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DIVISION II

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STATE OF WASHINGTON

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**COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON
Case No. 42990-0-II**

**JASON EHLERT,
Respondent,
And
MARIA SPURIA-EHLERT,
Appellant.**

Reply Brief of Appellant Maria Spuria-Ehlert

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I. SUMMARY OF REPLY

With the opening brief, Maria Spuria-Ehlert provided a thorough legal and factual analysis of the trial court's ruling, explaining why remand is necessary to achieve a decision in the children's best interests. The trial court's abuse of discretion was evident in five independent ways. First, Judge Fleming's rulings failed to address or even acknowledge the mandatory factors established in RCW 26.09.187(3). Second, instead of the mandatory factors, Judge Fleming relied expressly and exclusively on an unsupported two factor "50 / 50" legal analysis. Third, the trial court abandoned an objective foundation for his rulings, when he disregarded the testimony of both parents and the Guardian Ad Litem. Fourth, Judge Fleming ruled that the children's life in their home country Australia was irrelevant, even though the basis for Jason's residency in the United States was admittedly untrue. Fifth, in contrast to overwhelming evidence from Maria, Jason failed to provide the court with any reasoned analysis of the mandatory RCW 26.09.187(3) factors.

In the response brief, Jason Ehlert admits that Maria was the only party to submit detailed evidence and argument on how the statutory factors should be applied. Jason's Brief, p. 20. For authority, Jason provides only a few cases in support of his arguments. Not one of these cases

justifies a trial court's analysis that expressly departs from the legal framework, and completely fails to acknowledge, either in writing or orally, the analysis for objectively achieving the best interests of children.

Factually, Jason's brief fails to set forth a factual foundation and analysis under RCW 26.09.187(3) that otherwise might have supported the trial court's ruling (assuming, of course, the trial court had even attempted to consider such an analysis). Jason's brief contains many factual assertions that are not supported by the record, are inconsistent with the record, and which are not pertinent to the issues on review. For example, Jason asserts that the record contains "overwhelming" evidence that he was a primary and superior caretaker of the children. This is false, and his record references confirm the relative lack of evidence provided. Jason also exaggerates Maria's international travel. See Jason's Brief, pp. 6-7. Again, the record does not support excessive travel. To the contrary, Maria's brief sets forth in rich detail the consistent level of involvement she has had in nurturing her children and their activities. See, e.g., Maria's Brief, pp. 6-8, 10-11, 16-17; see also Exhibit 67; compare Jason's Brief, p. 12. Jason also suggests that Maria moved in with a "boyfriend" during her visit to Australia. This is false, and without record support. Maria's brief sets forth the factual background of a trip where she and the children

enjoyed a supportive time with their close, extended family. Maria's Brief, pp. 11-12. Jason's unsupported accusation is nothing more than an effort to distract the court from his poor judgment in exposing the children to his girlfriend, Mikelle. Based on the recommendations of the Guardian Ad Litem, Jason was ordered to remove Mikelle from the children's custodial arrangement. Maria's Brief, p. 13.

In contrast to Jason's unsupported factual distractions, Maria has provided a well-supported explanation of reversible errors. Maria respectfully asks for a prompt remand so that a proper review of the children's wellbeing and best interests can be resolved under the governing legal standards.

II. ARGUMENT

A. The Parenting Plan Should Be Remanded For Review Under The Objective Factors Of RCW 26.09.187(3), Which Are Mandatory For Determining A Child's Best Interests.

Washington courts will reverse a trial court's residential placement decision unless the record confirms consideration of the mandatory factors for achieving the children's best interests under RCW 26.09.187(3). *See, e.g., In re Marriage of McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007) (cursory findings of fact, even when supported by the record, are insufficient); *In re Marriage of Horner*, 151 Wn.2d 884, 896-897, 93 P.3d

124 (2004) (conclusory findings are insufficient because its basis is unclear and appellate courts cannot review the trial court's decision); In re Marriage of Kinnan, 131 Wn.App. 738, 129 P.3d 807 (2006) (trial court's failure to make findings that reflect the application of each relevant factor is error); In re Marriage of Kovacs, 121 Wn.2d 795, 854 P.2d 629 (1993); Murray v. Murray, 28 Wn.App. 187, 189-90, 622 P.2d 1288 (1981) (despite substantial evidence, trial court's ruling was reversed because the record did not reflect a careful consideration of the mandatory factors).

Jason attempts to defend the trial court's failure to consider the factors by relying on two cases, which allegedly excuse a trial court from creating a record showing application of the mandatory factors in RCW 26.09.187(3). See Jason's Brief, p. 19-21, *citing* In re Marriage of Croley, 91 Wn.2d 288, 292, 588 P.2d 738 (1978); Fernando v. Niewswandt, 87 Wn. App. 103, 107, 40 P.2d 1380 (1997). These two authorities merely confirm that a trial court is subject to reversal unless the record shows proper consideration of the governing factors.

In Croley, for example, the Supreme Court upheld a custody decision based on a record which clearly showed that all statutory factors had been considered. In doing so, the Court reaffirmed the rule that the trial court's record must demonstrate that all factors were considered.

Croley, 91 Wn. App. at 291. Although specific findings on each factor were not entered, this oversight was excused based on a clear trial court record. The parties had presented substantial evidence “on each of the factors”. Id., 91 Wn. App. at 291. The record on the factors was detailed and thorough:

Testimony regarding the statutory factors was offered by a staff member of the family court and a psychiatrist as authorized by RCW 26.09.220. Both the father and the mother testified as did a woman friend of the father and a teacher of one of the children.

Id. Each specific statutory factor had been “discussed thoroughly.” Id. In addition, the court made specific findings of fact on certain prominent factors, such as “the fitness of the father” and the “emotional and behavioral problems” impacting the children. Id. at 292. Importantly, the trial judge’s oral opinion and the factual findings “clearly indicate that the statutory factors were weighed in determining which parent would be best suited as custodian of the children.” Id. Based on this detailed factual record showing the trial court’s consideration of factors, additional factual findings were not required. Id. Croley does not excuse the record of flawed decision making in this case.

Jason cites Fernando v. Nieswandt for the proposition that “there is no requirement that there be a listing under each factor – as long as they are considered.” Jason’s Brief, p. 21. While the case does not support the

proposition for which it was cited, Fernando is another case confirming the requirement for a trial court record sufficient to show how the statutory factors were actually considered. Unlike the record in this case, the record in Fernando included a set of “oral findings and conclusions demonstrated attention to the details” of both parties’ evidence, and consideration of the mandatory factors. Fernando, 87 Wn. App. at 108. Ironically, the mother had challenged the trial court based on a record which actually confirmed consideration of the governing statutory guidelines. She claimed this was improper where neither party briefed the statutory requirements. Id. at 109. The Court of Appeals rejected this argument, noting that “the trial court must consider the governing law when fashioning the parent plan, even if the parties do not present it to the court.” Id. at 109. As a result, the court did not err when it considered the governing statute in making its decision: “[I]t would have been error not to.” Id. at 109. In this case, Maria has demonstrated the trial court’s error in failing to consider the mandatory factors of the RCW 26.09.187.

In his brief, Jason actually admits that “Maria presented detailed evidence and argument explaining how each of the statutory factors under RCW 26.09.187(3) favored a parenting plan under which she would serve as the primary residential parent.” See Jason’s Brief, p. 20, citing VRP

IV, pp. 10, 14-24 (detailed factors analysis); Exhibit 67 (GAL Report). However, he is unable to identify neither a reasoned analysis nor a substantial evidentiary support for the trial court's rulings on the relevant factors. Although Jason argues that he also "presented evidence applying to the factors", he cannot offer a single record citation for this assertion. See Jason's Brief, p. 21. Jason did not properly address these factors, and the court did not consider them. Rather than a record of the statutory factors, we have a record that shows an affirmative misapplication of the law. The decision violates the fundamental right of all interested parties to a parenting plan that objectively furthers the children's best interests.

B. Jason Provides No Defense For The Shorthand "50 / 50" Child Placement Ruling.

In her brief, Maria demonstrates that rather than the statutory factors, Judge Fleming relied upon a two factor shorthand analysis which, by itself, reflects an abuse of discretion. See Maria's Brief, Argument B, pp. 28-30. The factors driving his decision were explicit and simple: (1) neither parent was credible; and (2) both loved their children. The trial court disregarded the factors analysis which favored Maria's plan, had no competing analysis from Jason, ignored critical factors supporting Maria's position as "irrelevant", and essentially left the parents up to their own

devices without any exercise of judgment according to the best interests factors.

Jason's brief does not squarely address this abuse of discretion. While written findings are sometimes excused where the record shows the development and consideration of each factor, such an excuse will not exist in cases like this, where the record affirmatively shows that the trial court pursued a legal standard of its own subjective making.

C. Jason Cannot Support A Subjective Trial Court Decision That Disregards Both The GAL's Recommendations And The Parent's Testimony.

Maria's brief also explains how the trial court abused its discretion by ignoring recommendations of the Guardian Ad Litem despite finding that neither the parents nor the witnesses were credible. See Maria's Brief, Arg. C, pp. 30-33. As Waggener makes clear, when a trial court determines that the parents cannot be relied upon to develop the necessary analysis, the report of the GAL becomes an essential and necessary foundation for its ruling. In re Marriage of Waggener, 13 Wn. App. 911, 538 P.2d 845 (1975). In such cases, the trial court must act "affirmatively" to cure concerns with deficiencies in the evidence, through appointment of a GAL or attorney, to avoid an impermissible subjective evaluation of the issues. Id. at 917. Here, if the court found the parents' presentations

unreliable, it should not have also displaced the neutral reports of the GAL with his own subjective and speculative impressions.

D. Jason Cannot Defend The Trial Court's Ruling That The Children's Life In Australia Was Irrelevant, Especially When His Own U.S. Residency Is Without Support.

Maria also explained why Judge Fleming abused his discretion by callously refusing to consider the children's connections to Australia. See Maria's Brief, Arg. D, pp. 33-36. Under RCW 26.09.187(3), consideration of these connections was mandatory, and the explicit rejection of the children's strong family relationships was an uncaring abuse of discretion which further demonstrated a trial court's disregard for the statutory factors. See VRP III, p. 59; RCW 26.09.187(3)(a)(iv) (emotional needs factor); (a)(v) (relationship with other significant adults, other physical surroundings, and activities); (a)(vi) (wishes of the parents and the child). At least some regard for the children's warm extended family was essential for a reasoned evaluation of their best interests.

In his response brief, Jason defends the trial court's decision to ignore the children's connections to Australia as some sort of punishment for Maria's taking the children to Australia to see family in 2010. See Jason's Brief, p. 21. If punishment was the court's reason for ignoring the children's loving connections to grandparents and others in Australia, this

too would be an abuse of discretion. Punishing children for perceived misconduct of a parent is not an appropriate factor.

Jason further suggests that the court properly found Australia irrelevant because the “children have no emotional ties to family or school in Australia other than when Maria kidnapped them.” Jason’s Brief, p. 22. Here too is a flawed rationale for ignoring the children’s undisputed important relationship to Australia. There is no dispute that the children were born in Australia, and thrived there as part of a large and supportive extended family, which included maternal grandparents, Maria’s four aunts and uncles, nieces and nephew, seven cousins and others. See Maria’s Brief, pp. 4-6; VRP I, pp. 15-18, 99-101, 105-110, 114; VRP III, p. 82; Exhibits 5, 35, and 67. The children’s Australian relatives have always been a valid and important part of the children’s lives. VRP I, pp. 43, 117. Even Jason testified in support of the children’s loving relationships in Australia. VRP I, p. 43. Jason’s argument that the children’s connections to Australia are “irrelevant” is selfish, false, and absurd. See Jason’s Brief, p. 22. The children continued to benefit from contact with their family in early 2010. Maria’s return to Australia was not a kidnapping and under no circumstance did it justify punishing the children through judicial ignorance of their important ties to family in their country of origin. See Maria’s

Brief, pp. 11-12.

The relevance of the children's connections to Australia was also critical given Jason's tenuous and unstable status in the United States. Maria's Brief, pp. 34-35. The record contains Jason's admissions that the underlying basis for his residency had expired. In her brief, Maria provided the federal authority confirming that Jason is subject to removal from the United States based on his misrepresentations. See Maria's Brief, pp. 34-35, *citing* 8 U.S.C. Sec. 1182(a)(6)(C); Kungys v. United States, 485 U.S. 759, 772, 108 S. Ct. 1537 (1988); Forbes v. INS, 48 F.3d 439, 442 (9th Cir. 1995) (an alien's misrepresentation is a basis for exclusion from the country). Jason has not provided any meaningful response to this major threat to his residency. The court should not have blinded itself to a parenting plan that took into account the children's strong connections to the only nation where their continued residency is secure.

E. Maria Is Entitled To An Award Of The Reasonable Expenses Of Her Successful Motion For Contempt.

In her brief, Maria explained how the trial court abused its discretion when it failed to recognize the mandatory award of expenses that is due following a successful motion for contempt. See Maria's Brief, pp. 14-15; and Argument D, pp. 37-38. The contempt ruling was based on

Maria's successful motion under RCW 26.09.160, which proved up Jason's criminal act of violating Maria's residential rights by bugging her during private residential time.

In his response brief, Jason simply argues that expenses were properly denied because Maria's successful motion for a contempt ruling had "nothing to do with the parenting plan" under RCW 26.09.160. Jason's Brief, pp. 22-23. He offers no authority, analysis, or citation to the record. The trial court acted in its discretion when it found Jason in contempt, and that ruling mandated an award of expenses to Maria, whose rights were obviously violated. As a matter of law, the award of expenses was mandatory.

F. Maria Is Entitled To Attorney's Fees On Appeal.

Maria has properly requested reasonable attorney's fees associated with her appeal. RAP 18.1. In response, Jason appears to argue that he is somehow entitled to fees even though there was no basis for awarding fees to him below. Jason also suggests that he can request fees based on a few isolated and confusing disputes he has alleged with respect to appellant's brief. Jason's confused arguments do not support an award of fees. Maria is the party entitled to fees to the extent that she prevails on an appeal with regard to the issue of Jason's contempt.

III. CONCLUSION

The appellant, Maria Spuria-Ehlert, respectfully asks this Court reverse and remand for entry of a parenting plan based on the objective factors necessary to achieve the best interests of the children. In addition, she asks that this Court confirm her right to fees and costs associated with Jason's contempt, including reasonable fees on appeal.

RESPECTFULLY SUBMITTED this 20th day of December, 2012.

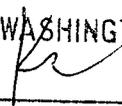


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In re the Marriage of:

JASON EHLERT,

Respondent,

And

MARIA SPURIA-EHLERT,

Appellant.

No. 42990-0-II

**DECLARATION OF
SERVICE**

THE UNDERSIGNED, hereby declares as follows:

That I am now and at all times herein mentioned a citizen of the United States and a resident of the State of Washington, over the age of 18 years, not a party to the above entitled action and competent to be a witness therein. That on the 19th day of December, 2012, she placed a true copy of the Reply Brief of Appellant Maria Spuria-Ehlert on file in the above-entitled matter, in an envelope addressed to Theodore C. Rogge and Selene Becker, at the addresses below stated and also transmitted a copy to

Theodore C. Rogge by electronic service to Rogge Law

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Theodore C. Rogge
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3211 6th Avenue
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Selene Becker
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That she placed and affixed proper postage to the said envelope, sealed the same, and placed it in a receptacle maintained by the United States Post Office for the deposit of letters for mailing in the City of Puyallup, County of Pierce, State of Washington. That she mailed the envelope first class, postage prepaid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Signed at Puyallup, Pierce County, Washington this 19th day of December, 2012.


Michelle A. Lea