

66054-3

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Nos. 66054-3-I

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66894-3-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.

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APPELLANT'S CONSOLIDATED OPENING BRIEF

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

The Honorable Laura Gene Middaugh

APPELLANT'S CONSOLIDATED 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 Chris<sup>1</sup> 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

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<sup>1</sup> 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.

- 9) The trial court erred when it limited two fit parents' constitutional rights to the care, custody, control and companionship of their children when neither parent requested such limitations.
- 10) The trial court erred when it limited two fit parents' abilities to write letters and give gifts to their children because no evidence exists to demonstrate these limitations were necessary.
- 11) The trial court erred when it unilaterally imposed limitations on two fit parents' constitutionally protected relationships with their children without providing the parents with notice and opportunity to be heard.
- 12) The trial court erred when it re-characterized the parties' clarification motions as modification actions and then modified the parenting plan that was under review in this Court.
- 13) The trial court erred when it failed to conclude Chris was in contempt of the parenting plan because Janice was trying to be polite when she requested residential time over Labor Day weekend 2010, which he denied.

## **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?
- 9) Did the trial court err and violate the parties' substantive due process rights when it unilaterally limited two fit parents' ability to write letters and give gifts to their children when these issues were not before the trial court at the request of either party?
- 10) Did the trial court err when it unilaterally imposed restrictions on two fit parents' rights to write and give gifts to their children when there was no evidence that such limitations were necessary to prevent harm to the children?

- 11) Did the trial court err when it unilaterally imposed restrictions on two fit parents concerning their care, custody, control, and companionship of their children without providing to the parents notice and opportunity to be heard?
- 12) Did the trial court err when it failed to find Chris Howd in contempt of the parenting plan when Janice Howd's request for residential time during Labor Day weekend 2010 was written politely, and nonetheless Chris denied her the time she was entitled to?

### **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.<sup>2</sup>

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 1065-74. 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

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<sup>2</sup> 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.

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 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 meantime, 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.<sup>3</sup> 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

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<sup>3</sup> 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.

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 1100-1114) was 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.<sup>4</sup> 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 ruling<sup>5</sup>, 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.*

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<sup>4</sup> 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.

<sup>5</sup> 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)).

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 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.<sup>6</sup> 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 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

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<sup>6</sup> Factor 11, of course, does not apply to this case because it deals with temporary orders.

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. Contempt And Modifying The Parenting Plan

On November 1, 2010, Janice filed a motion for an order to show cause re contempt of the July 2010 final parenting plan and a motion for clarification of the parenting plan. CP II 1-50.<sup>7</sup> In Janice's contempt motion, she alleged that Chris failed to comply with the parenting plan by denying Janice residential time with the children over Labor Day weekend in 2010. CP II 1-11. Janice also wanted the trial court to clarify: 1) Other school breaks and holidays, especially whether Chris could pre-reserve

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<sup>7</sup> Janice's Third Appeal Cause No. has Clerk's Papers that do not continue the numbering convention in the prior two consolidated appeals; rather the numbering convention begins again with page 1. Accordingly, Janice will refer to the Clerk's Pages in her third appeal that has been consolidated with the first two appeals as "CP II."

Labor Day weekend or other holidays each year; and 2) what regular and reliable access to the children through the use of webcam technology and cell phone meant. CP II 1-48.

Chris filed a cross motion to clarify the parenting plan, but requested the trial court to modify the parenting plan: 1) So he received spring and Janice received mid-winter break; 2) So he did not need to fly the children on non-stop flights between Seattle and Orlando; 3) So Janice had to return the children to Seattle before 8:00 p.m.; and 4) So Chris could provide input into the necessary long distance travel arrangements. CP II 51-65. Janice responded to Chris' cross motion and generally argued against Chris' requests. CP II 66-72.

The trial court heard oral argument on December 16, 2010. CP II 49-51; Dec. 16, 2010 VRP 1-46. The court ruled on the motions and it was agreed that the parties would present the order at a later date. Dec. 16, 2010 VRP 43. Janice noted a Notice of Presentation without oral argument before the trial court judge to be heard on February 18, 2011. CP II 705-06. Chris failed to timely respond to Janice's notice. On February 17, 2011, the trial court entered the order Janice proposed because Chris did not timely respond to Janice's notice. CP II 758-763.

This Order clarified and addressed the issues both parents raised in their respective motions.

After the order was entered, Chris' attorney, Robert C. Kaufman, filed a Declaration responding to the Notice of Presentation and requested the court reject Janice's proposed order and enter Chris'. CP II 707-710. Janice replied to Mr. Kaufman's declaration. CP II 764-768. The trial court considered Chris' attorney's untimely submission and on February 25, 2011, the trial court entered a second order on the parties' motions. CP II 769-771. This second Order referenced entry of a Modified Final Parenting Plan Upon Relocation of Petitioner ("Modified Final Parenting Plan") that the court was entering simultaneously with the Order. CP II 770-71; 772-88. The court entered the Modified Final Parenting Plan despite the July 2010 Parenting Plan being reviewed by this Court.

In the Modified Final Parenting Plan, the trial court not only addressed the issues the parties' raised in their respective motions, but also sua sponte interjected itself into this family's relationships between the children and their parents and addressed issues not raised or otherwise disputed by these two fit parents. For example, the court (1) limited the parents from writing a letter to their children to no more than once a week; (2) prohibited the parents from sending a gift to a child if the gift requires

the other parent to do something about its usage; and (3) restricts the parents from giving gifts of significant value to their children except on holidays and special occasions. CP II 788. The trial court imposed these restrictions without first notifying either parent about the proposed restrictions and without giving either parent an opportunity to be heard.

The trial court also concluded Chris was not in contempt despite his having wrongfully deprived Janice's residential time with the children over Labor Day 2010. The trial court's only reason for not concluding Chris was in contempt was because Janice was too polite when she stated her intent to have that weekend with the kids. CP II 726-27; 746-748.

E. Appellate Procedure.

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. On March 25, 2011, Janice timely appealed the trial court's order denying contempt and modifying the parenting plan. This third appeal was consolidated with the first two appeals over Janice's objection. .

**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.<sup>8</sup> "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

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<sup>8</sup> 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.

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.

*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.<sup>9</sup>

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

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<sup>9</sup> 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.

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

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 1075-99.

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. CONTEMPT AND MODIFIED PARENTING PLAN**

A. THE TRIAL COURT VIOLATED BOTH PARENTS’ AND THE CHILDREN’S SUBSTANTIVE DUE PROCESS RIGHTS WHEN IT LIMITED TWO FIT PARENTS’ CONSTITUTIONALLY-PROTECTED RELATIONSHIPS WITH THEIR CHILDREN WHEN NEITHER PARENT REQUESTED THE LIMITATIONS THE COURT IMPOSED.

The Fifth and Fourteenth Amendments guarantee not only fair processes, but also provides substantive due process rights against state interference with fundamental rights and liberty interests. *Washington v. Glucksberg*, 521 U.S. 702, 719-20, 117 S.Ct. 2258 (1997). Parenting one’s children is a long-recognized fundamental liberty interest. *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *In re Hudson*, 13 Wn.wd 673, 678, 685, 126 P.2d 765 (1942). Therefore, the

Due Process Clause of the Fourteenth Amendment protects the fundamental rights of parents to direct the upbringing of their children, which includes making decisions concerning their care, custody, control, and companionship of their children. *Pierce v. Society of Sisters*, 268 U.S. 534-35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d. 49 (2000); *In re Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980).

Likewise for children, there is a “constitutional interest in familial companionship and society [that] logically extends to protect children from unwarranted state interference with their relationships with their parents.” *Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9<sup>th</sup> Cir. 1987). Therefore, a parent’s fundamental rights to the care, custody, control and companionship of their children is reciprocal and similarly extended to their children, who also have fundamental rights to the care, custody, control and companionship from their parents without state interference. *Id.* This two-way street results in the children’s interests in their relationships with a parent to be a cognizable liberty interest. *Id.* at 1419.

If a person’s fundamental right is implicated, then it is only justified if the state can show that it has a compelling interest and the interference is narrowly tailored to meet only the state’s interest involved.

*In re Custody of Smith*, 137 Wn.2d 1, 15, 969 P.2d 21 (1998) citing *Roe v. Wade*, 410 U.S. 113, 155, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). Because parents have constitutionally-protected rights in autonomy to raise their children without state interference, the incidents where the state may interfere with a family and family life are limited to cases when the state is exercising its police power to protect citizens (i.e. requiring vaccinations for children despite parental objection); when a parental decision may harm the health or safety of a child; or when it acts as *parens patriae* and acts from the viewpoint and interests of the child where a child has been harmed or there is a threat of harm. *Smith*, 137 Wn.2d at 15-17. But the incidents when the state's *parens patriae* interest overrides a parents' constitutionally protected rights are limited to those cases where the child "has suffered or is likely to suffer physical, mental, or emotional harm as a result of the parents' conduct." *In re Sumey*, 94 Wn.2d, 727, 762, 621 P.2d 108 (1980).

Additionally, there is a presumption that fit parents act in the best interests of their children. *Troxel*, 530 U.S. at 68. A "fit" parent is one who adequately cares for the children. *Id.* So long as the parent is fit and can provide the basic necessities of life to his or her children, then "there will normally be no reason for the State to inject itself into the private

realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.” *Troxel*, 530 U.S. at 68-69, citing *Reno v. Flores*, 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993). The United States Supreme Court made it clear that the Due Process Clause does not allow the state to interfere with a parent's fundamental rights to make child rearing decisions just because a state judge believes a “better” decision could be made. *Troxel*, 530 U.S. at 72-73. And further, if a fit parent's decision becomes subject to judicial review, then the court must give the parent's decision special weight and consideration. *Id.* at 70.

Here, there is no question that Janice and Chris are fit parents and therefore the Howd children do not fall under the state's *parens patriae* interest in their well-being to prevent harm from their parents' conduct. And, neither Janice nor Chris requested restriction on the number or nature of gifts they may give to their children. CP II 1-48; 53-55. Nor did either parent ask the court to consider limiting the number and frequency of letters the non-residential parent may send to their children. In fact, at the time the court heard the parents' cross motions, neither parent had a problem with the other parent concerning gift giving or letter writing, and these issues were not raised in their respective motions or were the subject

of any motion. Rather, the trial court judge inserted herself into the family unit and added these limitations that infringe on the parents' autonomy and constitutionally-protected rights to make child rearing decisions without state interference.

The bottom line is courts can settle parenting issue disputes between two fit parents who have equal constitutionally-protected fundamental liberty interests using a best interest of the child standard. But when courts step out of that role and begin imposing their own restrictions on a parent-child relationship, then the court's restrictions must meet the strict scrutiny analysis. Because the trial court in this case was never requested by either parent to restrict gift giving and letter writing, it unilaterally imposed restrictions must meet the strict scrutiny analysis. Here, the trial court's unilaterally-imposed restrictions do not meet this high hurdle, are unconstitutional, and must be reversed.

**B. THE TRIAL COURT ERRED WHEN IT RESTRICTED THE PARENTS' LETTER WRITING AND GIFT GIVING ABSENT EVIDENCE THERE WAS A PROBLEM THAT NEEDED TO BE CORRECTED WHEN THERE WAS NO EVIDENCE THAT THE LIMITATIONS WERE NECESSARY TO PREVENT HARM TO THE CHILDREN.**

Not only did the trial court impermissibly interject itself into the parent-child relationships without invitation by either parent, it also erred

in restricting the parents' relationship with their children absent evidence these was a problem with the parents' conduct. To be sure, all parenting plan modifications require evidence that the modifications are in the children's best interests. *See* RCW 26.09.260. In fact, absent RCW 26.09.191 restrictions, not present here, courts must also be presented evidence these is a substantive change of circumstances involving either parent or the children. RCW 26.09.260.

Here, there is no evidence that question that both Janice and Chris are fit parents. Neither parent is subject to RCW 26.09.191 restrictions in the parenting plan that would ordinarily result in automatic restrictions in residential time and decision-making for the children, as well as other possible limitations concerning contact with the children. Neither parent raised to the trial court in his/her motion or otherwise argued a substantial change of circumstances of either parent or a child, and there is no evidence to justify the trial judge inserting limitations to the nonresidential aspects of the parenting plan including limiting the parents' ability to give gifts to their children, and limitations on Janice's ability to write letters to her children. RCW 26.09.260(10). For these reasons, the trial court's decision should be reversed.

C. THE TRIAL COURT VIOLATED BOTH PARENTS' PROCEDURAL DUE PROCESS RIGHTS WHEN IT LIMITED TWO FIT PARENTS' CONSTITUTIONALLY-PROTECTED RELATIONSHIPS WITH THEIR CHILDREN ON ITS OWN INITIATIVE WITHOUT GIVING EITHER PARENT NOTICE OR AN OPPORTUNITY TO BE HEARD.

The Fourteenth and Fifth Amendments of the Constitution provide for procedural due process which, at a minimum, requires notice and opportunity to be heard and defend before a competent tribunal. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 93 L.Ed. 865 (1950). The fundamental requirements of procedural due process guaranteed by the U.S. and Washington Constitutions are notice and opportunity to be heard and defend before a fair and impartial tribunal. *In re Marriage of Ebbighausen*, 42 Wn. App. 99, 102, 708 P.2d 1220 (1985). Judgments entered in a proceeding that fail to provide procedural due process are void. *Id.*, see also, *In re Deville*, 361 F.3d 539, 548 (9<sup>th</sup> Cir. 2004) (“A court’s failure to give notice of an intent to exercise inherent power may, therefore invalidate the action taken”).

For instance, Division III of the Washington Court of Appeals found that a father’s constitutional rights of due process were violated when the trial court resolved a custody issue in chambers with each parties’ counsels but failed to hear testimony from the parents concerning

the merits of both parents' custody requests. *Ebbinghausen*, 42 Wn. App. at 101-02. The judge in *Ebbinghausen* did not take testimony from either party because he determined it would not affect the outcome of the dissolution. *Id.* at 100.

Given the father's fundamental right to the care, custody and companionship of the child that is protected by the due process clause of the Fourteenth Amendment, the Court of Appeals found that the father's due process rights were violated because he had the right to present his position and was not afforded the opportunity to be heard. *Id.* at 102-04 (citing *In re Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980); *In re Myricks*, 85 Wn.2d 252, 253-43, 533 P.2d 841 (1975); *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 2991, 77 L.Ed.2d 614 (1983); *Caban v. Mohammed*, 441 U.S. 380, 397, 99 S.Ct. 1760, 1770, 60 L.Ed.2d 297 (1979); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 862-63, 97 S.Ct. 2094, 2119, 53 L.Ed.2d 14 (1977).

Similarly here, the trial court violated Janice's (and Chris') procedural due process rights when it did not provide them with notice about the trial court's *sua sponte* orders concerning its restricting their gift-giving and written communications to their children. Consequently, neither parent, nor their respective attorneys, had any notice or opportunity

to be heard to support or defend the trial court's unilaterally-imposed restrictions, resulting in a violation of the parents' due process rights.

D. THE TRIAL COURT WAS WITHOUT SUBJECT MATTER JURISDICTION WHEN IT RE-CHARACTERIZED BOTH PARENTS' CLARIFICATION MOTIONS AS REQUESTS FOR MODIFICATION, AND THEN MODIFIED A PARENTING PLAN THIS COURT WAS CURRENTLY REVIEWING WITHOUT OBTAINING THIS COURT'S PERMISSION TO MODIFY THE PARENTING PLAN BEING REVIEWED.

The trial court's Order modified the parenting plan. If a trial court inserts new language in a parenting plan that goes beyond filling-in procedural details or goes beyond explaining the terms of the existing parenting plan, then it rings of a modification action and not a clarification of the plan. *In re Marriage of Christel and Blanchard*, 101 Wn. App. 13, 23, 1 P.3d 600 (2000). And, it is likely a modification if the order on its face "imposes new limits on the rights of the parents." *Id.* To be sure, the trial court's oral opinion and ensuing order specifically state the trial court's intent to modify the parenting plan. CP II 770; Dec. 16, 2010 VRP 4.

The trial court did not have subject matter jurisdiction to modify the parenting plan because the parenting plan was under review. The trial court has authority to hear and determine postjudgment motions and actions to change or modify a decision. RAP 7.2(e). If the decision

changes a decision that is being reviewed by the appellate court, then the trial court must first obtain permission from the appellate court prior to formal entry of the trial court decision. RAP 7.2(e). Here, the trial court's final parenting plan was being reviewed by this Court. The trial court's order obviously affected the decisions under review as evidenced by the new issues in this appeal. The trial court, therefore, needed this Court to relinquish jurisdiction prior to formally entering its order modifying the parenting plan currently being reviewed.

E. THE TRIAL COURT ERRED WHEN IT CONCLUDED FATHER WAS NOT IN CONTEMPT FOR INTENTIONALLY DISOBEYING THE PERMANENT PARENTING PLAN AND DEPRIVING MOTHER OF HER COURT-ORDERED RESIDENTIAL TIME OVER LABOR DAY WEEKEND BECAUSE MOTHER WAS TRYING TO BE POLITE WHEN COMMUNICATING WITH FATHER.

A parent who fails to comply with a parenting plan may be in contempt if the other parent can establish the contemnor acted in bad faith by a preponderance of the evidence. *In re Marriage of James*, 79 Wn. App. 436, 442, 903 P.2d 470 (1995); *see also* RCW 26.09.160(2)(b). The trial court must then balance the competing documentary evidence, weigh credibility, and make a determination regarding whether the alleged contemnor acted in bad faith. *In re Marriage of Rideout*, 150 Wn.2d 337, 350-51, 77 P.3d 1174 (2003). If the court finds a parent in contempt of

failing to comply with a parenting plan, it must make specific findings of bad faith or intentional misconduct. *James*, 79 Wn. App. at 441.

Here, the parties' July 14, 2010 Final Parenting Plan Upon Relocation of Petitioner provided that for extended breaks from school, Janice is allowed to half the 3-day weekends so long as she communicated her travel plans to Chris at least 30 days in advance. CP II 57-59; *see also* CP II 7-8. The provision further provides that Chris shall inform Janice of any long weekends where he has plans involving the children and Janice may not have the children on those long weekends "unless she has notified the father first." CP II 58; CP II 8. According to the children's 2010-2011 school schedule, there were seven (7) long weekends to choose from, one of them being Labor Day weekend 2010. CP II 8.

On June 30, 2010, Janice sent an email to Chris requesting, amongst other things, that she have the children Labor Day weekend on September 3-6, 2010. CP II 7-8; 31-32. On July 20, 2010, three weeks after Janice indicated she wanted to see the children on Labor Day weekend 2010, Chris' attorney, Mr. Robert Kaufman, sent a letter to Janice's attorney stating that Chris will *always* have a conflict with Labor Day weekend and therefore Janice could not see the children for Labor Day weekend 2010 or any Labor Day weekend thereafter. CP II 8-9; 33-

35. Janice filed a motion for contempt of the parenting plan regarding this issue as well as for other violations of the parenting plan. CP II 1-2.

At the hearing, the trial judge stated concerning the Labor Day weekend issue:

You know, I do kind of think that was contempt, except for the fact that when I went through and read, again, the e-mails...the e-mail from Ms. Howd was, "I believe I've been granted half the long weekends. These are what I want. I—" It says, "I would like the following weekends, and will take the additional weekends if you allow it." And then the response was, well – I mean, I think she was trying to be polite.

The response [from Chris] was, "Well, no, that's really inconvenient for us and –" because he's already made plans. And I think if she said, "These are the weekends I'm taking," and he said no, there would have been contempt. But the communication between these parties is so bad that – you know, I looked at that and I went – and then I read it the second time, and I went, 'Oh; she was asking. She was being nice and asking. And he was saying no.

And so here's what I think: I think the response to that – to her request was a – not in the spirit of the Parenting Plan. But I don't think, technically, the way it was written, it was contempt....

And so I'm not going to find that there was contempt, but you don't get to just say, "I want Labor Day" - - or whatever - - every year. And that was not the appropriate thing to say, and that was against the Parenting Plan...

Dec. 16, 2010 VRP 36-38; CP II 746-48.

And I know for a fact that many of the Commissioners on the Family Law calendar do not have the attitude I have towards motions for contempt, and they will much more readily grant a motion for contempt, because they don't have the nuance of everything that has gone on in this case

Dec. 16, 2010 VRP 41; CP II 751.

The judge stated Chris' response to Janice's request for Labor Day weekend 2010 was "not in the spirit of the Parenting Plan." CP II 747. The judge also analyzed the parties' communications with each other and concluded that Janice's request for Labor Day weekend 2010 and other long weekends was constructed to be civil and polite to Chris, and had she worded her request in a more blunt manner, then Chris' denial of her request would have been contempt. This flies in the face of the trial judge's other findings that Janice is more challenged in her communication style than Chris. Dec. 16, 2010 VRP 29; CP II 739; and RP 77. So, on one hand the trial court criticizes Janice for being too blunt and then denies her contempt relief because she is not blunt enough. No matter what or how Janice says anything, she cannot win.

However, regardless of how Janice worded her request for Labor Day weekend, whether politely or more directly as the judge conjectured, the actual request for Labor Day 2010 is the same, and likewise, Chris' response would be the same – a denial of the residential time for 2010 and for all subsequent years for Labor Day weekend. So, Chris nonetheless acted in bad faith by violating the "spirit of the Parenting Plan" when he pre-reserved Labor Day weekend for every year and denied Janice this weekend for 2010, and those actions constitute contempt on its face,

regardless of how Janice worded her request for Labor Day weekend 2010. Therefore, the trial court's ruling that Chris was not in contempt of the parenting plan should be reversed.

**VII. 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).

**VIII. 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 26<sup>th</sup> day of April 2011.

Respectfully submitted,

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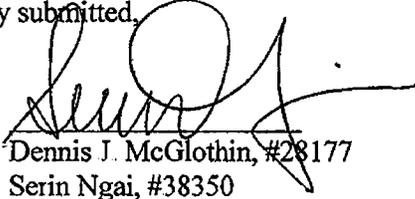
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