73466-1

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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

In re the Marriage of:

ALEXA INGRAM-CAUCHI,

Appellant,

and

STEVEN STOUT,

Respondent.

BRIEF OF RESPONDENT WITH ERRATA

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INTRODUCTION

When the parties divorced in 2012, they agreed to a shared parenting plan, giving father Steve Stout more than 40% of the residential time during the school year, and 50% during the summer. The agreed parenting plan stated mother Alexa Ingram-Cauchi's intent to stay in Seattle, and provided that the parties would move to a year-round 50/50 plan in June 2015. Yet Alexa moved to relocate in July 2014, shortly after learning Steve would remarry.

Alexa's appeal from the order denying relocation is effectively that she has always been more involved with the kids and that her parenting is "right" while Steve's is "wrong." Alexa is alone in that opinion. Many witnesses, including the parenting evaluator who recommended against relocation, testified to Steve's many strengths as a parent, and his strong bond with the children.

Alexa has instilled in the children this harmful narrative that her parenting is "right" and Steve's is "wrong." This dynamic jeopardizes the children's long-term emotional well-being, and geographic distance would only make that worse. And while Steve supports Alexa's relationship with the kids, her relocation request was viewed as a final effort to marginalize Steve completely.

This Court should affirm.

RESTATEMENT OF THE ISSUES

1. Is the trial court's order denying relocation well within its broad discretion, where the court: (a) carefully analyzed each statutory factor in writing; (b) found that the detrimental effect of the relocation outweighs the benefit to the children and the relocating person; and (c) based those findings in large part of the parenting evaluator's report and testimony that Steve is an excellent father who will protect the children's relationship with Alexa if relocation is denied, in contrast to a significant concern that Alexa has, and would continue to marginalize Steve if relocation were allowed?

2. Did the trial court properly exclude a proposed witness disclosed for the first time 5 days into trial, and if the court did not satisfy ***Burnet***, *infra*, then is the error harmless where the proffered testimony was cumulative?

3. Is the trial court's attorney fee award well within its broad discretion?

STATEMENT OF THE CASE

A. The parties' already struggling marriage broke under the weight of Alexa's deep sense that her parenting style was "right," while Steve's was "wrong."

Steve Stout and Alexa Ingram-Cauchi met in college in 1989 or 1990 and began dating shortly thereafter. RP 42. They married in

September 2000, and had a daughter, G. in 2004, and a son, W. in 2007. Ex 64 at 1; RP 42-43; CP 24. Steve and Alexa settled in Seattle with their children. RP 43.[1] The kids have not lived anywhere other than Seattle, or the outlying area. RP 43, 65, 520.

Alexa started the company iD Tech with her brother right before the parties married. RP 43. The company is based in California, and Alexa has always travelled there for business. RP 43-44. She has always had a home office and worked principally from home since the company's inception. *Id.* Alexa cut back some when the children were born, but has always been actively working. RP 44.

The parties did not have a strong marriage to start, and at some point both realized it. RP 45. Having children further exposed their marriage's weaknesses. *Id.* While they shared similar ideas about childrearing, their daily interactions grew unhealthy. RP 45-46.

Family friend Erinn Ford, who has known the parties since 1992, testified that Alexa would become "visibly agitated" or speak out if she disagreed with how Steve did something as small as change a diaper. RP 81, 98. To Ford and her husband, it was "crazy."

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[1] This brief uses first names, adopting the convention in the opening brief. No disrespect is intended.

RP 98. As Ford put it, Alexa had a definite "plan" for the kids, right down to what and when they should eat, and she did not like it when Steve deviated from her plan. RP 98-99.

Family friend Stacy Ann Tribble, who also met the parties in college, described Alexa as displaying a "negative energy and disdain for Steve," including in front of the children. RP 365, 369-70. Steve never disparaged Alexa, but she frequently disparaged Steve, conveying the sense that Steve "couldn't seem to do anything quite right." RP 369. Steve was not doing anything "wrong" – "It just wasn't the way that [Alexa] wanted it done." *Id.*

Steve's mother, Jan Stout, recalled Alexa constantly "nit-picking" at Steve for "little things," such as failing to do the dishes or putting balloons in the "wrong" place at a birthday party. RP 404, 409-10. Alexa would call Jan to complain about Steve, typically regarding the kids. RP 410. This included asking Jan to try to convince Steve to "back off" and let Alexa and the nanny "control" the children. *Id.*

Eventually the parties' oldest child G. began picking up on Alexa's disparaging comments. RP 45-46. Steve then realized that it would be better for the kids if they were apart – a clear indication "the marriage should end." RP 46.

B. The parties divorced in early 2013, agreeing to shared parenting and a 50/50 plan in June 2015.

The parties separated in June 2011. Ex 66 at 3; RP 41; CP 24. Steve moved out in August and Alexa filed for dissolution in November. Ex 66 at 3; RP 44-45, 1180; CP 23. Dr. Jenifer Wheeler conducted a parenting evaluation, initially recommending shared parenting that would increase to a 50/50 split 9-months later. CP 74, 623; RP 140, 495. She opined that the kids missed Steve and needed the "balance" he provides. RP 140.

Alexa would not agree. RP 495-96. The parties negotiated a parenting plan providing that the kids would reside over 40% of the time with Steve during the school year, and 50% of the time during the summer. Ex 66 at 3. The plan also provided that the parties would switch to a year-round 50/50 schedule in June 2015. RP 495-96. Though Steve wanted a 50/50 plan "right away," he felt that it was in the children's best interest to resolve things amicably, and that giving up "one Sunday every two weeks, to let the kids be with their mom" was a "small sacrifice." RP 495.

The final parenting plan the parties agreed to also provides that Alexa intended to continue living in Seattle so that she and Steve could co-parent:

> It is the petitioner's/mother's intention to stay in Seattle and raise the children here with the respondent father in spite of the first phase of the residential schedule when the children will reside the majority of time with her prior to the shift of 50/50 residential schedule in June 2015.

RP 520. Steve negotiated for this provision and it was very important to him. *Id.* He wanted to be able to co-parent without the concern that Alexa would choose try to move the kids. *Id.*

C. All other than Alexa agree that Steve is a wonderful father who has created a beautiful blended family with his now wife Meredith.

Steve describes G. as an intelligent young lady, who is sweet, affectionate, studious, and academically and athletically gifted. RP 60-63. She loves being the older sister to her brother, and is a "true friend" to her close friends. RP 61. She has a good sense of humor and a great smile, but starts out "more serious" like Steve, observing and analyzing before jumping in. RP 61, 62. G. is truly Steve's daughter, and they share a close bond. *Id.*

W. is very outgoing socially, knows everyone on the playground, and is "a friend to all." RP 72. He does well academically and athletically, and loves to explore. RP 69, 72, 73. From an early age, W. has enjoyed making people laugh. RP 69. He is "very empathetic," and takes pride in knowing when others are sad and in trying to help. *Id.*

The children spend their residential time with Steve in their family home in Brier, with Steve's new wife Meredith and her three daughters now ages 9, 14 and 18. RP 38, 170, 206, 273, 588. The kids reacted very positively to the news that Steve and Meredith were engaged. RP 611-13. Following advice from the children's therapist, Steve told the kids without Meredith, so that they could react authentically. RP 612-13. The kids were all smiles. RP 613. W. wanted to know whether Steve proposed "on one knee like Prince Charming," jumping down from the table to act it out. *Id.*

Steve and Meredith decided to build a home in Brier, where they would have enough space to give each of the five children their own room. RP 57-58. The move did not change the children's relationships with their friends in Seattle, or their activities. RP 65.

W. has a strong bond with Meredith, who he often seeks out. RP 79, 445, 475, 481, 1498. W. does not think of Meredith as his mother, nor does she try to be. RP 79, 205. But he respects her as a friend and adult woman in the house, has fun with her, and enjoys talking to her. RP 79. "[T]hey have a good relationship." *Id.*

G. has been slower to bond with Meredith, but they have a healthy bond that is developing. RP 446, 492-93. G. can be a bit more "standoffish at first," but respects Meredith and believes she is

a good person. RP 493. G will seek out Meredith's opinions, and is certainly comfortable with her. *Id.*

W. also shares a strong bond with his youngest stepsister A. RP 441, 447, 558. They spend a lot of time together, and are "really, really good friends." RP 558. G. engages with them too, but more like a "little mother." RP 447.

Steve has breakfast with the kids every day that they are with him, a "special time" for the family. RP 1497. Steve grew up in a household where the family ate dinner together, and follows the same ritual with the kids. RP 1497-98. Meredith is typically there too, and when her daughters' schedules allow, they also eat with the rest of the family. RP 1498.

Steve coaches G.'s soccer team, and has refereed W.'s soccer games. RP 54-55, 63. He and the kids participate in Y Guides, and Steve takes the children to their dance classes, attending their recitals on all but a very few occasions. RP 50, 71-72, 641-42. Steve helps with homework, plays games, organizes birthday parties, and the like. RP 52-53, 57, 70, 72-73, 460.

Steve and the kids have made it a tradition to vacation on Spring Break in Hawaii. RP 56. During the summer, they visit Steve's family in eastern Washington, and spend many holidays with Steve's

family as well. RP 58-59, 582-83. In both summer and winter, they spend considerable time at a cabin Steve co-owns on Alta Lake, boating, swimming, and hiking in the summer, and sledding, ice skating, and skiing in the winter. RP 654-55, 722.

Rather than focus on the three years since the parties have been co-parenting under a shared parenting plan, Alexa focuses on the marriage, claiming that she "did most [of] the child rearing, while running her company from her home office." BA 6. During trial, Alexa described Steve as having been "uninvolved and uninterested." RP 1176-77. She admits, though, that "[q]uite a bit has changed." *Id.*

Family friends rejected Alexa's claim outright. Ford described Steve as a great friend and a wonderful dad, who is "highly engaged with his kids." RP 84, 90-91. Steve has an extremely soft and sensitive approach to parenting, has a deep level of love, care and commitment to his children, and has always made them his top priority. RP 84, 92, 96. Steve has always been a "hands-on" parent, be that changing diapers, holding the kids when they were babies,

carving sled tracks in the snow, or dancing with the kids on the Fourth of July. RP 89-90.[2]

Tribble also described Steve as a wonderful friend and father, who loves his children deeply. RP 366-67. He is not "hands-off," but very devoted. RP 367-68. He is attuned to the children's feelings and addresses any concerns that they raise. RP 376. The children are very affectionate with Steve. *Id.*[3]

Another family friend, Matt Frank, described Steve as a patient father, adept at setting boundaries for the kids while also pushing them to try new challenges. RP 392-93, 397-98. Steve's mom described him as a loving father, who is deeply interested in every aspect of his children's lives. RP 404. Steve also took issue with Alexa calling him a hands-off parent (RP 552), explaining the difference in their parenting styles as follows (RP 528):

> I believe Alexa is a good parent. I believe she loves the kids. I love the kids. That's easy. But all parents have strengths and weaknesses. And – and one of Alexa's weaknesses is that she creates and – and sometimes fosters an unnecessary

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[2] Although Ford considers Alexa a close friend, she "pull[ed] back" from Alexa in 2012 or 2013, when she felt that Alexa was attempting to manipulate their friendship to turn her against Steve. RP 85-86.

[3] Like Ford, Tribble felt that Alexa was trying to pit her against Steve. RP 378.

> dependence upon her that the kids have. And I understand it's important to be close to your kids, but there's – there's levels, and – and that's a concern I have. I think it's not necessarily a strength but a weakness because there's a blind spot as to if that's the best interests of the kids.

D. Despite their agreement to remain in Seattle, Alexa sought to relocate the kids to California shortly before the parties would have moved to a year-round 50/50 plan.

In May 2013, Alexa and her brother and business partner, Peter Ingram-Cauchi, met Bryan Kelly and Paul Farr, who expressed an interest in investing in iD Tech. RP 850, 904-05, 1406. The investors purchased 40% of iD Tech in August 2013. RP 1407, 1409. During this time, Alexa reiterated her commitment to staying in Seattle, telling Steve via email that she was dating someone in California, that they had discussed him moving to Washington if things progressed, and that "[a]s discussed, my moving to California is not in the picture." RP 556, 1407.

Steve announced his engagement to Meredith in January 2014. Ex 66 at 3; RP 440, 1409. That Spring, Steve notified Alexa that they would be building a home in Brier, and planned to move in together in Fall 2014. Ex 66 at 3; RP 1409. Alexa then moved to relocate, filing her notice in July 2014. Ex 66 at 3; CP 604.

Alexa's notice of relocation was the first time Steve heard that Alexa desired to move, and Alexa had not given Steve any indication

that her company was changing in a way that might impact the residential schedule. RP 40. Steve objected, and the parties entered an agreed order that the children would not relocate before trial. Ex 66 at 3; CP 57, 63, 82, 113.

Steve and Meredith moved to Brier in October 2014. RP 38, 449; CP 114. One month later, Alexa showed the kids a California property she was considering purchasing. Ex 66 at 3; RP 1412.

On November 25, 2014, the trial court entered an agreed order appointing Wheeler to conduct a parenting evaluation. CP 83, 114. Wheeler issued her final report on March 3, 2015. CP 83. The parties were set for trial on March 23, 2015. CP 114.

Steve did not want the kids to know about the relocation if possible, and the parties agreed to consult their parenting coach regarding how to tell the kids. RP 510-13. But Steve later learned from a friend that Alexa had told the kids about the relocation. RP 508-09. Alexa admits telling the kids about relocating in January 2015, months before Wheeler even finished her report. RP 1412.

Wheeler opined that before trial, Alexa "'poisoned the well'" regarding the relocation. Ex 66 at 19. Alexa told the kids that she was tired of traveling and intended to move to California. *Id.* & n.15. She strongly suggested that they would be moving with her, evidenced

by the children's reports that they had views from their rooms in the California home, that they would live close to their new school, and that they had friends in their new neighborhood. Ex 66 at 19 & n.16. Alexa even told the children that they could not attend the same school if they remained in Washington. *Id.* Alexa elicited from the children positive responses about the relocation. *Id.* at 19.

E. The trial court denied the relocation, relying in large part on Dr. Wheeler's report and testimony recommending against relocating the children to California.

The parties went to trial on March 23, 2015. CP 71. Following six days of testimony, the trial court denied Alexa's request to relocate the children, entering a 12-page order addressing at length each of the applicable factors under RCW 26.09.520. CP 440-51. The court entered a final parenting plan designating Steve the primary residential parent. CP 556-570. Alexa appealed. CP 571.

The court's decision is based in large part on Dr. Wheeler's expert report and testimony.[4] CP 441-50. Wheeler opined that while the parties are quite different parents, they are both "very strong parents, very skilled, very loving, very supportive." RP 129. Steve's

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[4] Wheeler's statutory-factor analysis is addressed in the argument section below.

unique skill set is that he is very active, and very adventurous, and "very skillfully is aware that his children have some anxiety and some shyness and some reservation." RP 140. He is adept at encouraging the kids to take risks and try things they feel uncomfortable with. RP 140-41. That is "a very important parenting quality," particularly for these kids. RP 141.

During the 2012 evaluation, Wheeler expressed concern that Alexa was "undermining" Steve's parenting. RP 145. When asked whether Alexa is aware of this dynamic, Wheeler explained that Alexa firmly believes that she is a better parent. RP 145-46. That "belief is so intense" that it blinds Alexa to "her own actions and how those actions are influencing the children." *Id.* In the most recent evaluation, Wheeler saw no improvement in Alexa's inability to recognize that Steve's parenting style, while different than hers, is valuable to the kids. RP 147-48.

Whether explicitly or implicitly, Alexa has communicated a "narrative" to the children that her parenting is "right" and Steve's is "wrong." Ex 66 at 15. In both reports, Wheeler expressed a deep concern that the children are too aware of Alexa's feelings, particularly her negative feelings about Steve's parenting. *Id.* This is

"particularly concerning" where everyone but Alexa reported that Steve "is a highly interested, supportive, and protective parent." *Id.*

This dynamic had worsened by the time Alexa sought to relocate. RP 134-35. The children remain "highly aware" of the difference in their parents' households, and "highly attuned to [Alexa's] worries about [Steve's] parenting." Ex 66 at 15-16. They have "absorbed" the narrative that they are supposed to question Steve's parenting choices when they differ from Alexa's. *Id.* at 16. The children were monitoring Steve's household for perceived imperfections to enforce the "right" way of doing things – Alexa's way. *Id.* at 15. Wheeler opined that this dynamic continued to threaten the children's long-term emotional well-being. *Id.* at 16.

In sharp contrast to Alexa, collateral sources consistently described Steve as very supportive of Alexa's parenting. RP 201. At least one collateral contact commented that Steve can be supportive "[p]erhaps to his detriment." *Id.* Wheeler agreed, explaining that Steve works "to protect the kids from conflict even if it means he has to lose out a little bit." RP 201-02. That is very unusual. RP 202.

Wheeler opined that if the court allowed the children to relocate, then there was a significant concern that the narrative that

Steve is a bad parent would become so exaggerated that the children would eventually see Steve as an "intrusion" on their lives:

> [M]y fear with the relocation is that that narrative would become very exaggerated and very amplified when Dad doesn't have the opportunity to counteract it with his own firsthand data. I think the reason that things aren't worse off than they are now is because Dad has been essentially a 50/50 parent for the last couple of years and he's had plenty of opportunity to influence these kids with his own parenting style. I think if he didn't have that regular day-to-day opportunity with them that that – the dynamic would become much more exaggerated and amplified. . . . I have significant concerns about Dad becoming marginalized and essentially becoming an intrusion in his children's lives in California. . . .

RP 154-55. Wheeler opined that the children were most likely to maintain a relationship with both parents by remaining in Washington with Steve:

> [T]the best shot I think these kids have of protecting their access to and relationship with both parents . . . in terms of the support of each parent to the other, that's the best shot these kids have of having an ongoing regular contact with both parents.

RP 220. This is due in large part to the fact that Steve is "highly motivated" to help and support the children's relationship with Alexa, while the same cannot be said about Alexa. RP 311-12.

ARGUMENT

A. Standard of review.

This Court reviews a trial court's decision on relocation for an abuse of discretion. ***In re Marriage of McNaught***, 189 Wn. App. 545,

552, 561, ____ P.3d ____ (2015). The trial court abuses its discretion only where "it makes a manifestly unreasonable decision or bases its decision on untenable grounds or untenable reasons." ***McNaught***, 189 Wn. App. at 552. "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. ***In re Marriage of Horner***, 151 Wn.2d 884, 894, 93 P.3d 124 (2004) (quoting ***In re Marriage of Littlefield***, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)).

B. The trial court properly applied the presumption in RCW 26.09.520.

Alexa begins her argument with a four page "introduction," discussing the Washington Child Relocation Act's rebuttable presumption that "the intended relocation of the child will be permitted." RCW 26.09.520; BA 18-23. For the most part, Steve does not disagree with Alexa's account of the law, insofar as it provides: (1) that the CRA creates the aforementioned rebuttable presumption; (2) that the rebuttable presumption incorporates the presumption that

fit parents act in their children's best interest; and (3) that the CRA requires courts to consider the children's best interest as well as the relocating parent's interests. ***McNaught***, 189 Wn. App. at 553-54. But imbedded in this discussion is Alexa's claim that the trial court improperly applied a best-interest-of-the-child analysis. BA 21-22. Alexa later repeats the same, arguing that the trial court and Dr. Wheeler "engaged in a 'best interest' analysis," failing to implement the presumption favoring relocation. BA 23. That is false.

Alexa incorrectly suggests that the CRA does not incorporate a best interest analysis. BA 21-22. This Court and others have often stated that CRA looks not only at the child's best interest, but also at the relocating parent's interests: "'The CRA shifts the analysis away from only the best interests of the child to an analysis that focuses on both the child and the relocating person.'" ***McNaught***, 189 Wn. App. at 553 (citing ***Horner***, 151 Wn.2d at 887). That is not to say, as Alexa suggests, that the children's best interest drops out of the analysis.

Rather, the CRA requires a balancing of many interests, including the children's, while placing particular importance on the relocating parent's interests. ***McNaught***, 189 Wn. App. at 555. As this Court recently explained, "the CRA's 11 child relocation factors

'serve as a balancing test between many important and competing interests and circumstances involved in relocation matters,' while the presumption in favor of relocation operates to give particular importance to the interests and circumstances of the relocating parent, not only the best interests of the child." 189 Wn. App. at 555 (quoting ***Horner***, 151 Wn.2d at 894).

The trial court plainly understood the law. CP 441. The court began its analysis by noting that Alexa is entitled to the rebuttable presumption that the court will permit the intended relocation of the children, where she had the children 8 out of 14 overnights. CP 441. The court continued that Steve could rebut that presumption by demonstrating that the detrimental effect of the relocation outweighs the benefit of the relocation to the children and Alexa. *Id.* In other words, the court correctly stated the applicable presumption and burden of proof, as this Court recently articulated in ***McNaught***.

Nonetheless, Alexa suggests, without offering any specifics, that the trial court ran afoul of this Court's holding that the party opposing the relocation must carry the burden of production and persuasion. BA 21-22, 24. This Court should disregard this unsupported argument. ***Cowich Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). The simple fact that the

trial court denied Alexa's requested relocation does not mean that the court failed to apply the rebuttable presumption.

Alexa's remaining arguments on this point are so abstract as to be unintelligible. BA 23-24. Alexa argues, for example, that the court attempted to "rebalance" the parties' relationships with the kids to allow Steve time to "catch up." BA 23-24. She complains that the CRA does not allow the court to "restructur[e]" families. BA 24. It is impossible to tell what Alexa is driving at. The court did not "restructur[e]" the family or "rebalance" the parties, who had very close to equal residential time, and were on their way to a 50/50 schedule. And Steve is not trying to catch up – everyone but Alexa agrees that he is a great father who has always been actively involved with the kids. Ex 66 at 15; RP 84, 90-91, 367-68, 552.

Alexa next suggests that the court subjected the parties to "intense scrutiny," claiming that "misunderstanding the burden of proof resulted in days of testimony critiquing typical parenting decisions . . . ." BA 24. That is baseless. Again, the court plainly understood the law.

And the trial court did not dictate how the parties tried their cases. Steve was very supportive of Alexa's parenting, so it is unclear why she asserts that her "typical parenting decisions" were

called into question. *Compare* BA 24 with RP 201, 311-12, 369. On the other hand, Steve was forced to spend considerable time – and call a number of witnesses – to defend his parenting style against Alexa's narrative that he is bad parent. *E.g.* RP 80-106, 365-449.

Finally, Alexa's argument is plainly belied by the facts, which are more than sufficient to support the trial court's decision. Alexa claims that the parties "constructed their lives as they exist today" so that Alexa would have a larger role in raising the kids. BA 26. That is false. The parties agreed to nearly equal residential time, moving to a year-round 50/50 plan in June 2015. RP 520-21. Steve did not construct his life to cede parenting to Alexa.

Equally false is Alexa's suggestion that Steve's only evidence against relocation was "evidence of differing parenting styles," or "evidence the children aligned more with one of these styles." BA 26. Indeed, it is incredible to suggest "that alignment weighs in favor of continuity." *Id.* Wheeler unequivocally opined that Steve's parenting style was very beneficial for the kids and that they aligned more with Alexa's style because she had instilled in them the narrative that her way is right and Steve's is wrong. Ex 66 at 15-16; RP 134-35. It is precisely because of this dynamic, and the propensity that this dynamic coupled with geographic distance would further undermine

Steve's relationship with the kids, that Wheeler opined that the detrimental effect of relocation would outweigh the benefit to the kids and Alexa. Ex 66 at 25.

C. The trial court carefully considered each statutory factor and its decision denying relocation is well within its broad discretion.

Alexa gives short shrift to the 12-page order addressing each statutory factor relevant to her requested relocation. The court's decision is well within its broad discretion – its analysis was careful and its reasoning sound. The decision denying relocation is lockstep with Wheeler's expert opinion. This Court should affirm.

The trial court began its analysis on Alexa's proposed relocation by noting that Alexa was entitled to a presumption favoring relocation and that Steve could rebut that presumption only by showing that the detrimental effect of the relocation outweighed the benefit to Alexa and the kids. CP 441. The trial court then noted that the parties agreed that Dr. Wheeler was "ideally situated" to conduct the evaluation for trial, where she had done the evaluation during the parties' 2012 divorce. *Id.* The court considered both evaluations and found that both were thorough. *Id.* The court specifically found Dr. Wheeler credible. *Id.*

The court also noted that Alexa's witness Dr. Bruce Olsen did not conduct a separate evaluation. CP 441. He did not criticize Dr. Wheeler's report, but testified that he was very familiar with her, respected her work, trusted her judgment, and found that her work in this case was thorough. RP 1004-05, 1015, 1020; CP 411.

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.

The trial court found RCW 26.29.520(1) neutral. CP 443. The court found that while Steve and Alexa have different parenting styles, they both have very strong relationships with the kids, and are "highly bonded" and "highly involved" with the children. CP 442. The court relied heavily on Dr. Wheeler's opinion that the children were doing well coping with their parents' divorce and that the parties were both "doing an excellent job of providing them with love, support, structure, nurturance, guidance, and security during these transitions." CP 442 (quoting Ex 66 at 14). The court specifically noted Dr. Wheeler's opinion that the parties are "highly interested, involved, skilled, competent, confident, warm, loving, supportive and effective parents." CP 442 (quoting Ex 66 at 15).

The court noted Wheeler's opinion that the children's relationship with Alexa is "somewhat stronger and more stable" than

their relationship with Steve, adopting her explanation that this is due in part to the children internalizing Alexa's "narrative" that she is the "better" parent. CP 442. Like Wheeler, the court found it important that Steve is patient in the face of this continuing dynamic, and provides the kids with a balanced perspective. *Id.*

Continuing, the court found that the kids have "close friends" in the Seattle area, their school and their extracurricular activities. CP 442. While it was possible that the children would have to change schools if Alexa relocated, any school change would not disrupt their dance and soccer, as those activities are not affiliated with their schools. *Id.* Further, Steve was very committed to keeping the kids in their same schools if possible. RP 536-37, 576, 656-57.

The children have extended family in Washington and in California. CP 442, 443. They have significant therapeutic relationships in Seattle. CP 443. They are developing a nice relationship with Steve's new wife, Meredith, and her children. CP 442. W. "established a very nice step-brother/sister bond" with Meredith's youngest daughter A. *Id.*

Dr. Wheeler's opinion plainly supports the trial court's finding on factor 1. Ex 66 at 14-17; RP 173-76. Wheeler opined that both parents are "highly interested, involved, skilled, competent,

confident, warm, loving, supportive, and effective parents." Ex 66 at 15. She explained that the children's relationship with Alexa continues to be "somewhat stronger," where they have "internalized" Alexa's "narrative" that she is the better parent. Ex 66 at 17; RP 173. They view even minor differences in Steve's parenting as "'wrong,'" undermining their confidence in Steve's parenting ability. *Id.* That dynamic "appears to be primarily driven by the children's internalized perceptions of their mother's disapproval/mistrust of their father's choices, and their vigilant monitoring and reporting of his 'imperfections.'" *Id.*

Wheeler also noted the children's strong relationships with family and friends in Washington and in California, and their strong therapeutic relationships in Seattle. Ex 66 at 17; RP 175. Of course, Steve and others testified at length about the strength of Steve's relationship with the kids, as well as the children's other significant relationships in Seattle. *Supra*, Statement of the Case C.

Alexa seems to suggest that factor 1 must weigh in favor of relocation where both parents have a strong relationship with the children, and the children are more "align[ed]" with Alexa. BA 27 (citing CP 442). This entirely ignores that Alexa's superior "alignment" results in large part from her false narrative that she is a

superior parent. Ex 66 at 17; RP 173. This was a significant concern for Wheeler and for the trial court. *Id.*; CP 442.

Alexa argues that the court abused its discretion in finding that this factor is neutral, in light of the children's attachment to Alexa. BA 27. Here, Alexa ignores that this "attachment" was both a positive and a negative. RP 173, 175. Wheeler plainly opined that the children were too attuned to Alexa's feelings, particularly her feeling that Steve is a bad parent. *Id.*; Ex 66 at 17. Alexa also ignores that this factor looks not only at the children's relationships with their parents, but also with other important people in their lives. BA 26-27.

Finally, Alexa accuses the trial court of evading the fact that she "must move," stating that even if this factor is neutral, "the presumption tips the factor weighs in favor or relocation [*sic*]." BA 27. Relocation is a balancing of 11 equal factors. ***Horner***, 151 Wn.2d at 886-87. It is not an abuse of discretion to find individual factors neutral. That is common practice. This Court should not circumscribe this difficult analysis in the manner Alexa suggests.

2. Factor 2: Prior agreements of the parties.

The trial court found that factor 2 weighs against relocation, where Alexa previously agreed not to move to California, and Steve depended on her promise in agreeing to delay a 50/50 residential

split. CP 443-44. Before the parties entered their agreed 2012 parenting plan, Alexa's brother and fellow board-member Peter asked whether she would move to California. *Id.* She answered: "I would never do that to my kids, because their dad is up here." *Id.*

Steve agreed to the parenting-plan provision delaying a year-round 50/50 schedule until June 2015, only because Alexa agreed to a parenting plan provision stating "her intention to remain in Seattle with the children." *Id.* This agreed-provision was very important to Steve, who was well aware that Alexa's company is in California and did not want his children to move there. *Id.* Both parties were represented and understood the consequences of their agreement. *Id.* After the agreed parenting plan, Alexa again reiterated her commitment to staying in Washington. *Id.*

Wheeler's report and testimony, Steve's testimony, and the 2012 parenting plan, plainly support the trial court's finding. Steve specifically negotiated for a parenting plan provision stating that Alexa intended to stay in Seattle, and Alexa agreed. Ex 66 at 18; RP 520-21. This provision was plainly important. *Id.*

Wheeler placed weight on this factor, where it had been important to her 2012 analysis that Alexa "understood that [Steve] is an extremely important part of [the children's] long-term emotional

well being, so much so that she would never consider moving to California." RP 177-78. During the 2012 evaluation, Alexa "was very clear [with Wheeler] that she was planning to stay in Seattle and not relocate." RP 176. It was then that Alexa told Peter that she would not move to California. RP 176-77.

Claiming that Steve "relocated" when he moved to Brier, Alexa argues that "it makes no sense" to hold only her to the parties' agreement to raise the children in Seattle. BA 42-44. It "makes no sense" to talk about Steve "relocating," where he was not the primary residential parent when he moved, and moved within the Seattle area. RP 520. More importantly, the purpose of the parties' agreement was plainly to prevent Alexa from moving the children to California, not to require the parties to live within Seattle City limits. Ex 66 at 18; RP 177-78.

3. Factor 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.

The court found that factor 3 "weighs strongly against relocating the children to California." CP 444-45. The trial court began by noting Dr. Wheeler's concern that the family dynamics could have a long-term effect on the children's emotional well-being,

specifically: (1) that the children are "excessively attuned" to Alexa's feelings about Steve's parenting, which "continues to undermine the children's confidence in the[ir] father's ability to care for them;" (2) that the children have become "highly aware" of the differences in each party's household, and perceive Alexa's way as "'right'" and Steve's way as "'wrong'"; and (3) that Alexa has a "'blindspot'" about the way she devalues Steve's parenting and the effect that has on the kids. CP 444. Although the court doubted that Alexa was deliberately undermining Steve, it found this pattern "highly concerning." *Id.*

The court also noted Wheeler's analysis that if the children relocated, then this troubling dynamic would persist, and could worsen to the degree that Steve would be alienated from the children. *Id.* The only thing preventing that was the shared parenting schedule. *Id.* Thus, relocation would "significantly negatively impact[]" "the children's long-term relationship with their father." CP 245.

The court also noted that Wheeler's primary concern about disallowing relocation was "due to mother's behavior" in building up the move. *Id.* Wheeler found no long-term negative impact on the children's relationship with Alexa if they stayed in Seattle. *Id.*

Again, Wheeler's report and testimony amply supports this finding. As discussed above, Wheeler expressed concern that if the children relocated to California, then Steve would become marginalized to the point that he could be alienated from the children entirely. Ex 66 at 18. That is, the children could become increasingly resistant to spending time with Steve, even though he is an "interested, involved, skilled and effective parent." *Id.* This had not yet happened, likely because the children spent nearly equal time with both parents. *Id.* Wheeler had "significant concerns that [relocation] would be highly detrimental to the children's regard for the value of their father's role in their lives, and would increase the risk that his visits would be regarded as an unwelcome 'intrusion' in their lives in California." *Id.*

If, however, the children remain in Washington with Steve, then "their relationship with each parent is much more likely to succeed." RP 185. Put another way, "They will not lose [Alexa] if they remain in Washington, but they may lose their father if this dynamic is allowed to perpetuate from an even greater distance." RP 194.

Steve is fully capable of assuming the role of primary residential parent, and the children would benefit from experiencing Steve as the primary parent, particularly where that might mitigate

Alexa's narrative that Steve is a second-class parent. Ex 66 at 19. While the children would experience some sadness from the disruption of regular physical contact with Alexa, the strength of their bond would likely survive. *Id.* Indeed, the "primary concern" in placing the kids primarily with Steve was that Alexa had already "poisoned the well," building up the move to California and strongly suggesting that the children were relocating. *Id.*; RP 186-87.

Alexa begins by suggesting that the court found "fault with how this family structured itself." BA 28. But again, Steve had nearly equal residential time, and would have had a 50/50 schedule in June 2015. RP 520. The family "structured itself" to share parenting.

Alexa faults the trial court and Wheeler for focusing principally on the disruption of contact with Steve, but both addressed that Alexa's relationship with the kids would survive decreased residential time, while Steve's likely would not, given the troubling narrative Alexa instilled in the kids. *Compare* BA 28 *with* RP 154-55, 185, 194; CP 444. Alexa next challenged Wheeler's opinion that relocation would alienate the children from Steve, but ignores that she created the dynamic this concern is based on. BA 28-29; Ex 66 at 18; RP 185, 194. And while alienation is not guaranteed, both Wheeler and the trial court found that relocation would, at a minimum, exacerbate

the troubling dynamic Alexa had created. Ex 66 at 18; RP 219-20, 310-12, 315-16; CP 444.

Asserting that there currently "is no evidence of alienation," Alexa ignores Wheeler's opinion and the court's finding that the reason alienation has not yet occurred is most likely because Steve has nearly equal residential time with the kids. BA 29; RP 154-55. But again, alienation is "a very strong concern," where relocation would allow Alexa to further marginalize Steve. RP 321-22; *see also* RP 310-11, 325-27.

This is not a matter if the children "prefer[ring]" Alexa's household, but of Alexa instilling in the children a narrative that her "household" and her parenting are right, and Steve's are wrong. BA 31; RP 135-36, 154-55. That dynamic is false, and it is harmful. RP 310-11, 321-22, 325-27.

4. Factor 4: Whether either parent or a person entitled to residential time with the child is subject to limitations under RCW 26.09.191.

There are no .191s in place and the trial court did not address factor 4. CP 446. Nonetheless, Wheeler felt compelled to comment on this factor, opining that Alexa "does have a significant 'blind spot' about the ways in which her disapproval of [Steve's] parenting, and her devaluation of his parenting role in general, is detrimental to her

children's long-term well-being." Ex 66 at 20. Wheeler again noted that relocation could result in increasing alienation due to Alexa's "'blind spots'" and "undue worries about [Steve]." *Id.*

5. Factor 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.

The trial court found that Alexa's reasons for wanting to relocate were in good faith, where Alexa testified that she was exhausted from commuting to California and that is would be much better for her work if she was there five-days a week. CP 446. Company employees testified about difficulties associated with Alexa being in Seattle. *Id.* Although there was no Board mandate that Alexa move, and no negative consequences threatened if she declined, the court did not doubt that "Board members or other members of the company have placed pressure on [Alexa] to move to California." *Id.* The court also found Steve's objections in good faith, finding that "[h]e is seeking to maintain the status quo of the parties' current parenting plan and to see his children on a consistent basis." CP 447.

The court found that this factor weighs against relocation based on Alexa's "suspect" timing in seeking relocation. CP 446-47. Alexa moved for relocation in July 2014, one year before the parties were supposed to move to a year-round 50/50 plan. RP 520; CP 58,

604. The court thought it "reasonable" that Alexa would try the 50/50 plan as agreed. CP 446. Alexa's timing seemed like a strategic move to maintain an advantage in a relocation trial by maintaining the presumption. *Id.* That, the court found, "indicates bad faith." *Id.*

Wheeler's opinion supports the trial court's findings here as well. Wheeler opined that Steve opposed relocation due to concerns about losing day-to-day contact with the kids and becoming further marginalized in their lives. Ex 66 at 20. She reported that Alexa was seeking relocation due to the increased demands and work and her need to be there five-days a week. *Id.*

But Wheeler also noted that collateral sources reported concerns that Alexa was seeking relocation in an "ultimate attempt to exert control over the children," and "further (if not completely) marginalize [Steve] from the children's lives." RP 197-98; Ex 66 at 20. Alexa seemed to think that she alone could "make up for the loss" of Steve, blind to the fact that "he's an incredibly important part of [the children's] long-term well being." RP 198.

It was important to Wheeler's factor-five analysis that in contrast to Alexa, Steve recognizes how important Alexa is to the kids, is very supportive of her parenting role, and will continue to be so in the future. RP 199. Wheeler opined that the timing of the

relocation, just before the onset of the 50/50 schedule and following Steve's engagement to Meredith "accentuates concerns that at least some aspects of this relocation may . . . not be in good faith." Ex 66 at 20.

Alexa claims that "the presumption tips the scale to her." BA 41. This ignores the court's finding that Alexa's timing "indicates bad faith," which is amply supported by evidence from Wheeler, Steve, and mutual friends. Ex 66 at 20; RP 554; CP 446. And again, Alexa wrongly asserts, contrary to ***Horner***, that a single factor cannot be neutral. 151 Wn.2d at 886-87.

Alexa argues that the court improperly considered that the parties were headed toward a 50/50 plan when Alexa sought to relocate, claiming that the court incorrectly assumed that under a 50/50 plan, Alexa would not retain the presumption favoring relocation. BA 39-40. The CRA assumes that the person seeking to relocate the children resides with them "a majority of the time." RCW 26.09.430. Thus, it is a fair assumption that the presumption would not apply when neither parent lives with the children a majority of the time. CP 446.

Alexa also claims that the court gave Steve a "pass" for moving to Brier. BA 42 (citing CP 441). Steve did not violate the

agreed parenting plan when he moved to Brier. *Supra*, Argument § C 2. His move did not change the residential schedule one bit.

Finally, Alexa argues that the trial court's finding on factor five is "contradictory" and creates an ambiguity undermining the court's order. BA 41 (citing ***In re Marriage of Katare***, 125 Wn. App. 813, 830-31, 105 P.3d 44 (2004)). ***Katare*** is inapposite – it holds that a finding supporting .191 restrictions coupled with a finding that there is no basis for a restriction created an ambiguity. 125 Wn. App. at 816. In any event, the finding is not contradictory. Alexa does have good reasons for wanting to move to California – the same ones that have existed since her company's inception, including in 2012 when she promised to remain in Seattle. But it is equally true that seeking relocation before the 50/50 schedule began was suspect.

6. Factor 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.

The trial court found that factor 6 weighs against relocation, again relying heavily on Dr. Wheeler's report. CP 447 (citing Ex 66 at 21). The trial court began by noting that at ages 7 and 10, the children depend largely on their parents for social, emotional, and

cognitive support. *Id.* Both parents are skilled at supporting the children. *Id.*

But the court also found that Alexa has "engaged in behavior (consciously or unconsciously) that has had a negative emotional impact on the children." CP 447. The court then noted Dr. Wheeler's concern that the children were monitoring Steve for perceived missteps and "wrong" behavior, rather than relaxing in his able care, and then reporting back to Alexa, and that this dynamic needed to be "intervened upon." *Id.* "This [gave] the Court cause for concern if [Alexa] were to have the bulk of the residential time with the children geographically removed from [Steve's] stabilizing influence." *Id.*

Again, Wheeler's testimony amply supports the court's finding on this factor. Wheeler opined that at their ages, the children's greatest source of social, emotional, and cognitive support came from their parents, who were both skilled at meeting the children's developmental needs. Ex 66 at 20-21. But Wheeler continued to have the same concerns expressed in her 2012 report that "the children are <u>too</u> attuned too/dependent on their mother's emotional responses, particularly with regard for [Steve's] parenting." *Id.* (emphasis in original). As Wheeler "feared, the children appear to have developed an alignment with [Alexa], which at times positions

them 'against' [Steve] when his parenting choices differ from [Alexa's]." *Id.* Since Steve is a "highly involved, effective, and skilled parent," Wheeler opined that "the children's diminished confidence in his parenting appears to be a source of potential long-term emotional harm to them." *Id.*

Wheeler's testimony emphasized this concerning dynamic articulated in her report. RP 207-10. Alexa "over-read[s]" the children "in an unduly negative light" particularly when they return from residential time with Steve. RP 208. Alexa and the children are in a cycle where she is "overly sensitive" to their reports about Steve, and they make reports that are "not an accurate representation of what's going on." RP 208-09. Again, this dynamic puts the children's long-term emotional development at risk. RP 209-10.

Alexa asserts that this factor is a "tie," where both parents are adept at emotionally supporting the kids. BA 36. She claims that instead of breaking this tie in favor of relocation, as it must, the trial court "endorsed [Wheeler's] goal of shoring up [Steve's] parenting in the eyes of the children." BA 36 (citing CP 447). This ignores Wheeler's and the trial court's concern that consciously or not, Alexa is pitting the kids against Steve, creating undue anxiety and depriving them of the ability to simply relax and enjoy their dad. Ex 66 at 20-

21; RP 208-10. There is no "tie" – this dynamic puts the children's long-term emotional development at risk. RP 208-09.

7. Factor 7: The quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations.

The trial court found that factor 7 favors relocation, where the children will have beautiful surroundings, quality schools, and stimulating extracurricular activities in either location, but that Alexa would plainly benefit from moving to California. CP 448. Wheeler's report amply supports this finding. Ex 66 at 21.

Alexa quips that the court "ended up in the right place," but complains that the court's analysis demonstrates its failure to "fully implement the presumption." BA 45. As it must, the trial court plainly considered both Alexa and the kids in this analysis. What more Alexa wants is unclear, but nothing more was required.

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

The court found that factor 8 weighs against relocation, finding that as an alternative to relocating, Alexa could reside in California and exercise residential time in her Washington home on a mid-week-on-week-off basis. CP 448-49. When Alexa moved to relocate, Steve offered to immediately move to the impending 50/50 schedule

to help Alexa attend to her business. CP 448. Alexa testified that she planned to keep her Seattle home and employed a full-time nanny who is "like a grandmother to the kids." *Id.* The court found it reasonable that she would have at least tried a plan that would reduce her travel, increase her time in California, and still accomplish what is best for the kids. CP 448-49.

Again, Wheeler's testimony and report amply support this finding. Wheeler too noted Steve's willingness to maintain a 50/50 schedule as intended under the 2012 parenting plan if Alexa could accommodate it. Ex 66 at 21; RP 214. While Wheeler noted Alexa's generous offer to pay for Steve's travel to California, she found that her proposed schedule assumes that Steve can take off more time than he actually can. RP 214. Wheeler was also concerned that this arrangement would exacerbate the dynamic addressed above, marginalize Steve, and set him up for failure every time he lacked the work flexibility to visit the kids. RP 215-16.

Alexa, on the other hand, has homes in Seattle, including one she "rents" to the children's former nanny at below market rent. RP 1426. She has always enjoyed job flexibility, and while that has

changed to an extent, it is not gone, and vastly outstrips Steve's ability to work remotely or take time off. RP 341-42.[5]

9. Factor 9: The alternatives to relocation and whether it is feasible and desirable for the other party to relocate also.

The trial court found that factor 9 weighs against relocation, where Steve cannot relocate – he is an employee, unlike Alexa who co-owns the company. CP 449. And Steve recently built a house, and is engaged to be married to Meredith who shares custody with her ex-husband, also located in Washington. *Id.*

This finding too is amply supported by evidence from Wheeler and Steve. Steve cannot work remotely or move to California. RP 39, 588; Ex 66 at 22. He cannot take the time off work to fly down to California for a week-long visit every month – his job simply does not allow it. RP 587-88; Ex 66 at 22. And aside from work, Steve was engaged to be married to Meredith during trial, and is now married. RP 588; Ex 66 at 22. Meredith's girls live with Steve and Meredith when they are not with their father, who is also in Washington. *Id.*

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[5] Alexa does not seem to directly address factor 8. Since her response, if any, is combined her arguments on factor 9, Steve addresses her arguments below.

Wheeler accepted Alexa's statements that she can no longer commute. Ex 66 at 21; RP 216-17. But she found it unfortunate and disappointing that Alexa, the co-owner and President of her company who had commuted for 16 years, could not continue doing so to better serve her children's best interests. Ex 66 at 21-22.

Alexa takes issue with the court noting that there was no mandate from the board that Alexa move, arguing that the court simply refused to "accept that [she] needed to move." BA 38. The court is statutorily required to consider alternatives to relocation. RCW 26.09.520(9). And the court is right – there is no evidence that the board directed Alexa to move. The board plainly wanted Alexa to move, and the trial court was well aware of that fact. CP 446.

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

The court found that factor 10 weighs against relocation, where Alexa has considerably more flexibility than Steve. CP 449. Alexa has significant wealth, including multiple homes in California and Washington, and the ability to travel back and forth with little or no impact on her finances. *Id.* As the founder and President of her company, Alexa has considerable flexibility in the hours she works and when she works. *Id.* Steve, by contrast, has less job flexibility and commitments to his new wife and stepchildren. *Id.* Although

Alexa "generously" offered to pay for Steve's travel once a month, he has limited time off from work. *Id.*

Wheeler said little about this factor other than that the parties' financial situation was stable whether the relocation was allowed or prevented. Ex 66 at 22; RP 217. Logistically, Steve cannot work remotely or take the time away from work to regularly see the kids in California. RP 39, 587-88; Ex 66 at 22.

Alexa's only comment on factor 10 is that the court failed to give enough credit to Alexa's offer to pay the costs associated with Steve traveling to California. BA 44. That misses the point. Factor 10 is not just about finances, but also logistics. Steve simply cannot work remotely or take off a week every month to see the kids. RP 39, 587-88; Ex 66 at 22. Alexa, on the other hand, enjoys considerable flexibility, including the ability to work remotely. RP 341-42, 840-42, 904, 1031-32, 1438-39.[6]

In sum, the trial court plainly considered each statutory factor on the record and its findings are amply supported by Dr. Wheeler, Steve, and others. This Court should affirm.

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[6] Factor 11 does not apply, as it addresses only temporary orders. RCW 26.09.520.

D. The trial court properly excluded Behar, and any error is harmless.

Alexa argues the trial court erroneously excluded Howard Behar, an iD Tech board member disclosed for the first time 5 days into trial. BA 46-48. The trial court satisfied ***Burnet v. Spokane Ambulance*** (*infra*) – with little help from Alexa. And even assuming *arguendo* that an error occurred, it is harmless, where Behar's proffered testimony was cumulative. This Court should affirm.

Alexa incorrectly asserts that this Court applies a *de novo* standard of review. BA 47. As our Supreme Court recently reiterated in ***Keck v. Collins***, the appellate courts review witness exclusion under ***Burnet*** for an abuse of discretion. ***Keck v. Collins***, 184 Wn.2d 358, 369, 357 P.3d 1080 (2015) (discussing ***Burnet v. Spokane Ambulance***, 131 Wn.2d 484, 933 P.2d 1036 (1997)).

Five days into a week-log trial, Alexa sought to call Howard Behar, an iD Tech board member, to "rebut Steve's claim that she was not being asked to move by the Board." BA 46: RP 939, 941-42. Alexa plainly knew who Behar was, and what he would say all along, but chose not to disclose him as a potential witness, believing that he would be out of the country during trial. RP 938, 939. During her deposition, Alexa refused to even identify Behar. RP 936-37.

When Alexa sought to call Behar near the end of trial, the court repeatedly asked her to address the three-part ***Burnet*** test. RP 937-41. She never did, bypassing willfulness and prejudice, and arguing only that the court should allow Behar's testimony and require Steve to depose him overnight – a "lesser" sanction. *Id.* The court ruled as follows:

> Under ***Burnet*** I need to look at whether it's a willful violation, whether it would be substantially prejudicial, and whether there's a lesser sanction. We started trial Monday the 23rd. This is our fifth day of trial. We're now at March 30th, hoping to wrap up in a couple of days. My understanding is that Mr. Behar was never on the witness list. Other members of the board are on the witness list and are testifying. I think that it sounds from the offer of proof that the testimony is relatively cumulative but for the fact that he's not a friend or family member which, frankly, only goes to impeachment to a certain extent. I – you still listen to the – substantively to the testimony. I think that since he was never disclosed and there is clearly substantial prejudice being that we're in the middle of trial, I don't think a lesser sanction of having him be deposed and testifying tomorrow is adequate. I think that would be – you know, it's really a little bit trial by ambush. So I'm not going to allow his testimony.

RP 945-46. The court plainly considered each ***Burnet*** factor "on the record." ***Teter v. Deck***, 174 Wn.2d 207, 217, 274 P.3d 336 (2012). No more is required.

But even assuming arguendo that the ***Burnet*** analysis falls short, the error is harmless, where Behar's testimony is entirely cumulative. ***Jones v. City of Seattle***, 179 Wn.2d 322, 355-60, 314 P.3d 380 (2013). Behar would have testified about the board's desire

and expectation that Alexa would be in California on a daily basis. RP 939-41. Board member Mathew Baumel testified to precisely that same thing (RP 1095-96):

> Q. And so has there been discussion among the board about the need for Alexa to be on the ground in California on a full-time basis?
>
> A. Of course. Of course. You know, ever since the board started we've been talking about when Alexa's going to move down to be part of their full-time. She's the founder. She's the leader. She's the president. . . . And we need Alexa down there. It's – I mean, it's really nonnegotiable. It's extremely important that she's in the office each day and every day.

Similarly, when Alexa's brother and fellow board member Peter was asked whether the board had ever asked Alexa to move to California, Peter said, "I think it's just so ingrained in the thinking that it's – I think we had that discussion – we've had that discussion in board meetings. We've had that discussion ongoing that this is really a nonnegotiable item for us." RP 877. He later stated that the board had repeatedly asked Alexa to relocate. RP 904.

Further, any error is also harmless where Behar's proffered testimony was admittedly relevant only to whether Alexa sought to relocate in good faith, and the trial court found that Alexa's "reason for wanting to move to California is made in good faith," stating: "No doubt, Board members or other members of the company have

placed pressure on the mother to move to California." CP 446; RP 940. The court's finding that Alexa's timing is not in good faith is based on the impending 50/50 residential split and Alexa's unwillingness to follow through on trying that schedule. CP 446. Board member testimony is irrelevant to that issue.

In short, the trial court plainly considered the ***Burnet*** factors, but any error is harmless in any event.

F. The trial court properly awarded Steve attorney fees.

The trial courts are not limited to awarding attorney fees only where a party would otherwise be left destitute. Here, the court found it inequitable that Steve would have to pay attorney fees that exceed his annual income, in light of the considerable disparity in the parties' incomes and assets. That is well within the court's broad discretion. This Court should affirm.

The trial court awarded attorney fees based on the substantial and undisputed disparity in the parties' income and assets. CP 454-56. Alexa does not challenge those findings. BA 49. They are amply supported. RP 671, 722-23, 830-31, 918, 1409, 1463-67.

Alexa makes a single argument – that the trial court may award a party fees under RCW 26.09.140 only if that "party cannot pay his or her own fees." BA 50 (citing ***In re Marriage of Booth***, 114

Wn.2d 772, 780, 791 P.2d 519 (1990).[7] ***Booth*** says no such thing, holding that a trial court awarding fees under RCW 26.09.140 must consider "the financial resources of the respective parties." 114 Wn.2d at 779. ***Booth*** is inapposite in any event, where the appellate court affirmed the denial of a fee award, where both parties' incomes were within the same range. *Id.* at 780.

Fee awards are highly discretionary. ***In re Parentage of J.M.K.***, 155 Wn.2d 374, 395-96, 119 P.3d 840 (2005). The trial court correctly concluded that Steve has "substantially less" than Alexa. CP 456. She was well within her broad discretion in finding it inequitable that Steve be saddled with attorney fees exceeding his annual income. *Id.* This Court should affirm.

CONCLUSION

The trial court's decision denying relocation is amply supported by the record and well within the court's broad discretion. The ruling prohibiting Behar's testimony complies with ***Burnet***, and is a harmless error, if error at all. The fee award too is well within the court's broad discretion. This Court should affirm.

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[7] Although Alexa cites ***In re Marriage of Griffin***, the case name is actually ***In re Marriage of Booth***.

RESPECTFULLY SUBMITTED this 11th day of January 2016.

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CERTIFICATE OF SERVICE BY EMAIL/MAIL

I certify that I mailed, or caused to be mailed or emailed, a copy of the foregoing **BRIEF OF RESPONDENT WITH ERRATA** postage prepaid, via U.S. mail on the 11th day of January 2016, to the following counsel of record at the following addresses:

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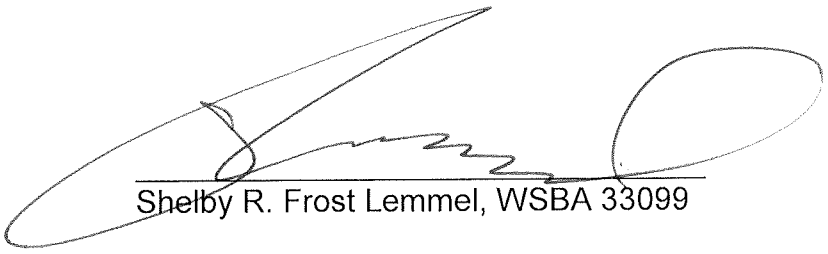

Shelby R. Frost Lemmel, WSBA 33099

RCW 26.09.140

Payment of costs, attorneys' fees, etc.

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Upon 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.

The court may order that the attorneys' fees be paid directly to the attorney who may enforce the order in his or her name.

[2011 c 336 § 690; 1973 1st ex.s. c 157 § 14.]

RCW 26.09.191

Restrictions in temporary or permanent parenting plans.

(1) The permanent parenting plan shall not require mutual decision-making or designation of a dispute resolution process other than court action if it is found that a parent has engaged in any of the following conduct: (a) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (b) physical, sexual, or a pattern of emotional abuse of a child; or (c) a history of acts of domestic violence as defined in *RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.

(2) (a) The parent's residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct: (i) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (ii) physical, sexual, or a pattern of emotional abuse of a child; (iii) a history of acts of domestic violence as defined in *RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm; or (iv) the parent has been convicted as an adult of a sex offense under:

(A) RCW 9A.44.076 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (d) of this subsection;
(B) RCW 9A.44.079 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (d) of this subsection;
(C) RCW 9A.44.086 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (d) of this subsection;
(D) RCW 9A.44.089;
(E) RCW 9A.44.093;
(F) RCW 9A.44.096;
(G) RCW 9A.64.020 (1) or (2) if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (d) of this subsection;
(H) Chapter 9.68A RCW;
(I) Any predecessor or antecedent statute for the offenses listed in (a)(iv)(A) through (H) of this subsection;
(J) Any statute from any other jurisdiction that describes an offense analogous to the offenses listed in (a)(iv)(A) through (H) of this subsection.

This subsection (2)(a) shall not apply when (c) or (d) of this subsection applies.

(b) The parent's residential time with the child shall be limited if it is found that the parent resides with a person who has engaged in any of the following conduct: (i) Physical, sexual, or a pattern of emotional abuse of a child; (ii) a history of acts of domestic violence as defined in *RCW 26.50.010(1) or an assault or sexual assault that causes grievous bodily harm or the fear of such harm; or (iii) the person has been convicted as an adult or as a juvenile has been adjudicated of a sex offense under:

(A) RCW 9A.44.076 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;

(B) RCW 9A.44.079 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;
(C) RCW 9A.44.086 if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;
(D) RCW 9A.44.089;
(E) RCW 9A.44.093;
(F) RCW 9A.44.096;
(G) RCW 9A.64.020 (1) or (2) if, because of the difference in age between the offender and the victim, no rebuttable presumption exists under (e) of this subsection;
(H) Chapter 9.68A RCW;
(I) Any predecessor or antecedent statute for the offenses listed in (b)(iii)(A) through (H) of this subsection;
(J) Any statute from any other jurisdiction that describes an offense analogous to the offenses listed in (b)(iii)(A) through (H) of this subsection.

This subsection (2)(b) shall not apply when (c) or (e) of this subsection applies.

(c) If a parent has been found to be a sexual predator under chapter 71.09 RCW or under an analogous statute of any other jurisdiction, the court shall restrain the parent from contact with a child that would otherwise be allowed under this chapter. If a parent resides with an adult or a juvenile who has been found to be a sexual predator under chapter 71.09 RCW or under an analogous statute of any other jurisdiction, the court shall restrain the parent from contact with the parent's child except contact that occurs outside that person's presence.

(d) There is a rebuttable presumption that a parent who has been convicted as an adult of a sex offense listed in (d)(i) through (ix) of this subsection poses a present danger to a child. Unless the parent rebuts this presumption, the court shall restrain the parent from contact with a child that would otherwise be allowed under this chapter:

(i) RCW 9A.64.020 (1) or (2), provided that the person convicted was at least five years older than the other person;
(ii) RCW 9A.44.073;
(iii) RCW 9A.44.076, provided that the person convicted was at least eight years older than the victim;
(iv) RCW 9A.44.079, provided that the person convicted was at least eight years older than the victim;
(v) RCW 9A.44.083;
(vi) RCW 9A.44.086, provided that the person convicted was at least eight years older than the victim;
(vii) RCW 9A.44.100;
(viii) Any predecessor or antecedent statute for the offenses listed in (d)(i) through (vii) of this subsection;
(ix) Any statute from any other jurisdiction that describes an offense analogous to the offenses listed in (d)(i) through (vii) of this subsection.

(e) There is a rebuttable presumption that a parent who resides with a person who, as an adult, has been convicted, or as a juvenile has been adjudicated, of the sex offenses listed in (e)(i) through (ix) of this subsection places a child at risk of abuse or harm when that parent exercises residential time in the presence of the convicted or adjudicated person. Unless the parent rebuts the presumption, the court shall restrain the parent from contact with the parent's child except for contact that occurs outside of the convicted or adjudicated person's presence:

(i) RCW 9A.64.020 (1) or (2), provided that the person convicted was at least five years older than the other person;

(ii) RCW 9A.44.073;

(iii) RCW 9A.44.076, provided that the person convicted was at least eight years older than the victim;

(iv) RCW 9A.44.079, provided that the person convicted was at least eight years older than the victim;

(v) RCW 9A.44.083;

(vi) RCW 9A.44.086, provided that the person convicted was at least eight years older than the victim;

(vii) RCW 9A.44.100;

(viii) Any predecessor or antecedent statute for the offenses listed in (e)(i) through (vii) of this subsection;

(ix) Any statute from any other jurisdiction that describes an offense analogous to the offenses listed in (e)(i) through (vii) of this subsection.

(f) The presumption established in (d) of this subsection may be rebutted only after a written finding that:

(i) If the child was not the victim of the sex offense committed by the parent requesting residential time, (A) contact between the child and the offending parent is appropriate and poses minimal risk to the child, and (B) the offending parent has successfully engaged in treatment for sex offenders or is engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes such contact is appropriate and poses minimal risk to the child; or

(ii) If the child was the victim of the sex offense committed by the parent requesting residential time, (A) contact between the child and the offending parent is appropriate and poses minimal risk to the child, (B) if the child is in or has been in therapy for victims of sexual abuse, the child's counselor believes such contact between the child and the offending parent is in the child's best interest, and (C) the offending parent has successfully engaged in treatment for sex offenders or is engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes such contact is appropriate and poses minimal risk to the child.

(g) The presumption established in (e) of this subsection may be rebutted only after a written finding that:

(i) If the child was not the victim of the sex offense committed by the person who is residing with the parent requesting residential time, (A) contact between the

child and the parent residing with the convicted or adjudicated person is appropriate and that parent is able to protect the child in the presence of the convicted or adjudicated person, and (B) the convicted or adjudicated person has successfully engaged in treatment for sex offenders or is engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes such contact is appropriate and poses minimal risk to the child; or

(ii) If the child was the victim of the sex offense committed by the person who is residing with the parent requesting residential time, (A) contact between the child and the parent in the presence of the convicted or adjudicated person is appropriate and poses minimal risk to the child, (B) if the child is in or has been in therapy for victims of sexual abuse, the child's counselor believes such contact between the child and the parent residing with the convicted or adjudicated person in the presence of the convicted or adjudicated person is in the child's best interest, and (C) the convicted or adjudicated person has successfully engaged in treatment for sex offenders or is engaged in and making progress in such treatment, if any was ordered by a court, and the treatment provider believes contact between the parent and child in the presence of the convicted or adjudicated person is appropriate and poses minimal risk to the child.

(h) If the court finds that the parent has met the burden of rebutting the presumption under (f) of this subsection, the court may allow a parent who has been convicted as an adult of a sex offense listed in (d)(i) through (ix) of this subsection to have residential time with the child supervised by a neutral and independent adult and pursuant to an adequate plan for supervision of such residential time. The court shall not approve of a supervisor for contact between the child and the parent unless the court finds, based on the evidence, that the supervisor is willing and capable of protecting the child from harm. The court shall revoke court approval of the supervisor upon finding, based on the evidence, that the supervisor has failed to protect the child or is no longer willing or capable of protecting the child.

(i) If the court finds that the parent has met the burden of rebutting the presumption under (g) of this subsection, the court may allow a parent residing with a person who has been adjudicated as a juvenile of a sex offense listed in (e)(i) through (ix) of this subsection to have residential time with the child in the presence of the person adjudicated as a juvenile, supervised by a neutral and independent adult and pursuant to an adequate plan for supervision of such residential time. The court shall not approve of a supervisor for contact between the child and the parent unless the court finds, based on the evidence, that the supervisor is willing and capable of protecting the child from harm. The court shall revoke court approval of the supervisor upon finding, based on the evidence, that the supervisor has failed to protect the child or is no longer willing or capable of protecting the child.

(j) If the court finds that the parent has met the burden of rebutting the presumption under (g) of this subsection, the court may allow a parent residing with a person who, as an adult, has been convicted of a sex offense listed in (e)(i) through (ix) of

this subsection to have residential time with the child in the presence of the convicted person supervised by a neutral and independent adult and pursuant to an adequate plan for supervision of such residential time. The court shall not approve of a supervisor for contact between the child and the parent unless the court finds, based on the evidence, that the supervisor is willing and capable of protecting the child from harm. The court shall revoke court approval of the supervisor upon finding, based on the evidence, that the supervisor has failed to protect the child or is no longer willing or capable of protecting the child.

(k) A court shall not order unsupervised contact between the offending parent and a child of the offending parent who was sexually abused by that parent. A court may order unsupervised contact between the offending parent and a child who was not sexually abused by the parent after the presumption under (d) of this subsection has been rebutted and supervised residential time has occurred for at least two years with no further arrests or convictions of sex offenses involving children under chapter 9A.44 RCW, RCW 9A.64.020, or chapter 9.68A RCW and (i) the sex offense of the offending parent was not committed against a child of the offending parent, and (ii) the court finds that unsupervised contact between the child and the offending parent is appropriate and poses minimal risk to the child, after consideration of the testimony of a state-certified therapist, mental health counselor, or social worker with expertise in treating child sexual abuse victims who has supervised at least one period of residential time between the parent and the child, and after consideration of evidence of the offending parent's compliance with community supervision requirements, if any. If the offending parent was not ordered by a court to participate in treatment for sex offenders, then the parent shall obtain a psychosexual evaluation conducted by a certified sex offender treatment provider or a certified affiliate sex offender treatment provider indicating that the offender has the lowest likelihood of risk to reoffend before the court grants unsupervised contact between the parent and a child.

(l) A court may order unsupervised contact between the parent and a child which may occur in the presence of a juvenile adjudicated of a sex offense listed in (e)(i) through (ix) of this subsection who resides with the parent after the presumption under (e) of this subsection has been rebutted and supervised residential time has occurred for at least two years during which time the adjudicated juvenile has had no further arrests, adjudications, or convictions of sex offenses involving children under chapter 9A.44 RCW, RCW 9A.64.020, or chapter 9.68A RCW, and (i) the court finds that unsupervised contact between the child and the parent that may occur in the presence of the adjudicated juvenile is appropriate and poses minimal risk to the child, after consideration of the testimony of a state-certified therapist, mental health counselor, or social worker with expertise in treatment of child sexual abuse victims who has supervised at least one period of residential time between the parent and the child in the presence of the adjudicated juvenile, and after consideration of evidence of the adjudicated juvenile's compliance with community supervision or parole requirements, if any. If the adjudicated juvenile was not ordered by a court to participate in treatment for sex offenders, then the adjudicated juvenile shall obtain a

psychosexual evaluation conducted by a certified sex offender treatment provider or a certified affiliate sex offender treatment provider indicating that the adjudicated juvenile has the lowest likelihood of risk to reoffend before the court grants unsupervised contact between the parent and a child which may occur in the presence of the adjudicated juvenile who is residing with the parent.

(m) (i) The limitations imposed by the court under (a) or (b) of this subsection shall be reasonably calculated to protect the child from the physical, sexual, or emotional abuse or harm that could result if the child has contact with the parent requesting residential time. The limitations shall also be reasonably calculated to provide for the safety of the parent who may be at risk of physical, sexual, or emotional abuse or harm that could result if the parent has contact with the parent requesting residential time. The limitations the court may impose include, but are not limited to: Supervised contact between the child and the parent or completion of relevant counseling or treatment. If the court expressly finds based on the evidence that limitations on the residential time with the child will not adequately protect the child from the harm or abuse that could result if the child has contact with the parent requesting residential time, the court shall restrain the parent requesting residential time from all contact with the child.

(ii) The court shall not enter an order under (a) of this subsection allowing a parent to have contact with a child if the parent has been found by clear and convincing evidence in a civil action or by a preponderance of the evidence in a dependency action to have sexually abused the child, except upon recommendation by an evaluator or therapist for the child that the child is ready for contact with the parent and will not be harmed by the contact. The court shall not enter an order allowing a parent to have contact with the child in the offender's presence if the parent resides with a person who has been found by clear and convincing evidence in a civil action or by a preponderance of the evidence in a dependency action to have sexually abused a child, unless the court finds that the parent accepts that the person engaged in the harmful conduct and the parent is willing to and capable of protecting the child from harm from the person.

(iii) If the court limits residential time under (a) or (b) of this subsection to require supervised contact between the child and the parent, the court shall not approve of a supervisor for contact between a child and a parent who has engaged in physical, sexual, or a pattern of emotional abuse of the child unless the court finds based upon the evidence that the supervisor accepts that the harmful conduct occurred and is willing to and capable of protecting the child from harm. The court shall revoke court approval of the supervisor upon finding, based on the evidence, that the supervisor has failed to protect the child or is no longer willing to or capable of protecting the child.

(n) If the court expressly finds based on the evidence that contact between the parent and the child will not cause physical, sexual, or emotional abuse or harm to

the child and that the probability that the parent's or other person's harmful or abusive conduct will recur is so remote that it would not be in the child's best interests to apply the limitations of (a), (b), and (m)(i) and (iii) of this subsection, or if the court expressly finds that the parent's conduct did not have an impact on the child, then the court need not apply the limitations of (a), (b), and (m)(i) and (iii) of this subsection. The weight given to the existence of a protection order issued under chapter 26.50 RCW as to domestic violence is within the discretion of the court. This subsection shall not apply when (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), and (m)(ii) of this subsection apply.

(3) A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist:

(a) A parent's neglect or substantial nonperformance of parenting functions;

(b) A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in RCW 26.09.004;

(c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;

(d) The absence or substantial impairment of emotional ties between the parent and the child;

(e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;

(f) A parent has withheld from the other parent access to the child for a protracted period without good cause; or

(g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

(4) In cases involving allegations of limiting factors under subsection (2)(a)(ii) and (iii) of this section, both parties shall be screened to determine the appropriateness of a comprehensive assessment regarding the impact of the limiting factor on the child and the parties.

(5) In entering a permanent parenting plan, the court shall not draw any presumptions from the provisions of the temporary parenting plan.

(6) In determining whether any of the conduct described in this section has occurred, the court shall apply the civil rules of evidence, proof, and procedure.

(7) For the purposes of this section:

(a) "A parent's child" means that parent's natural child, adopted child, or stepchild; and

(b) "Social worker" means a person with a master's or further advanced degree from a social work educational program accredited and approved as provided in RCW 18.320.010.

[2011 c 89 § 6; 2007 c 496 § 303; 2004 c 38 § 12; 1996 c 303 § 1; 1994 c 267 § 1. Prior: 1989 c 375 § 11; 1989 c 326 § 1; 1987 c 460 § 10.]

RCW 26.09.430

Notice requirement.

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 and 26.09.450.

[2000 c 21 § 5.]

RCW 26.09.520

Basis for determination.

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.

[2000 c 21 § 14.]