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Court of Appeals
Division I
State of Washington

No. 73466-1-I

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

In re the Marriage of

ALEXA INGRAM-CAUCHI
Appellant

and

STEVEN STOUT
Respondent

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The trial court here described cases brought under the child relocation act (CRA) as "hideous." As difficult as the subject of relocation may be for families, the statute – when properly applied – actually simplifies the court's job, with benefits to the family in the form of predictability, consistency, custodial continuity, and less judicial involvement in "micro-managing" post-separation families. By requiring an objecting parent to rebut a presumption in favor of relocation, and requiring that such rebuttal must take the form of proving detriment, Washington establishes a "brighter" line than prevails under a "best interests" standard. While other states approach relocation cases differently, our state is not a "start over" or "do over" state, meaning, a proposed relocation does not ask or permit a trial court to focus solely, or mainly, on a best interests analysis, as the court did here. Rather, in our state, the relocation shall be permitted unless the objecting parent proves detriment, and detriment is a standard with a particularized substance in our state's law. Nothing like detriment was established here – in fact the parents were acknowledged as equally good parents - which is why the trial court's decision should be vacated. Moreover, when trial courts properly implement the statute, the intended benefits -- to the parties and the court -- follow. In short, relocation cases become less "hideous."

II. STATEMENT OF ISSUES IN REPLY

1. To acknowledge a presumption is not the same as applying a presumption.

2. The relocation statute requires the court to presume the parent's decision to relocate serves the child's best interests, which the court here failed to do.

3. The objecting parent has the burden to prove and persuade that the "detrimental effect" of the relocation outweighs the presumed benefit of the children relocating with the primary residential parent, which the father here failed to do.

4. The court must take the family as it finds it, including with its history of actual parenting, not, as here, by relying on speculation about "friendly parent" or "parental alienation," particularly where the court found both parents have strong, bonded relationships with the children.

5. The court's assessment of the relocation factors demonstrates its failure to apply the presumption or hold the father to his evidentiary burden to prove detriment.

6. The trial court did not perform the requisite analysis for excluding a witness and the error is not harmless.

7. The trial court awarded fees without proof of the father's need and despite evidence of the father's ability to pay his own fees.

III. ARGUMENT IN REPLY

A. INTRODUCTION AND FACTUAL CLARIFICATIONS.

A relocation proceeding should devolve into an attack upon a parent's style of parenting only in extraordinary circumstances, as our case law makes clear, not where both parents are capable and loving. The mother does not dispute the father is a good parent, yet she was forced at trial to defend against his blistering critique of her – reaching back to when the children were in diapers. As argued in the opening brief and below, the relocation presumption, properly applied, should short-circuit this kind of unnecessary parental warfare.

As preface, only to illustrate the damage done when a relocation cases loses its statutorily-prescribed focus, several of Steve's factual arguments bear noting. For example, he begins by blaming Alexa for the marriage ending. See Br. Respondent, at 3-4. Already, we know we are off-course. He then recites the testimony of his various witnesses that, prior to separation, Alexa disparaged his parenting, Br. Respondent, at 9, though he acknowledges Alexa does not minimize his parental role. RP 715.[1] After rehashing their pre-separation difficulties, Steve then complains that Alexa focuses on the past, i.e., the fact that she has

[1] Some of these same witnesses also praised Alexa. See Ex. 4 (Declaration of Erinn Ford describing Alexa as "always attentive to the kids ensuring their care and safety," "a devoted mother who keeps the well-being of her children at the forefront," and "works hard proactively to foster a loving and nurturing environment," "provides them with much love and attention," and has a "calm, yet firm approach to discipline.").

provided the primary care for the children, a fact plainly relevant to the relocation analysis insofar as it establishes that Alexa has and continues to be the primary caregiver.

These factual corrections are made here to underscore the mistaken, intense, and unnecessary focus on the different parenting styles of the parties, as if those differences mattered. Alexa and Steve are good parents, imperfect as we all are, different in their approach to some subjects, but undeserving of having every minute aspect of their private family lives laid bare and graded. As discussed immediately below, this intense scrutiny resulted from a misapplication of the CRA. See III.B. Additional facts, insofar as they are relevant, will be discussed in connection with the court's analysis of the factors below. See III.C.

B. THE PRESUMPTION IN RELOCATION CASES SHOULD OPERATE TO PERMIT RELOCATION EXCEPT WHERE DETRIMENT IS PROVEN SO AS TO PROMOTE OTHER IMPORTANT POLICIES EMBRACED BY OUR LEGISLATURE.

Steve complains that Alexa's analysis of the presumption is "so abstract as to be unintelligible" (Br. Respondent, at 19), which perhaps explains why he fails to demonstrate how the trial court's analysis in any respect differs from one based on a best interests standard. Apart from declaring the statutory presumption applies, the trial court did nothing to implement it. A review of cases from Washington involving the detriment

(harm) standard, and from other states utilizing a "best interests" standard, illustrates that problem.

The CRA applies where children live in a "principal residence" (RCW 26.09.410) and imposes requirements on the parent in that residence who wishes to relocate. RCW 26.09.430 ("a person with whom the child resides a majority of the time …").[2] The act also bestows on that parent a rebuttable presumption in favor of the relocation. RCW 26.09.520. Alexa has previously described how the CRA, in this way, harmonizes and advances other Washington family law policies, including favoring custodial continuity, predictability, and finality (reducing litigation and state involvement in post-separation families). Br. Appellant, at 18-20. This case represents how the statute and these policies can only be served if the statute is observed in practice, not merely in word.

The mechanism by which the Washington statute advances these important policies not only places on the objecting parent the burdens of proof and persuasion, by means of the presumption, it establishes what the objecting parent must prove: "that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person, based upon [eleven factors]." RCW 26.09.520. The word "detriment"

[2] The statutes are in the appendix, excerpted in pertinent part.

must be given meaning. *See State v. K.L.B.,* 180 Wn.2d 735, 742, 328 P.3d 886 (2014) ("a court must not interpret a statute in any way that renders any portion meaningless or superfluous."). That meaning is supplied by the other uses to which the legislature puts this same standard.

For example, in the related context of modification, the detriment standard appears as a basis for permitting the court to modify a parenting plan. RCW 26.09.520(1)(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"). In this context, the courts have found detriment proved where, for example, the custodial parent married an incarcerated felon, took the child to lengthy prison visits multiple times per week, and moved five times within 11 months. *Marriage of Frasier,* 33 Wn. App. 445, 655 P.2d 718 (1982). In another case, the detriment standard was satisfied where the custodial parent exhibited instability (repeat marriage engagements), had attempted suicide, and lived with the children in overcrowded conditions in a relative's home. *Timmons v. Timmons,* 94 Wn.2d 594, 600, 617 P.2d 1032 (1980). In another case, detriment was proved when the custodial parent's home was extremely dysfunctional, marked by repeated instances of intrafamily violence, including against the child. *Marriage of Zigler and Sidwell*, 154 Wn. App.

803, 813-14, 226 P.3d 202 (2010). In yet another case, detriment was proved based on the custodial parent's effort to terminate the other parent's relationship with the child, efforts that included repeated allegations of sexual abuse, deprivation of residential time, and obstruction of access to the child and to pertinent records. *Velickoff v. Velickoff,* 95 Wn. App. 346, 355, 968 P.2d 20 (1998). None of these kinds of facts are present in this case. *Compare Marriage of Lemke*, 120 Wn. App. 536, 541-542, 85 P3d 966 (2004) (no prima facie showing of detriment from claim that fit mother left children in care of others so she could work). In short, the detriment standard – its rigorous substance – measures and protects the value we place in custodial continuity.

The detriment standard applies in another family law context. In nonparental custody cases, the court presumes placement of a child with the parents serves the child's best interests, a presumption that can be overcome only by proof of parental unfitness or actual detriment to the child's growth or development. *In re Custody of B.M.H.,* 179 Wn.2d 224, 236, 315 P.3d 470 (2013). In this context, the court has noted the "actual detriment" showing must be determined on a case-by-case basis, but that the standard can only be met in "extraordinary circumstances." *Id.* (and offering examples, such as hearing impaired child, traumatized child). Recently, for example, Division Three recognized that poor parenting

choices (not just style differences, but poor choices) do not rise to the level of detriment. *In re Custody of A.L.D.,* 2015 WL 7734296 (Wash. Ct. App. December 5, 2015).

The same meaning should be given to the "detriment" standard under the CRA as under these other family law statutes. A principle of statutory interpretation provides that when the Legislature uses a word in a statute in one sense, then uses the same word when legislating on the same subject matter, the court will interpret the word consistently, unless a different intent is revealed. *Champion v. Shoreline School Dist. No. 412 of King County,* 81 Wn.2d 672, 676, 504 P.2d 304 (1972) (internal citations omitted). *See, also, In re Yim,* 139 Wn.2d 581, 591, 989 P.2d 512 (1999) (the statutory construction principle of *in pari materia* requires that statutes relating to the same subject matter should be read together "as together constituting one law."). This harmonizing principle helps to make the law consistent and predictable and applies here to help describe what the CRA requires a parent objecting to relocation to prove. As the examples above show, detriment is substantially different than the indeterminate "best interests" standard used by the trial court here. Rather, through the more rigorous standard, the CRA "both incorporates and gives substantial weight to the traditional presumption that a fit parent will act in the best interests of her child." *Osborne v. Osborne (In re*

Osborne), 119 Wn. App. 133, 147, 79 P.3d 465, 472 (2003). Certainly, under Washington law, detriment was not proved here.

Additional insight into how our CRA operates can be gleaned from other states, particularly those without the presumption and detriment standard of Washington's statute, where trial courts are free basically to "do over" the best interests analysis that applied to the original custody orders. *See, e.g., Orta v. Suarez,* 66 So.3d 988 (Fla. 3rd Dist. 2011) (best interests analysis implemented using 11-factor test, resulting in long trial and discretionary decision by judge); *see, also*, Valdespino, Jacqueline M., Relocation: A Moveable Feast? 89 *Fla. B. J.* 34 (2015).

For example, in Oklahoma, where the statute requires that an objecting parent need only show relocation is not in the "best interests," the reviewing court summarized the ensuing trial:

> For our purposes it suffices to state that each parent presented negative accounts of the other's personal attributes and parenting skills. Father argued the best interest of the children would be served by the move to New York and Mother contended it would not.

Mahmaoodjanloo v. Mahmoodjanloo, 2007 OK 32, 160 P.3d 951 (Ok. 2007). This description pretty much fits this case to the tee. Notably the Oklahoma statute replaced the standard the court there had previously devised, requiring evidence that the relocation would "place the child at risk of specific and real harm." 160 P.3d at 952. The court had favored

this more rigorous standard for its "judicial deference to family decisions made by the custodial parent" and because "limiting judicial intervention in post-divorce parental decision making is an overriding goal." *Id.* (citing *Kaiser v. Kaiser*, 23 P.3d 278, 287 (2001)). The court observed that to "'micromanage' everyday parenting decisions by trial courts does not serve the interests of the parties, the judiciary or the public." *Id.* (internal citation omitted). The Oklahoma legislature disagreed, endorsing a different approach, a best interests approach; but the Washington legislature agrees with the Oklahoma court. The more rigorous "harm" standard applies here.

Different policy arguments support these different approaches and different states and, for that matter, different nations, have embraced varying approaches. *See, e.g.,* Boyd, Susan B., Relocation, Indeterminacy, and Burden of Proof: Lessons from Canada, 23 *Child & Fam. L. Q.* 155 (2011); Richards, Janet Leach, Resolving Relocation Issues Pursuant to *ALI Principles:* Are Children Better Protected? 2001 *BYU L. Rev.* 1105 (2001). Washington's legislature was persuaded by the policies favoring more of a "bright line" test, such as the presumption and detriment standard supply, with benefits to children from reducing parental conflict and instability. After all, "[p]rocedure by presumption is always cheaper and easier than individualized determination." *Stanley v. Illinois,* 405 U.S.

645, 656-657, 92 S.Ct. 120, 831 L.Ed.2d 55 (1972). As previously argued, the kind of pitched warfare waged here against the mother's parenting style cannot be what the legislature had in mind when it enacted the CRA. Simply, the act does not invite and does not allow the court to "do over" the best interests analysis that applies in the original parenting plan proceeding. Yet, that is precisely what happened here. This approach simply nullifies the presumption and its substantive standard, detriment, in plain violation of the statute and frustrating the goals served by the more determinate mechanism.

C. THE COURT INVOKED BUT DID NOT APPLY THE PRESUMPTION HERE.

Alexa has previously analyzed factor-by-factor how the court's analysis went off the statutory rails. Here, briefly, she replies to those points made by Steve. Broadly, while the response brief ticks through each of the relocation factors and concludes that the trial court's findings were a proper exercise of discretion, it ignores the trial court's failure to apply the statutory presumption and the lack of factual support for a finding of detriment.

1) Factor 1: The relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent, siblings, and other significant persons in the child's life.

Steve argues that the trial court's finding that this factor was "neutral" was not an abuse of discretion. First, he takes issue with Alexa's

point that when a presumption applies, the party with the burdens of proof and persuasion either succeeds or fails. Only a "best interests" analysis should result in "equipoise." *See, e.g, Orta v. Suarez,* 66 So.3d at 994. Certainly, equipoise signals a failure to prove detriment.

Moreover, the court's finding ignores the undisputed evidence that Alexa's bond with the children was stronger. Both Steve and the trial court rely on Wheeler's unsupported assertion that this stronger bond was simply a result of Alexa's "narrative" that she is the better parent. Br. Respondent, at 25. As discussed at length in the opening brief, and below, the record does not support Wheeler's "narrative" theory. To the contrary, the record shows that a bond was formed at birth and consistently strengthened as a result of Alexa's role as the primary caregiver. See Br. Appellant, at 14-15 (Wheeler, third parties recognize kids more "attuned" to her simply because she was more attuned to their needs.).

Both because a "neutral" finding means Steve failed to carry his burden, and because the evidence simply establishes that Alexa has the stronger bond, the court's finding on this factor is erroneous.

2) Factor 2: Prior agreements between the parties.

Steve dismisses the fact that he was first to abrogate the parties' agreement to raise the children in Seattle by moving to Brier (i.e., out of the school district), proving that for this family, as for so many others, life

has other plans. Nevertheless, Steve asserts the intent of the agreement was to prevent Alexa from moving, not to require both parties to stay in Seattle. Br. Respondent, at 28. However, the language on which he relies focuses specifically on raising the children in Seattle, a goal his move to Brier potentially affected, particularly when the plan went to 50/50. Ex. 5 at 10. That the trial court held it against Alexa – but not Steve – for later abandoning the Seattle plan betrays a double standard, objectionable in any circumstance, but completely at odds with the presumption that must work in favor of Alexa's decision to move when work-related changes in her life required her to do so.

3) Factor 3: Whether disrupting the child's contact with the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting the child's contact with the person objecting to the relocation.

As support for this finding, Steve again relies exclusively on Wheeler's assertions about the "narrative" instilled by Alexa. Br. Respondent, at 30. As the opening brief points out, even if the evidence shows the children had a preference for the mother's parenting style, it fails to show something wrong with this or something wrong that Alexa has done. If anything, it demonstrates the importance of continuity. Certainly, the evidence does not prove this preference resulted from some sinister campaign by Alexa. Contra Br. Appellant, at 29, 31. Indeed, Steve himself testified that he did not believe Alexa was minimizing his

parenting role. RP 715. Wheeler likewise admitted that Alexa was not "deliberately manipulating the children's emotions or perceptions, but rather that she has a very strong influence on these children's feelings." Ex. 66 at 16. How is this surprising or wrong?

Significantly, the children's health providers saw nothing sinister at work in these family dynamics, attributing the children's perceptions to simply differing parenting styles, not Alexa's "manipulation" or "undue influence." Dr. Meehan (pediatrician) saw "no red flags" regarding "the dynamic where mother regards father as "under-attentive' and father regards mother as 'over-attentive,'" noting "[t]hat is how they see each other…mom might be overly concerned, but she listens and doesn't push me. . .their complaints of each other are very common in parental values." Ex. 67 at 5. Nor did Dr. Behling (therapist) attribute the children's perceptions to anything Alexa did: "I don't think Alexa was trying to make it worse… she provided a listening ear, I don't think she was knowingly reinforcing it but I do think the parents' styles of responding to expressions of anxiety are different." Ex. 67 at 2. Dr. Behling was specifically referring to the children's frustration with how Steve responded to their anxiety, noting that in comparision to Alexa's parenting "there is this difference in how much attention, time, energy he gives to their reports, concerns, than mom." Ex. 67 at 3. This illustrates the further point made in the opening brief that the children's feelings arise from their relationship with Steve, not Alexa's

"powerful influence." See Br. Appellant, at 34.

Steve also points to the court's finding that at a minimum, relocation would "exacerbate" the "narrative." Br. Respondent, at 31. As observed in the opening brief, the court does not improve upon this speculation by embracing it. It remains wholly speculative. As discussed above, there is no evidence that this narrative even existed, so how could it be exacerbated? The parents are different, so much so they divorced. But they are both good parents, and Steve points to no evidence in the record that the children's bond with him has been negatively affected by anything attributable to Alexa. Indeed by all accounts – including his own - the children are well bonded to him, better than they were pre-separation. See RP 575 (Steve testified, "there's no confusion to them about that they're connected with me very, very closely. We have an extraordinarily strong bond."). Notably, Steve does not address the evidence in the record showing that any tension in his relationship with the children might arise from his own parenting style. See Br. Appellant, at 34; Ex. 66 at 6-7, 9, 13, 15; Ex. 64 at 29; RP 174, 287 (his history of absenteeism, their difficulties with the blended family, his resistance to dance schedule, his lack of sensitivity to their anxiety). Steve's persistent blaming of Alexa for their marital difficulties and for whatever friction he encounters with his children is not accurate and not helpful.

Steve also focuses on the trial court's concern about Alexa's "poisoning of the well" by telling the children about the possible relocation, implying there was an agreement not to tell them. Br. Respondent, at 31. In fact the trial court specifically declined to find that one existed, though seemed nevertheless to hold this against Alexa. CP 445 n.3. Again, Steve and the court hold Alexa to a standard from which he exempts himself (i.e., Steve unilaterally deciding when to tell children about his move to Brier). Not only was there no agreement binding Alexa, but there is no evidence that her disclosure to the children of inevitable information was detrimental.

4) Factor 4: Whether either parent is subject to limitations under RCW 26.09.191.

The court correctly found that this factor did not apply, as there was no basis whatsoever for such restrictions. Nonetheless, Steve suggests this factor weighed against relocation, noting Wheeler's comments about the detrimental effect of Alexa's "blind spot" about her "devaluing" of his parenting role. Br. Respondent, at 32-33. These ridiculous speculations serve only to underscore how inappropriate this proceeding became (and how far off-base the parenting evaluator's understanding of the pertinent legal standards). These are fit parents, unimpaired in any of the ways pertinent to RCW 26.09.191. Insinuating

otherwise reveals again the "scorched earth" strategy Steve pursued. The court's finding on this factor was proper: it does not apply.

5) Factor 5: The reasons of each person seeking or opposing relocation and each of the parties' good faith in requesting or opposing relocation.

Steve argues that the trial court's findings are not inconsistent because, while there was good faith in Alexa's reason for the move, there was bad faith in the timing. Br. Respondent, at 33. Really, these cannot be squared (i.e., the reason she needs to move arose at a particular time because of recent changes in her work situation). In any case, the statutory factor is meant as a check on truly evil intentions, not an invitation to second-guess and micro-manage the relocating parent's decision. Alexa proved her need to move (or, properly, Steve failed to prove or persuade that her job-driven decision was spurious). Simply, this factor favors relocation.

Nevertheless, Steve (and the trial court) again resort to the speculation about Alexa marginalizing Steve. As the evidence makes clear, he is not marginalized. In any case, this concern is built on a house of cards: Steve relies on Wheeler's reference to "collateral sources" suggesting that Alexa sought relocation to marginalize Steve from the kids' lives. Br. Respondent, at 34. He cites to Wheeler's testimony and report noting that some of their past mutual friends "expressed a concern"

that Alexa's move was intended to marginalize Steve from their lives. See RP 197-98, Ex. 66 at 20. But none of these "past mutual friends" had been in contact with Alexa when she made the relocation decision and could not personally attest to her to motivations. See RP 375 (past mutual friend admits to not having contact with Alexa for the past two years). Moreover, Wheeler herself acknowledged that she was unsure that this is what Alexa was "consciously thinking;" rather, Wheeler simply expressed that it was her "concern" that the relocation was Alexa's attempt "to exert ultimate control over the kids." RP 197. In light of the simpler, obvious reality of Alexa's work, the psychologist's guessing about some kind of sinister (and unconscious!) motive is, at best, curious. In this context, meaning the context of specific legal standards, it is counter-productive and only helps to take the inquiry off-track.

Steve also argues Alexa postponed her move until after he got engaged and before the 50/50 plan went into effect, to take advantage of the presumption, demonstrating bad faith. Br. Respondent, at 11, 35. While Steve's sequence of events places a lot of significance on his engagement, Alexa's life was on a different track: months before Steve's engagement, her business went into public ownership, setting in motion the changes that fundamentally altered her work life. Months after Steve's engagement, and a year before the 50/50 parenting plan was to go into

effect, the company launched Alexa Café, by which point, it was clear Alexa could not continue to work from Seattle. These events drove the timing, not Alexa. Her work world had changed, just as had Steve's personal life. That's all. This factor favors relocation.

6) Factor 6: The age, developmental stage and needs of the child, the likely impact that the relocation or its prevention will have on child's physical, educational, and emotional development, considering any special needs of the child.

The court found that both parents were skilled at supporting the children's development. CP 447. No detriment here. Yet the court bent this factor into a focus on protecting Steve's new living arrangement (relocation to Brier) from causing any further friction with the children. CP 447. Again, Steve avoids any accountability for the effect of that disruption, while the court also avoids any consideration of the effect on Alexa of preventing her move. No presumption at work here.

In support of the court's finding that this factor weighs against relocation, Steve cites Wheeler's concerns that the kids were "anxiously monitoring" Steve's parenting and "reporting" back to Alexa. Br. Appellant, at 38. But, again, he points to no evidence to support Wheeler's assertions. Rather, Wheeler's testimony and report simply refer to the children's perceptions of each party's parenting, which are based on their own observations and experiences in each parent's household, specifically, tension related to the blended family dynamics, Steve's

insensitivity to their reactions, and his resistance to their dance schedule. It is not accurate or fair to blame Alexa for these problems or to expect the children won't have their own ideas, or won't express them.

Steve also cites Wheeler's concerns about the children being "too attuned" to mom, and her "fear" of their alignment with Alexa, which "positions them against Steve when his parenting choices differ." Br. Respondent, at 37- 38. While he claims that this "dynamic" puts the children's "long term emotional development at risk," there is no evidence in the record to support such speculation, nor does it make much sense. Even while married, parents have these kinds of issues. In fact, as Alexa's expert testified, attunement and alignment are not inherently harmful and are often "a naturally occurring phenomenon," even in intact families. RP 1000-1002, 1004. Steve points to no evidence that such attunement or alignment here has in fact harmed the children's bond with him. To the contrary, as confirmed repeatedly throughout the record, their bond with him is strong. If anything, this evidence of attunement aligns with our state's policy favoring custodial continuity. By legislative judgment, disrupting this relationship – between Alexa and the children -- is presumptively harmful. The court turned this concern for protecting the children against this harm on its head.

7) Factor 8:[3] The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent.

In its findings on this factor the court again failed to apply the presumption or even to read the factor correctly, which asks the court how to ameliorate the effects of the relocation on the child's relationship with the objecting parent. Here, the court simply declared the "alternative arrangement" was for Alexa not to relocate, but to continue to commute to California. CP 448 (mother should try court's proposed work schedule).[4] But the court had also found that shuttling back and forth was no longer workable for Alexa and precisely her "good faith" reason for seeking relocation. In any case, Alexa's decision to move, rather than continue an unworkable schedule, is not evidence of detriment under this factor.

8) Factor 9: Alternatives to relocation and whether it is feasible or desirable for the other party to relocate.

Steve contends that there was no evidence the Board directed Alexa to move. Br. Respondent, at 42. This, again, puts the shoe on the wrong foot. It is his burden to prove her reason to move is a bad faith reason. Instead, the evidence was undisputed that Alexa's business is in

[3] Steve does not appear to contest the court's finding on factor 7 weighing in favor of relocation ("the quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations").

[4] The court went into considerable detail about how Alexa could structure her life, including by re-employing the former full-time nanny, as she had while the children were younger. CP 448; see RP 138, 1150. See Br. Respondent, at 40.

California and that trying to work from Seattle was exhausting her and putting her employment at risk. The statute does not permit relocation only if it is the "least restrictive alternative" (as in constitutional heightened scrutiny). Here, again, the court ignores the presumption. Moreover, as previously discussed and discussed below, the trial court prevented Alexa from presenting evidence on the "Board mandate" issue by erroneously excluding Behar's testimony. Simply, there was no alternative and this factor favored relocation.

9) Factor 10: The financial impact and logistics of the relocation or its prevention.

The court found that this factor weighed against relocation, despite the unusual circumstance of Alexa being able to ameliorate many of the practical difficulties (e.g., increased costs) that relocations usually present. Not unusually, Steve is limited in his ability to take advantage of some of what Alexa offered. But that is not a showing of detriment; the statute does not require the relocating parent to achieve the impossible: negate all effects of relocation. Moreover, the court's analysis is one-sided: the court ignores the ongoing toll taken on Alexa from having to commute to California to work. The logistical impact on Alexa of mandating a continued commute to California is punishing. This clearly is not how the statute works or relocation would never be permitted, let alone be presumptively permitted.

D. THE COURT DID NOT CONDUCT THE PROPER ANALYSIS TO EXCLUDE ALEXA'S WITNESS AND THE ERROR IS NOT HARMLESS.

Steve contends that the trial court "plainly considered each *Burnet* factor on the record" before excluding Behar's testimony, simply citing the court's ruling. Br. Respondent, at 45. But he does not address the ruling's lack of findings on willfulness and availability of lesser sanctions, which are required under *Burnet* before the court may exclude testimony. See Br. Appellant, at 47-48. The court's ruling only includes a finding of prejudice ("trial by ambush"), which cannot be bootstrapped into a finding of willfulness, as Steve seems to suggest. *Jones v. City of Seattle*, 179 Wn.2d 322, 345, 354-55, 314 P.3d 380 (2013) (to show willfulness "something more is needed" than violation of a discovery order; willfulness finding cannot be read into judge's use of the term "ambush"). Nor did the trial court make a finding about the availability of lesser sanctions. While the court mentioned the "lesser sanction of having him deposed and testifying tomorrow," this is not a sanction at all, but simply an accommodation to the opposing party. The court considered no sanction against Alexa for the late disclosure, such as terms or other restrictions.

Steve does not address this lack of findings, but instead blames Alexa for the court's failure to make complete findings, arguing that Alexa

never addressed the *Burnet* factors, "bypassing willfulness and prejudice." Br. Respondent, at 45. It goes without saying that it is the court – not a party - that is tasked with making findings. Steve's harmless error argument is equally unavailing. While he contends that the excluded testimony was merely cumulative, the trial court's own findings demonstrate otherwise. This was precisely the evidence the court found lacking. See CP 446 ("There was no evidence, however, of any Board mandate that mother move to California or negative consequence to her position if she moved to Seattle."). Likewise, Steve makes much of the lack of a "Board mandate" in his own arguments, underscoring that this evidence was not cumulative and its exclusion was not harmless.

E. THE COURT IMPROPERLY AWARDED ATTORNEY FEES CONTRARY TO THE STATUTE'S PURPOSE.

The family law fees statute is not a means for re-distributing wealth for rewarding or punishing parties. Rather, the purpose of the statute is to "ensure that a person is not deprived of his or her day in court by reason of financial disadvantage." *Malfait v. Malfait,* 54 Wn.2d 413, 418, 341 P.2d 154 (1959). The statute must be read in light of this purpose. *Brand v. Dep't of Labor & Indus. of State of Wash.,* 139 Wn.2d 659, 667, 989 P.2d 1111, 1114 (1999), *as amended on denial of reconsideration* (Apr. 10, 2000), *as amended* (Apr. 17, 2000) ("[c]entral to the calculation of an attorney fees award … is the underlying purpose of

the statute authorizing the attorney fees"). Basically, here, the court ordered Alexa to pay Steve's fees because of the disparity in their resources (based only on some incidental evidence; not on Steve's compliance with the requirement for submission of financial proof). Because both parties have substantial resources and the ability to pay their own fees, the court abused its discretion.

IV. CONCLUSION

For the reasons stated above and in Appellant's Opening Brief, Alexa Ingram-Cauchi asks the trial court's orders on relocation be reversed and remanded for an order permitting the mother to relocate with the children and asks the court's order awarding attorney fees be vacated.

Respectfully submitted this 15th day of January 2016.

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EXCERPTS OF PERTINENT STATUTES

RCW 26.09.410(2) “Relocate” means a change in principal residence either permanently or for a protracted period of time.

RCW 26.09.430 (RELOCATION)

Except as provided in RCW 26.09.460, a person with whom the child resides a majority of the time shall notify every other person entitled to residential time or visitation with the child under a court order if the person intends to relocate. Notice shall be given as prescribed in RCW 26.09.440 [Contents and delivery] and 26.09.450 [How notice is given for relocation within the same school district].

RCW 26.09.520 (RELOCATION)

The person proposing to relocate with the child shall provide his or her reasons for the intended relocation. There is a rebuttable presumption that the intended relocation of the child will be permitted. A person entitled to object to the intended relocation of the child may rebut the presumption by demonstrating that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person, based upon the following factors. The factors listed in this section are not weighted. No inference is to be drawn from the order in which the following factors are listed:

(1) The relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent, siblings, and other significant persons in the child's life;

(2) Prior agreements of the parties;

(3) Whether disrupting the contact between the child and the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation;

(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;

(6) The age, developmental stage, and needs of the child, and the likely impact the relocation or its prevention will have on the child's physical, educational, and

emotional development, taking into consideration any special needs of the child;

(7) The quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations;

(8) The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent;

(9) The alternatives to relocation and whether it is feasible and desirable for the other party to relocate also;

(10) The financial impact and logistics of the relocation or its prevention; and

(11) For a temporary order, the amount of time before a final decision can be made at trial.

RCW 26.09.260 (MODIFICATION)

(1) Except as otherwise provided in subsections (4), (5), (6), (8), and (10) of this section, the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child. The effect of a parent's military duties potentially impacting parenting functions shall not, by itself, be a substantial change of circumstances justifying a permanent modification of a prior decree or plan.

(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan 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 because the parent failed to comply with the residential time provisions in the court-ordered parenting plan, or the parent has been convicted of custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070.