

Nos. 66054-3-I
66151-1-I
King Cty. Superior Ct. No. 05-3-04804-6 SEA

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

JANICE K. HOWD,
Appellant,
v.

CHRISTOPHER A. HOWD,
Appellee.

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

The Honorable Laura Gene Middaugh

APPELLANT'S OPENING BRIEF

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I.
ASSIGNMENTS OF ERROR

- 1) In denying relocation, the trial court improperly relied on the “friendly parent” doctrine, that is, the notion that the children should live primarily with the parent who will be more likely to foster a long-distance relationship with the other parent.
- 2) To the extent the trial court applied the correct legal standard, the court’s factual findings do not support that standard. In the court’s view, the determinative factor in this case was whether the detriment to the children would be greater if their contact with Chris¹ was disrupted rather than if their contact with Janice was disrupted. The court’s concern about Janice’s alleged hostility towards Chris and his new wife was irrelevant to the disruption factor.
- 3) The following factual findings in the relocation order are not supported by substantial evidence.
 - a) The reasons set out in paragraph 2.3.3 of the order denying relocation concerning why disrupting contact between the children and Chris would be more detrimental to the children than

¹ Because the parties share a last name they will be referred to by first names. No disrespect is intended.

disrupting contact between the children and Janice. *See* CP 493-94.

b) The finding in paragraph 2.3.8 that technology would foster Janice's long distance relationship with the children and that "both" parents are familiar with this technology and regularly use it. *See* CP 495-96.

- 4) The court erred in denying the motion for reconsideration, which showed that Chris was not furthering the children's relationship with Janice as the trial court believed he would.
- 5) The trial court erred in denying Janice's motion for a relocation evaluation.
- 6) The trial court's child support ruling cannot be upheld because it is internally inconsistent with regard to whether it is based on actual income or imputed income.
- 7) If the child support ruling is based on the actual income of Ricketts Corporation, the trial court erred in attributing 75% of the income to Janice simply because 75% of the company is in her name.
- 8) If the child support ruling is based on imputed income, the court should have relied on the median income for a woman of Janice's age.

II.
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1) May a court rely on the “friendly parent” concept when deciding whether a parent may relocate with the children?
- 2) In the trial court’s view, the determinative factor in denying relocation was that disrupting the children’s contact with Chris would be more detrimental to the children than disrupting their contact with Janice. The court reached that conclusion despite finding that both parents were equally “excellent.” The court relied primarily on Janice’s alleged hostility towards Chris and his new wife. The record indisputably showed, however, that Janice was far more committed than Chris to providing the non-residential parent with access to and information about the children. In view of that, do the trial court’s findings meet the requirements of the correct legal standard?
- 3) Is there substantial evidence to support the factual findings set out in assignment of error 3?
- 4) Did the trial court err in denying Janice’s motion for reconsideration when post-trial evidence proved that Chris was not furthering Janice’s long-distance relationship with the children as the trial court believed he would?

- 5) Did the trial court err in denying Janice's motion for a relocation evaluation when the proffered evaluation of Debra Hunter was made in the context of a prior modification action and did not address the relocation factors?
- 6) Must the court's child support ruling be overturned because it is internally inconsistent about whether the court relied on imputed or actual income?
- 7) If the court relied on actual income, could it properly attribute 75% of the income of Ricketts Corporation to Janice when she and her new husband had equal rights to all of the income as community property?
- 8) The court could have relied on imputed income only if it found that Janice's actual income was "unknown," which would mean that the court could *not* estimate her income from Ricketts Corporation. In that case, should the court have relied on the median income for a woman of Janice's age?

III. STATEMENT OF THE CASE

A. BACKGROUND

Janice Howd and Christopher Howd were married in New York in 1994. RP 421. They moved to Florida in 1995. *Id.* Their daughter,

Walker, was born in Florida on May 28, 1998. CP 79. Their son, Slater, was born in Washington on September 12, 2001.

During the marriage, Janice took the initiative to learn about child-rearing and to make decisions about the children's upbringing. RP 435-38. She handled all the paperwork and logistics for school and extracurricular activities. RP 445-48. She also handled such things as immunizations, dental check-ups and doctor visits. RP 457. To be sure, Chris also played an active role as a parent. Janice described him as "a wonderful father." RP 620. As the trial court found, "[t]he children have a very strong bond with both parents." CP 538.

Janice and Chris filed a petition for dissolution on June 30, 2005. CP 1-6. Despite their divorce, they continued to parent cooperatively for about two years. Chris moved to a home in the same neighborhood. RP 236. Although the children spent half their time at each house, both parents freely visited each other's houses and had keys to each other's homes. RP 233 (testimony of Chris); CP 23-24. On a typical day, the non-residential parent would see the children in the morning and in the evening. RP 234. There was considerable communication between the parents. RP 253. During this time, Chris was holding out some hope that he and Janice would reconcile. RP 236.

By 2007, however, Janice made it clear that she and Chris would not get back together. Chris pursued a relationship with Claudia Strittmatter and ultimately married her in 2008. RP 129. Janice married Colin Ricketts around the same time.

Chris's relationship with Janice changed sharply in 2007. As Ms. Strittmatter acknowledged at trial, she and Janice were uncomfortable with each other. RP 129. Chris was at times verbally abusive to Janice. RP 614. "He was physically aggressive towards me, he was verbally abusive towards me, and he really scared me." RP 647. Chris became very reluctant to share more than minimal information about or concerning the children. For example, Chris did not inform Janice that a doctor had prescribed medication for Walker's stomach problems. This caused Walker to suffer unnecessarily from stomach pain after she returned to Janice's home. RP 476-77. Similarly, Chris did not tell Janice that he needed to take Slater to the dentist for an abscessed tooth until after the tooth was pulled. RP 478. He did not inform her that there was an issue about whether Janice's son Slater and Claudia's son Conner should be on the same baseball team. RP 448-51. He also failed to inform Janice that Slater was going on a school field trip; Janice would have lost her chance to chaperone had she not learned about the trip from Slater. RP 474.

Janice could not communicate at all with Claudia Strittmatter because she blocked Janice's email address. RP 166.

This lack of communication and information caused considerable stress for Janice, since she had always been involved in every aspect of the children's lives. RP 462-63. Janice did not understand how she could co-parent with Chris when he would never talk to her. RP 468. As Janice acknowledged at trial, her anxiety over the children's welfare, the children's complaints about their time with their father, and the lack of communication from Chris, caused her at times to assume the worst about what was going on in Chris's household. *See, e.g.* RP 607-08.²

On July 14, 2008, Janice petitioned to modify the parenting plan. CP 35-51. She noted that in early 2007, Chris insisted that she stop visiting the children during her residential time. In exchange, he agreed that she could have the children for eight days out of every two weeks. Janice believed the frequent changes of residence were becoming disruptive to the children. She suggested that the children reside at her house except for every other weekend. Supp. CP ____ (Dkt. 26, July 14,

² After hearing testimony about the children's home life at Chris's household, Janice felt relieved. "I was very glad to hear all these people say it's loving over there." RP 428.

2008 Declaration of Janice Howd.)³ Parenting evaluator Debra Hunter was appointed for purposes of the modification action. CP 101-02. Ultimately, the parties agreed to resolve the modification action by entering a parenting plan that formally adopted the 8/6 arrangement they had been following. CP 153-65.

In Washington, Janice worked at first for Microsoft and later for Implement.com. RP 428-29. She began an MBA program in 2008 because she could see that Implement.com would have to downsize. RP 429-30. She was laid off from Implement.com around the end of 2008. RP 431. Her husband, Colin Ricketts was laid off from Implement.com in 2009. RP 530. Janice applied for hundreds of jobs in Washington, but could not find work. RP 525. Eventually, she realized that the only option was to sell her house and move somewhere more affordable and with income potential. *Id.*

Janice, Colin, and several others came up with a business plan for Songbird Systems, which would offer an email migration product. RP 536, 556. All the other partners, and the physical data center, are located in central Florida. RP 540. The group decided that Janice should be the

³ A supplemental designation of clerk's papers will be filed in King County Superior Court on March 11, 2011.

project manager, which requires her to be on-site in Florida. RP 543. *See also*, CP 436 (deposition testimony of Jere Larson).

B. RELOCATION

On January 28, 2010, Janice formally notified Chris that she was planning to relocate with the children to Florida. CP 178-85. Chris filed a formal objection on February 19, 2010. CP 170-203. Janice filed a motion to appoint a relocation evaluator and a co-parenting coach on March 30, 2010. CP 222-42. A commissioner denied the motion, CP 329-31, and Janice's motion for revision was likewise denied. CP 342-43.

The relocation trial commenced on June 14, 2010. RP 1. At the time of trial Walker was 12 and Slater was 8.

During pretrial motions, Janice objected to testimony concerning "the parents' relationship with each other," because only the parents' "relationship with the children" was relevant to the statutory relocation factors. RP 13-14. Janice noted that Chris would likely spend much court time on such matters as Janice's alleged lack of boundaries with Chris. *Id.* The court declined to exclude such evidence, however, believing it might become relevant to the "disruption factor." RP 15-16.

Janice testified that her work hours in Florida would let her take the children to school each day and pick them up. On days when the

children were off from school, if Janice needed to go on site she could leave the children with her sister, who lives close to the new workplace. RP 547. According to Janice's business analysis, the new company could be earning over \$1,000,000 in net revenue within three to five years. RP 548. In the mean time, Janice and Colin are living off of Colin's consulting income. RP 549. The cost of housing is much less in Florida. RP 634-35.

Janice's parents live in Florida, about one hour away from Janice's new home. The children have had a strong relationship with their maternal grandparents for their entire lives. RP 422-25. Janice's sister's family also lives nearby. RP 426. The sister has a particularly close relationship with Walker. *Id.* Numerous aunts, uncles and cousins also live in Florida. RP 426-27. Walker and Slater also have Florida cousins on Chris's side of the family. RP 427.

Janice explained how she would help the children stay in touch with their father and step-family through the use of webcam conversations, Facebook accounts, and possibly iphones. RP 550.

Chris testified that Janice was overly involved in the management of his household. RP 392.⁴ Chris found it intrusive that Janice wished to speak with the children by phone every day that they were with Chris. RP 354. Chris was initially opposed to the idea of setting up webcams so that the non-residential parent could communicate with the children by video. RP 406-07. In a deposition prior to trial, however, Chris said that he would agree with Janice's idea of setting up webcams for long-distance communication. After hearing that, Janice promptly provided the children with netbooks and set them up so that Chris had only to enter his wife's password. At the time of trial, Chris insisted that the netbooks would not work. RP 487. As discussed below, Chris *never* made the netbooks operable.

Debra Hunter's report from the modification proceeding (Supp. CP ___, Dkt. 115, November 3, 2009 Sealed Confidential Reports) was

⁴ When pressed for examples, however, it appears that Chris was at times overly resistant to reasonable suggestions from Janice. He noted that at one point Janice learned that Chris was attempting to drive the entire Howd and Strittmatter clan in his car, which required Claudia to ride in the back cargo area without a seatbelt. Janice offered to loan him her car so that he could transport everyone safely. RP 396-97. Chris also complained on the stand about Janice "telling me how to run my dishwasher and when." RP 393. In fact, the issue was simply that Janice would send the children to school with lunches on transition days and Chris would refuse to wash the food containers during the next six days – sending them back dirty and sometimes soiling other items in the children's backpacks. Janice ultimately solved the problem by having the children buy lunch on transition days. RP 456-57.

considered by the trial court at the relocation trial. *See* RP 29-30. Ms. Hunter also testified at trial. She noted that the frequency and negative tone of Janice's emails to Chris were discouraging to him. RP 77. According to Hunter, Janice was reluctant to permit Ms. Strittmatter and her children to play an active role in the lives of Janice's children. RP 83-85. Ms. Hunter criticized Janice for feeling "entitled to have a voice in the father's residential time with the children." RP 86. Hunter acknowledged, however, that the emails she reviewed were only from the time frame of April to September, 2009. RP 95. Hunter found the children's relationship with each parent to be "equally wonderful." RP 105. Similarly, she could not say that the children had a stronger relationship with one stepparent than the other. RP 105-06.

After receiving the evaluation from Debra Hunter, Janice met with counselor Jack Mahler. RP 451-52. He recommended involving Chris in co-parenting counseling, but Chris refused to participate. RP 453. At Mahler's recommendation, Janice read the book "difficult conversations" and met individually with Dr. Laurie Slater. RP 455-56. *See also*, RP 489-96 (testimony of Mahler). Mahler reviewed some emails that Janice was sending to Chris to verify that she had learned to avoid an angry tone. RP 495.

Dr. Slater, a marriage and family therapist, testified that Janice began seeing her in February, 2010. Dr. Slater was impressed with Janice's "strong desire to try to establish a strong co-parenting relationship." RP 319-20. Janice's "concern over trying to provide the best environment for her children that she possibly can is the major goal that she seems to have in life." RP 320. Janice expressed a "strong and continuing desire to co-parent." RP 332. It was clearly very important to Janice to have full communication about her children when they were with Chris. For example, if a child received an "affirmation" from a teacher, Janice would want to know that so that she could compliment the child. RP 332. During their sessions Janice made progress in coping with her anxiety about the children's welfare when they were not with her. *Id.* Janice demonstrated a good ability to see Chris's point of view and to avoid blaming him. *Id.* Janice testified that she learned from her counseling how to communicate less negatively with Chris. RP 464.

Janice testified that she found Claudia's children, Crystal and Connor, to be "lovely, lovely kids." RP 472. "I've had Crystal and Connor in my home, I invite them to Slater's birthday parties. I just saw Connor at the book fair at the school two weeks ago and he couldn't find his parents and he was with me and Slater, and I bought him books." *Id.*

Janice also suggested that the four children attend computer camp together. *Id.*

Throughout the divorce, Janice remained committed to the free flow of information about the children (to a fault, in Chris's view). For example, when Janice delivered the children to Chris for his residential time, she would provide a "transition folder" with "everything flat that I think is related to kids that Chris might like to know on his time." RP 473. This included such things as school assignments, report cards, after school activities the children might enjoy, "praise notes" from teachers and copies of any other paperwork Janice had filled out regarding the children. RP 473-74, 480-81. *See also* RP 211 (testimony of Strittmatter). Chris would also use the folder, but would sometimes leave out important information. RP 475-76. As noted above, Chris would also fail sometimes to keep Janice informed of medical or dental problems with the children. RP 477-79.

Claudia Strittmatter considered the transition folder "intrusive." When her own children were staying with her ex-husband, Claudia had a "let go mechanism." She was happy to simply trust the father to "deliver two alive children at the end of the week." RP 196. She criticized Janice

for providing a checklist so that Janice's children could round up all their items before returning to Janice's home.⁵ RP 197, 209.

There was no suggestion at trial or in the pleadings that Janice ever limited the time Chris could spend communicating with the children during her residential time, that she ever denied him visitation during her time, or that she ever failed to provide him with any information about the children he might desire.

In her oral ruling⁶, the court noted that "this has been one of the hardest relocation issues I've ever had because I have two parents who are excellent parents, both very involved with the children." RP 734. "I don't find that there's a substantive difference between these parents and their relationship and their bond and what they do for the children." *Id.*

The court found that the deciding factor was "who's going to be able to make the disruption to the children's relationship to the other parent least damaging to the children." She found that factor to weigh in

⁵ Janice explained that she had used this when the children were younger because they would often get upset after leaving things at Chris's house by accident, and Chris would have to make a special trip to return the items. RP 479.

⁶ The court's oral statements can be used to clarify consistent written findings. *State v. Parada*, 75 Wn. App. 224, 234, 877 P.2d 231 (1994) (citing *In re Marriage of Yates*, 17 Wn. App. 772, 773, 565 P.2d 825 (1977)).

favor of Chris. “And because of that, I am not allowing the children to move with the mother.” RP 735.

The written findings reflect that some factors favor Janice. CP 537-44. As to factor 5, for example, the court found that Janice sought relocation in good faith because she could not find work in Washington. CP 540-41. Under factor 9, the court found that Janice had no alternatives other than moving to Florida. CP 542. Under factor 10, the court found that relocation would have a positive financial impact because Janice had work available in Florida. *Id.* Factors 2, 4, 7 did not apply at all.⁷ CP 539-42. The deciding factor was number 3. The court found that “[d]isrupting contact between the child and the objecting party or parent is more detrimental to the child than disrupting contact between the child and the person with whom the child resides a majority of the time.” CP 539. As discussed below, the court based that finding on the “friendly parent” concept, that is, that Chris would be more likely than Janice to further the children’s relationship with the distant parent.

The court also found that “[c]urrent technology will also foster and continue the children’s relationship with their mother. The children and

⁷ Factor 11, of course, does not apply to this case because it deals with temporary orders.

both parents are familiar with this technology and regularly use it.” CP 541-42.

Soon after the court’s ruling it became clear that Chris was *not* furthering the children’s relationship with Janice now that she was in Florida, but was in fact thwarting it.

Specifically, he has taken the children on vacation during the time they are to spend with Mother; misinformed the Mother about the length of the vacation; refused to allow Mother to make up residential time despite numerous offers from Mother; has not facilitated any webcam access despite numerous requests and promises to do so; and has not facilitated daily telephone contact despite requests and more promises.

CP 509. *See also*, CP 512-36. Nevertheless, the court denied the motion for reconsideration. CP 537-44.

C. CHILD SUPPORT

At the time of trial, Janice’s income was difficult to determine since she was in the process of starting a new business. Chris argued that the court should use the income Janice had earned at Implement.com because “she’s taking herself out of the work force.” RP 706. Janice maintained that the court should use the median income for a woman her age. RP 728. The court indicated that it did not have enough information about Janice’s income to enter a child support order and directed the parties to bring the matter back before her by motion. RP 746.

After reviewing the post-trial pleadings filed by the parties, the trial court ordered Janice to make a monthly transfer payment to Chris of \$1435.00.

Additional facts are discussed below under the appropriate section of argument.

D. APPELLATE PROCEEDINGS

Janice filed a notice of appeal regarding the relocation findings on September 29, 2010. CP 650-51. She filed a second notice of appeal regarding the final child support order on November 17, 2010. CP 746-47. On December 22, 2010, this Court consolidated the two matters.

IV. ARGUMENT REGARDING RELOCATION TRIAL

A. STANDARD OF REVIEW

Washington's Relocation Act applies to any lengthy change in the principal residence of the children. RCW 26.09.420(2). "There is a rebuttable presumption that the intended relocation of the child will be permitted." RCW 26.09.520.⁸ "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.”

- (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 trial court in this case properly found that the presumption applied because Janice's home was the principal residence of the children. CP 540.

- (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.

Id.

A trial court's ruling regarding relocation is reviewed for abuse of discretion. *In re Marriage of Horner*, 151 Wn.2d 884, 893, 93 P.3d 124 (2004); *Bay v. Jensen*, 147 Wn. App. 641, 651, 196 P.3d 753 (2008).

Abuse of discretion is generally defined as discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971).

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. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995) (citing Washington State Bar Ass'n, Washington Appellate Practice Deskbook § 18.5 (2d ed.1993)), *review denied*, 129 Wn.2d 1003, 914 P.2d 66 (1996).

In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

In this case, the trial court’s ruling is based on “untenable reasons” because the court relied on an “incorrect standard,” that is, the “friendly parent” concept. Further, to the extent the court applied the correct standards under the relocation act, “the facts do not meet the requirements of the correct standard.” The court focused heavily on its view that Janice was overly involved with and critical of Chris’s parenting of the children. Even if that were true, however, there is no basis to conclude that such conduct is relevant to the statutory relocation factors. In addition, the ruling is based on “untenable grounds” because some of the key factual findings are “unsupported by the record.”

B. THE COURT IMPROPERLY RELIED ON THE “FRIENDLY PARENT” CONCEPT

This Court addressed the “friendly parent” issue in *Lawrence v. Lawrence*, 105 Wn. App. 683, 20 P.3d 972 (2001). “Under the ‘friendly parent’ concept, primary residential placement is awarded to the parent most likely to foster the child’s relationship with the other parent.” *Id.* at 687. “[W]e emphasize that the use of the friendly parent concept in a custody determination would be improper and an abuse of discretion.” *Id.* The Court noted that “[b]ills adopting the friendly parent concept, either as a presumption or a factor to be considered in custody decisions, have been

rejected by our Legislature every year since 1982.” *Id.* “The Legislature’s rejection of this rule is consistent with our state’s policy that ‘custody and visitation privileges are not to be used to penalize or reward parents for their conduct.’” *Id.* at 687-88, quoting *In re Marriage of Cabalquinto*, 100 Wn.2d 325, 329, 669 P.2d 886 (1983). “Because the ‘friendly parent’ concept is not the law of the state, a trial court’s use of the concept in a custody determination would be an abuse of discretion.” *Id.* at 688.

As discussed above, the trial court found that nearly all of the statutory relocation factors either applied equally to both sides, did not apply at all, or favored Janice. Since, as the trial court found, there is a presumption that Janice be allowed to relocate with the children, even an equal weighting of the factors would require a ruling in favor of Janice. The court found the presumption to be overcome solely by factor 3: “[d]isrupting contact between the child and the objecting party or parent is more detrimental to the child than disrupting contact between the child and the person with whom the child resides a majority of the time.” CP 539.

For the most part, this conclusion was based on the “friendly parent” concept, that is, that Janice would be less likely than Chris to foster the children’s long-distance relationship with the other parent.

[T]he past pattern of the parties in co-parenting indicates that it would be more disruptive to the children if they lived

across the country with their mother than if they stayed here with their father. The mother has shown an inability to evaluate the needs of the children independent of her own and a tendency to overreact and not communicate, which has interfered with the children's relationship with their father and extended family.

CP 539. The court also noted that Janice had been concerned about the children's involvement with their stepmother and stepsiblings, causing a "rift between the two households." The court acknowledged, however, that "the children seemed able to handle it." CP 539-40. "[B]y her actions, it appears that she has been unable to work with the father in light of his re-marriage and the integration of her children into that combined household." CP 540.

The court recognized that "both parents have had some strained communications," but concluded that "the mother is less flexible and quicker to jump to negative conclusions." The court also felt that Janice had implicitly communicated to the children a lack of trust in their father. CP 540.

As discussed below, some of these findings were not supported by substantial evidence. But even if they were, they amount to an impermissible "friendly parent" analysis. In essence, the court is giving various reasons why Janice would be less likely than Chris to foster the children's relationship with the other parent – precisely what the *Lawrence*

decision prohibits. The court's decision was therefore based on untenable reasons and must be reversed.

C. TO THE EXTENT THE TRIAL COURT APPLIED THE CORRECT STANDARD, THE COURT'S FACTUAL FINDINGS DO NOT MEET THE REQUIREMENTS OF THE STANDARD

The trial court's reasons for finding that factor 3 required denying relocation do not meet the requirements of the correct standard. This is true even if the court could properly consider which parent would better further the other's relationship with the children.

The ultimate question is the relative detriment to the children if their contact is disrupted with Janice rather than Chris. *See* factor 3. In either case, the children will suffer some distress from having a parent far away much of the time. Notably, the trial court did *not* find that Chris's relationship with the children was any stronger or more valuable than Janice's.

The detriment from a long-distance relationship between a child and parent is ameliorated by easy and frequent contact with the distant parent. Further, the children will benefit if the distant parent receives a free flow of information about the children when they are not in his care, so that he can help with joint decision making. The record indisputably shows that, regardless of her alleged problems with Chris and his new

wife, Janice has always been the one who has favored communication between the children and the non-residential parent. She has also been the one to insist not only on obtaining, but on providing, detailed and timely information about the children. Chris, on the other hand, has since 2007 sought to limit Janice's contact with the children and has only grudgingly and belatedly provided Janice with information about them. See Section III(A), above.

Chris did present considerable testimony concerning Janice's alleged meddling in his parenting, her negative tone in older email communications with him, and her hostility to his new wife. There was no testimony, however, that Janice prevented Chris from spending time with the children, from having communication and contact with the children, or from obtaining information about the children during Janice's residential time. To the contrary, by all accounts, Janice is the one who has always believed that *both* parents should have complete and unfettered communication with the children and access to information about them during the other's residential time. Janice, after all, was satisfied with the earlier arrangement under which Chris saw the children every morning and night even during Janice's residential time. It was Chris who ended that arrangement.

Even if it were true that Janice meddles with Chris's parenting, annoys him, and distrusts him, that does not explain why the children would be better off living most of the year in Washington with Chris rather than in Florida with Janice. The issue is not how the absent parent deals with the other parent during his residential time, but rather how the parent *with* residential time deals with the other parent. After all, when Chris has the children with him in Washington, Janice would have less rather than more ability to meddle with his parenting now that she is over 3,000 miles away.

The trial court's findings regarding relocation factor 3 also noted that Janice had attempted to restrict the children's involvement with their stepmother and step-siblings. It is clear from the court's oral discussion of the findings that it found this point very important. The court spent five pages of transcript expressing concern about Janice's reluctance to let Claudia Strittmatter and her children into the lives of Janice's children. RP 735-39. The Judge immediately followed that discussion with her conclusion that relocation should be denied. RP 740. As noted above, Janice testified without contradiction that in recent times she has actively encouraged the relationship between the stepchildren. She also explained that she was no longer concerned about the way Chris and Claudia ran

their household after hearing testimony about that. But even if the Court's concerns were accurate, they were no basis to deny relocation. The relocation statute addresses detriment to the children from disrupting their relationship with the "objecting party" (here Chris) and the "person with whom the child resides a majority of the time" (here Janice), but does not authorize a court to consider disruption of a relationship with step-family members.⁹

In short, the trial court appeared to deny Janice's request for relocation as a punishment for her perceived hostility towards Chris and his new family, rather than focusing solely on whether relocation would harm the Howd children. Under Washington law, however, a court may not penalize parents for their conduct towards the other parent by restricting residential time. *See Lawrence*, 105 Wn. App. at 687-88.

D. SOME OF THE TRIAL COURT'S FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Some of the trial court's findings under factor 3 are simply not supported by the evidence.

⁹ In any event, even if the statute did authorize such a consideration, there is no reason to believe that Janice's alleged dislike of the step-family would cause any greater problems if the children relocated to Florida with Janice than if they did not.

First, the court states that “The mother has shown an inability to evaluate the needs of the children independent of her own and a tendency to overreact and not communicate, which has interfered with the children’s relationship with their father and extended family.” CP 539. There was no evidence, however, that Janice placed her own needs ahead of her children’s. In fact, the testimony is clear that Janice has been, if anything, overly concerned about the welfare of her children when she is not with them. Further, while it may be true that Janice did at times “overreact” to events at Chris’s household, there is no evidence that she would “not communicate.” If anything, Chris felt that she communicated too much. Finally, there was no testimony that Janice’s conduct impaired Chris’s relationship with his children, even if there was testimony that Janice wished at some times to limit the stepfamily’s contact with her children.

The court further erred in finding that “[c]urrent technology will also foster the children’s relationship with their mother. The children and both parents are familiar with this technology and regularly use it.” CP 542. Even at the time of trial, there were concerns that Chris could not get the webcams working. Certainly by the time of the motion for reconsideration, it was clear that he was not using technology to further Janice’s relationship with the children. *See* section E, below.

E. THE TRIAL COURT ERRED IN DENYING THE MOTION FOR RECONSIDERATION

As discussed above in section III(B), the trial court denied relocation in part because it believed that Chris would best further a long-distance relationship with the absent parent. As the events discussed in the motion for reconsideration showed, however, Chris actions following the trial demonstrated just the opposite.

Specifically, he has taken the children on vacation during the time they are to spend with Mother; misinformed the Mother about the length of the vacation; refused to allow Mother to make up residential time despite numerous offers from Mother; has not facilitated any webcam access despite numerous requests and promises to do so; and has not facilitated daily telephone contact despite requests and more promises.

CP 509. *See also*, CP 512-36.

In the face of this new evidence, the trial court should have changed its decision. *See* CR 59(a)(4).

F. THE COURT ERRED IN DENYING A RELOCATION EVALUATION

As noted above in section III(B), Janice moved for a relocation evaluation. CP 222-42. Because Chris was objecting to relocation, “it is important to retain a private relocation evaluator to thoroughly investigate this issue, determine the children’s preferences, and to make a recommendation to the court.” CP 224. Debra Hunter had previously

prepared a report, but it focused only on the appropriateness of the proposed 8/6 parenting arrangement. Further, Janice pointed out that Ms. Hunter never observed Janice interacting with her children, and that Hunter focused largely on disputes and issues that took place many years ago. CP 225-26. Janice further pointed out that a relocation study would address the 10 relevant statutory factors. It would also address the terms of a new parenting plan, which would of course be necessary after Janice's move to Florida, whether or not the children were allowed to relocate with her. CP 288. In his response to the motion, Chris *agreed* that a relocation study was appropriate, although he wished to have Debra Hunter perform it. CP 256-83. Nevertheless, a commissioner denied the motion because it was close to the time of trial, and because no statute required an evaluation. CP 329-31. As Janice pointed out in her motion for revision, however, a private evaluator was prepared to complete the work before trial. CP 336. Further, while it is true that there is no statutory requirement for a relocation evaluation, there is no other effective way to determine the children's preferences. *Id.* Nevertheless, the Honorable Dean Lum denied the motion without explanation. CP 342-43. This left the trial court with *no* relocation evaluation, even though the only dispute between the parties was over who should perform the evaluation.

At trial, Debra Hunter acknowledged that her evaluation would have been “completely different” had she been asked to review a potential relocation. RP 93. Her focus was solely on whether the current 8/6 parenting plan was in the best interest of the children, rather than on how a relocation would affect them. RP 93-94.

The lack of a relocation evaluation affected the trial court’s ability to assess the best interests of the children. It may also have caused the court to focus on the largely irrelevant problems between Janice and Chris, which were emphasized in Ms. Hunter’s report.

V. ARGUMENT REGARDING CHILD SUPPORT

A. INTRODUCTION

The trial court ordered Janice to make a monthly transfer payment to Chris of \$1,435.00. The basis for this ruling, however, is unclear. Janice noted that her actual income was currently negative since her new business was not yet turning a profit. She asked the court to impute to her the median income for a woman her age, which is \$2,693/month. That would result in a transfer payment of \$633.14. CP 614-20 and CP 636-41. Chris asked the court to impute an income based either on 1) Janice’s monthly income of \$11,000 at her previous job with Implement.com; or 2)

commensurate with the CEO of a software company, which he estimated at somewhere between about \$135,00 and \$355,000 per year. Supp. CP ___ (Dkt. 201, September 20, 2010 Motion for Adjustment of Child Support).

The trial court chose a gross monthly income for Janice of \$9,487.00 (which does not correspond with either side's position), and a net income of \$7,376.00, yielding a monthly transfer payment from Janice to Chris of \$1,435.36. CP 729-45. As discussed below, however, it is not clear whether the trial court based this on a theory of actual income or imputed income.

This lack of clarity renders appellate review impossible, and requires a remand in and of itself. On remand, however, the trial court must do more than simply specify whether it was relying on a theory of imputed or actual income, because its analysis is faulty under either theory.

B. THE COURT'S FINDINGS ARE INTERNALLY INCONSISTENT

When the trial court's findings are inadequate to explain the basis for its ruling, remand for clarification is appropriate. *See, e.g., Katare v. Katare*, 125 Wn. App. 813, 105 P.3d 44 (2004), *rev. denied*, 155 Wn.2d 1005, 120 P.3d 577 (2005). In this case, the trial court's findings are

internally inconsistent so it is impossible to determine the basis for the child support order.

Paragraph 3.2(c) of the Amended Order of Child Support states that “[t]he net income of the obligor is *imputed* at \$7,376.00 because the obligor’s income is unknown.” CP 731 (emphasis added). At paragraph 3.3(A), however, the court states: “*Actual* Monthly Net Income: \$5,999.” *Id.* (emphasis added). The attached worksheet likewise specifies that the court is relying on “actual income” rather than “imputed income.” CP 741.

The attached “additional findings” do not resolve this issue. The first three findings set out some of the history of the case. CP 740. Finding no. 4 is that Janice currently has little ability to earn income “other than through the Ricketts Corporation.” In finding no. 5, the court notes that Ricketts Corporation had a gross income from January 1 through September 15, 2010 of \$142,296. The court then finds that Janice’s figures for business expenses are inflated because some of them should have been treated as personal expenses. After estimating the actual business expenses, the court comes up with a monthly net income for the corporation of \$12,650. “Since the wife is 75% owner, if we attribute 75% of this income to her, that sets her income at \$9487 per month. This is still less than she was earning at her prior job and less than she would earn as

CEO of a company, but is commensurate with the income that is available to her.” *Id.*

It is not clear from this discussion whether the court is finding that \$9,487 per month is Janice’s actual income, or whether this is an amount that should be imputed to her. The court’s efforts to estimate a net income for Ricketts Corporation suggest that it is applying an actual income theory. When a precise figure is not available, a trial court may use various methodologies to estimate actual income. *See In re Marriage of Sievers*, 78 Wn. App. 287, 305, 897 P.2d 388 (1995). The final sentence quoted above, however, suggests an imputed income theory. The court seems to be saying that it is relying on income “available” to Janice, whether or not she actually receives it. Further, by noting that it has chosen an amount lower than her previous earnings, and lower than typical for a CEO, the court seems to be explaining why Chris’s suggestions for imputed income are a bit too high. Further confusing the matter, the court’s worksheet lists the \$9,487 under the heading of “Wages and Salaries” rather than “Business Income.” CP 742. That is inconsistent with relying on the business income of Ricketts Corporation.

As discussed further below, the legal standards for imputing income are different from those for determining actual income. This Court

cannot effectively review the trial court's decision until it clarifies the theory it has relied on. The Court should therefore remand for clarification.

C. IF THE COURT INTENDED TO BASE ITS RULING ON ACTUAL INCOME, THE AMOUNT IS OVERSTATED

If the trial court based its ruling on actual income, its figure was at least 50% too high. The court estimated that Ricketts Corporation had true net earnings of \$12,650 per month. It then attributed 75% of those earnings to Janice simply because she is listed as a 75% owner of the corporation while her husband is listed as a 25% owner. As husband and wife, however, Colin Ricketts and Janice Howd are jointly entitled to all income from the business. Thus, there was no basis to attribute more than half of the income to Janice. Certainly, there was no evidence to support a finding that Janice and Colin truly split the income from Ricketts Corporation 75/25.

The income of a party's new spouse may not be considered when determining income unless the party is otherwise seeking a deviation, which was not the case here. *See* RCW 26.19.071(4)(a); RCW 26.19.075(1)(a)(i).

D. IF THE COURT INTENDED A THEORY OF IMPUTED INCOME, IT SHOULD HAVE RELIED ON MEDIAN INCOME

RCW 26.19.071 sets out the standards for imputing income.

(6) Imputation of income. The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. The court shall determine whether the parent is voluntarily underemployed or voluntarily unemployed based upon that parent's work history, education, health, and age, or any other relevant factors. A court shall not impute income to a parent who is gainfully employed on a full-time basis, unless the court finds that the parent is voluntarily underemployed and finds that the parent is purposely underemployed to reduce the parent's child support obligation. Income shall not be imputed for an unemployable parent. ... In the absence of records of a parent's actual earnings, the court shall impute a parent's income in the following order of priority:

(a) Full-time earnings at the current rate of pay;

(b) Full-time earnings at the historical rate of pay based on reliable information, such as employment security department data;

(c) Full-time earnings at a past rate of pay where information is incomplete or sporadic;

(d) [minimum wage for someone with a history of minimum wage work];

(e) Median net monthly income of year-round full-time workers as derived from the United States bureau of census, current population reports, or such replacement report as published by the bureau of census.

RCW 26.19.071(6).

Although the statute refers only to voluntary underemployment or unemployment, a court may also impute income where income is

unknown. *In re Marriage of Dodd*, 120 Wn. App. 638, 86 P.3d 801 (2004). *In re Marriage of Didier*, 134 Wn. App. 490, 498, 140 P.3d 607 (2006), *rev. denied*, 160 Wn.2d 1012, 161 P.3d 1026 (2007).

Here, the trial court made no finding that Janice was voluntarily unemployed or underemployed. Such a finding would be inconsistent with the trial court's finding at the relocation trial that Janice was forced to sell her house and move due to inability to find work. CP 541-42. Likewise, the court never found that Janice's income was "unknown." Janice fully disclosed the gross income and expenses of Ricketts Corporation, and there was no suggestion that she was hiding any other sources of income.

To be sure, the trial court questioned whether some items listed as "business expenses" were truly personal expenses. But the only reason the court could engage in that inquiry was because Janice accurately documented the nature of each expense. That is a far cry from the situation in cases where a court has found income to be "unknown." For example, in *Dodd*, the father arranged for employers to write checks to his girlfriend who would then cash the checks and give the money to the father. He frankly admitted that he did not keep a checking account in order to prevent the State from seizing money to satisfy his unpaid child support. *Dodd*, 120 Wn. App. at 640-41. Similarly in *Marriage of Didier*,

supra, the father refused to sign financial declarations and wrote “refused for Fraud F.R.C.P. 9(b) I am not a member of your body politic” across the statutory child support schedule worksheet. *Id.* at 494.

In order to find Janice’s income to be “unknown” the court would have to conclude that it could not reasonably estimate her income from Ricketts Corporation. Relying on previous income would be unfair because the court concluded during the relocation trial that Janice could not find work commensurate with her former rates of pay. The court should therefore have relied on the median income for a woman of Janice’s age.

**VI.
REQUEST FOR ATTORNEY FEES AND COSTS**

Janice asks this Court to award her attorney fees and costs based on the relative resources of the parties and the merits of the appeal. *See* RCW 26.09.140; RAP 18.1; *Leslie v. Verhey*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003, 972 P.2d 466 (1999).

**VII.
CONCLUSION**

In view of the errors at the relocation trial, this Court should remand for a new trial. This Court should also remand for reconsideration of the child support issue, under the standards discussed above.

DATED this 11th day of March, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David Zuckerman". The signature is written in a cursive style with a large initial "D" and a long horizontal stroke at the end.

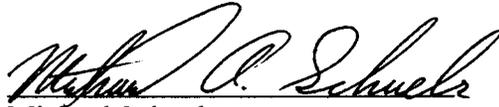
David B. Zuckerman, WSBA #18221
Attorney for Janice K. Howd

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail, postage prepaid, and email, one copy of the foregoing brief on the following:

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March 11, 2011
Date


Michael Schueler