b) of "pure questions of law"does not require deference to the Court of Appeals on such questions, implying that deference *is* due to fact issues). In determining initial child placement and child relocation issues in this trial, the trial court rendered a parenting decision which *first* met the objectives of the parenting act and the criteria for establishing a permanent parenting plan under RCW 26.09.002, 26.09.004, 26.09.184, and RCW 26.09.187. CP 185 - 194. Having decided that residential placement with Respondent Betsy Kim was in the best interests of the children, the trial court *then* undertook the factual and legal analysis of the relocation

request with the presumption that Betsy Kim would act on her relocation request in accordance with the best interests of the children. The trial court then applied the 10 germane factors outlined in RCW 26.09.520. CP 194 - 199. *See, In re Marriage of Horner,* 151 Wn.2d 884, 93 P.3d 124 (2004), *passim.*

V. ARGUMENT: REASONS TO DENY REVIEW IN FULL

This matter of review is governed by RAP 13.4(b):

> (b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Each of these factors is addressed below in subsections V. A. through C. With the foregoing principles in mind, we turn to the Respondent's request that this Court deny review.

A. The Decision Is Not In Conflict With Any Decision Of Another Court Of Appeals Or The Supreme Court. RAP 13.4(b)(1) and (2)

The instant case is controlled by firmly established authority from this Supreme Court and the cases from the Court of Appeals; there are no case conflicts and Petitioner never really identifies any. The intensive case analysis began with the Division I case of *In re Osborne,* 119 Wn.App. 133, 79 P.3d 465 (2003). A year later, a relocation issue was heard and decided in the Supreme Court in *In re Marriage of Horner,* 151 Wn.2d 884, 93 P.3d 124 (2004). *Osborne* and *Horner* were followed by Division III in *In re Marriage of Momb,* 132 Wn.App. 70, 130 P.3d 406 (2006). Anatole Kim's arguments have never come to grips with the meaning of these cases, which was summarized by this Court in *Horner*, which held that consideration of all of the 26.09.520 factors serves as a balancing test between the "many competing interests" in relocation cases. "Particularly important in this regard are the interests and circumstances of the relocating person." 151 Wn.2d at 894. Quoting *Osborne, supra* at length, the Court emphasized that the relocation act "incorporates and gives substantial weight to the traditional presumption that a fit parent will act in the best interests of her

child." *Id.* at 895.

This Court also noted that the lower courts' then-inconsistent applications (2003-2004) of the statute demonstrated a need for guidance from the Supreme Court. 151 Wn.2d at 892. No such inconsistency exists today.

Petitioner insists that the instant Decision creates a new standard other than that set by the statutes and cases, but he does not point to any part of the Decision or the record to substantiate the claim. This is because he cannot. The Decision thoroughly reviews the findings of fact by the trial court which follow and conform to RCW 26.09.520. Slip Op 13 - 20. The allegation that the Decision transforms the statutory rebuttable presumption into a "conclusive" presumption (Pet. For Rev. at 13) is erroneous. There is nothing in the Decision to support this strained argument. Indeed, the argument on that page shows only Petitioner's disagreement with the way the trial court found the facts as affirmed by the Court of Appeals. This is admitted in the Petition at footnote 1, at 6. This Court does not reevaluate facts of the case which have been affirmed by the Court of Appeals. *In re Marriage of Kovacs*, 121 Wn.2d 795, 810, 854 P.2d 629 (1993).

Petitioner's underlying argument is now - as it was at the Court of Appeals - that consideration of the "best interests of the children" is the prime concern in a relocation case, "trumping" all considerations of the advantages of relocation to the relocating person. The statute and the cases belie this claim. As noted earlier, the children's best interests were fully adjudicated in the first phase of the trial court's review of the evidence and its decision. This fact is so obvious that the Court of Appeals did not especially address it; it is apparent from the record itself.

Petitioner claims that "the focus [of the statutory relocation factors] is on the children" (Pet. For Rev. at 14). *Horner* contradicts this proposition. *See, Horner,* footnote 10, 151 P.3d at 895 which observes that several of the 11 factors refer to the interests and/or circumstances of the relocating person: RCW 26.09.520(2) ("Prior agreements of the parties"); (4) ("Whether either parent or a person entitled to residential time with the child is subject to limitations under RCW 26.09.191"); (5) ("The reasons of each person for seeking or opposing the relocation and the good faith of each of the parties in requesting or opposing the relocation"); (7) ("The quality of life, resources, and opportunities available to the child and to the

relocating party in the current and proposed geographic locations"); and (10) ("The financial impact and logistics of the relocation or its prevention").

The Petition presents nothing approaching a real argument that the Decision conflicts with any of the authorities dealing with the relocation act.

B. The Decision Does Not Present A Significant Question Of Law Under The Constitution Of The State Of Washington Or Of The United States RAP13.4(b)(3)

The Petition for Review does not actually raise or address a constitutional issue. There is not a single citation to the Washington Constitution or to the federal Constitution, and the only references to any constitutional idea are at the Petition pp. 3 (statement of Issue C.) and 13 (reference to Court of Appeals Opening Brief of Appellant). Such a nonchalant approach to an allegedly "significant question of law under" our state and federal constitutions can hardly be grounds for review within the meaning of RAP 13.4(b)(3).

In any event, courts of appeals have held the relocation act to be constitutional under the criteria enunciated in the Washington and federal

line of cases identified with *Troxel v. Granville,* 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), and *In re Custody of Smith,* 137 Wn.2d 1, 969 P.2d 21 (1998). These cases are: *In re Osborne,* 119 Wn.App. 133, 79 P.3d 465 (2003) and *In re Marriage of Momb,* 132 Wn.App. 70, 130 P.3d 404 (2006). In its explicit approval of and extensive quotations from the *Osborne* case, the *Horner* court implicitly approved of the *Osborne* holding on the constitutional principles.

151 Wn.2d at 895.

Instead of making any plausible constitutional claim, the better part of Anatole Kim's Petition is devoted to an argumentative restatement of the facts as the Petitioner wishes the trial and appellate courts had found them. Petition, footnote 1, *supra.*

C. The Decision Does Not Involve An Issue Of Substantial Public Interest That Should Be Determined By The Washington Supreme Court
RAP 13.4(b)(4)

The *Horner* case, 151 Wn.2d 884, *supra,* considered the proper scope and interpretation of the relocation act as one of, among other things, continuing and substantial public interest under the tests for determining

whether the case was moot, and found that it was of substantial public interest at the time. 151 Wn.2d at 891- 893. It also noted that had the case not been moot, the Court would have remanded to the trial court for factual findings under RCW 26.09.520. Fn 11.

Contrary to Petitioner's characterization of the *Horner* decision at Petition page 4 (*Horner* . . ."did not involve a fully contested appeal of the underlying, critical issues. . .), this Court held that the case was moot because the petitioner no longer wanted to relocate with the child, *not* because the case was not fully contested. The *Horner* court held that the mooted appellate decision merited Supreme Court review under that part of the test articulated in *Sorenson v. City of Bellingham,* 80 Wn.2d 547, 558, 496 P.2d 512 (1972) regarding the high quality of advocacy present in that case, which included support from *amicus curiae.* 151 Wn.2d at 893. Review of the names of the attorneys participating in *Horner* soundly confirms this assessment. Petitioner is patently mistaken.

Therefore, whether or not the issues now raised could be considered of public interest, the Petition fails to satisfy the second part of the test under RAP 13.4(b)(4) — that the issue "should be determined by the

Washington Supreme Court." It *has* been determined in *Horner,* and that case is "the gold standard" as witnessed by the fact that it has been cited with no negative treatment fifty-three times as of this writing, with 15 of those being court of appeals cases involving child relocation. This Court has cited it three times on the issue of mootness. *Horner* obviates the need for review of the parenting act as a matter of substantial public interest.

D. If Review Is Granted, The Supreme Court Should Not Review Property or Fee Award Issues ; and Respondent's Request For Fees

1. Property Issues

Anatole Kim's position on the sixty percent - forty percent property division in favor of Betsy Kim is without merit. He attempts to shoe-horn the compensatory maintenance decision in the well-known case of *In re Marriage of Washburn,* 101 Wn.2d 168, 677 P.2d 152 (1984) into a boot that does not fit, namely, the division of the property of the Kims' twenty-five year marriage in which the parties had accumulated a great deal of property. Washburn involved 2 consolidated cases where the marriages were short, one spouse had foregone her professional career to support the

other, and the parties had accumulated very little or no property. The trial court and Court of Appeals rightly rejected this claim with sound reasoning. *See* Slip Op at 22 - 26.

2. Attorney Fees Below And On This Petition

(a) Fees Awarded By The Court Of Appeals

RCW 26.09.140 provides that "[u]pon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs." When determining whether an award of fees is appropriate in a dissolution case, an appellate court considers the parties' "relative ability to pay" and the "arguable merit of the issues raised on appeal." *In re Marriage of Leslie,* 90 Wn.App, 796, 807, 954 P.2d 330 (1998), *review denied,* 137 Wn.2d 1003 (1999); *In re Marriage of C.M.C.,* 87 Wn.App. 84, 89, 940 P.2d 669 (1997):

In the case at bar, the Court of Appeals cited to *C.M.C., supra*, and awarded fees. Slip Op at 28 - 29. Having thoroughly reviewed each assignment of error by Anatole Kim and having rejected each as of little or no merit, the Court was entitled to award fees as it did. There is really nothing

to review.

(b) Respondent's Request For Reasonable Attorney Fees And Expenses For Answer To Petition

Should this Court deny the Petition for Review, Betsy Kim should be allowed her reasonable attorney fees and expenses as provided in RAP 18.1(j), which states in pertinent part:

> (j) Fees for Answering Petition for Review. If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review. A party seeking attorney fees and expenses should request them in the answer to the petition for review. The Supreme Court will decide whether fees are to be awarded at the time the Supreme Court denies the petition for review. . .

As Betsy Kim noted at the Court of Appeals, her income is substantially less than the Petitioner's, and she should not be required to deplete the assets awarded to her in the dissolution to defend an appeal without merit. The same reasoning applies to her Answer here. Therefore, Respondent respectfully requests an award of her reasonable attorney fees and expenses under RAP 18.1(j).

VI. CONCLUSION

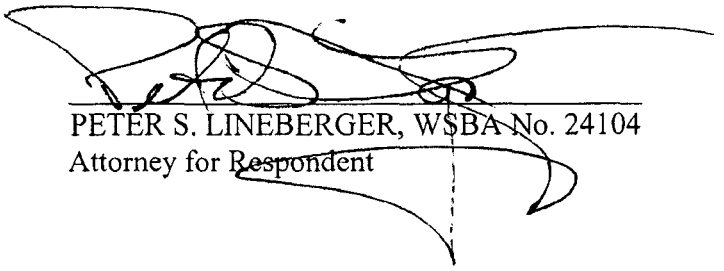
The only complaint Petitioner actually voices is that the trial court and the Court of Appeals did not see the facts of the case his way. He has never made a credible argument that the Findings of Fact are not supported by substantial evidence; he has utterly failed to show an abuse of discretion. These fact questions were essentially foreclosed by the Decision; this Court does not engage in a *de novo* review of factual findings.

The Supreme Court reviews court of appeals decisions when at least one of the four criteria of RAP 13.4 is met. This Petition does not qualify for review under any of the criteria. The Decision is in complete agreement with the former authorities which are embodied in the *Horner* case, and follows *Horner* quite scrupulously. No constitutional questions of law are presented seriously, and no new public policy issues are articulated. Petitioner's hyperbolic claims of nullification of the parenting act, violation of separation of powers, constitutional deprivations, and undecided questions of law under the State or federal constitution, are very misplaced, and approach being frivolous. While it is legitimate, and often admirable, to challenge laws by making a good faith argument for the extension, modification, or reversal of

existing law, neither the trial court, the Court of Appeals, nor we have been able to discern any request to extend, modify or reverse any law. Rather, Petitioner has attacked the view of the evidence as expressed by the Court of Appeals and is asking the Supreme Court to re-try the case.

Respondent, Betsy Kim-Akiyama, requests the Court to deny the Petition for Review and award her the prevailing party attorney fees and expenses to which she is entitled under RAP 18.1(j).

RESPECTFULLY SUBMITTED this 4th day of April, 2014.



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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on the 4th day of April, 2014, I caused a copy of the attached *Answer of Respondent to Petition for Review,* to be filed and served upon counsel of record as follows:

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Dated April 4th, 2014.

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Attorney for Respondent

OFFICE RECEPTIONIST, CLERK

To: Pete Lineberger
Subject: RE: Marriage of Kim, no. 89984-3, Attn: Clerk

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From: Pete Lineberger [mailto:psline@pslinelaw.com]
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Cc: 'Miller, Greg'; howard@rbhslaw.com; 'Tam Henry'
Subject: Marriage of Kim, no. 89984-3, Attn: Clerk

Clerk and Counsel:

Documents to be filed:
1. Answer to Petition for Review
2. Declaration of Service
3. Letter to Court with copy to Division III

Case Name: In re Marriage of Kim
Case No.: 89984-3 (COA No. 31426-0)
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Thank you,

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