

No. 48338-6-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

**AMANDA LEANN ORSE (nka Pellanda),
Appellant,**

v.

**RYAN GARRETT SCHWARDER,
Respondent.**

**OPENING BRIEF OF APPELLANT
(Amended only to include citation to
supplemental Clerks Papers)**

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ASSIGNMENTS OF ERROR

The trial court erred by denying the appellant's request to relocate to Oklahoma with the children.

The trial court erred by not making factual findings specifically related to the factors contained in RCW 26.09.187(3) in its post-trial ruling, and instead, by simply "copying" the findings made related to the proposed relocation. RCW 26.09.520.

The trial court erred by finding that agreements were situational at best and dependent on the needs of the parents. The trial court erred by further finding that at all times said agreements appear to be what was best for the children and favored neither parent's status as caregiver.

Finding of Fact 2.10 (ii) – CP 4

The trial court erred by finding that over nine years, both appellant and respondent's ability to care for the children was "conditional on circumstances in regards to their relationship" which dictated their parental responsibilities.

Finding of Fact 2.10 (iii) – CP 4-5

The trial court further erred by finding that the present alternating week-on, week-off residential schedule creates brief and substantially equal intervals of time. It was further error to find that the parties' parenting relationship was and has been a substantially equal time parenting residential schedule, essentially a 50/50 residential time split situation, and case law indicates that an exact mathematical precision is not determinative.

Finding of Fact 2.10 (iii) – CP 4-5

The trial court erred by finding that the respondent has a relationship with his oldest son, so the boys have a half-brother who is another part of an extended family group.

Finding of Fact 2.10 (v) – CP 5

The trial court erred by finding that remaining in Washington would be in the children's best interests and would allow the children to continue to thrive with the majority of the established family members while the appellant and respondent build and stabilize their new relationships.

Finding of Fact 2.10 (v) – CP 5

The trial court erred by finding that the appellant married, knowing that her new husband would be transferred to an out-of-state location while this matter was pending and before a decision was made regarding the parenting plan.

Finding of Fact 2.10 (vi) – CP 5-6

The trial court erred by finding appellant never personally visited Oklahoma, to see and verify living accommodations, schools for the children, or even get an understanding of what her rights are as a military spouse and what benefits and accommodations are available to her as a military spouse.

Finding of Fact 2.10 (vi) – CP 5-6

The trial court erred by giving precedential effect to the temporary parenting plan.

The trial court erred by finding that the mother placed the children in full-time day care in April 2014 and father continued to see the children every other weekend and began seeing them every Wednesday; the trial court also erred by finding that the residential schedule continued until June 2015 when the court entered a temporary order was relevant to an agreement to relocate.

Finding of fact 2.3 (i) CP 30.

The trial court erred by finding that over nine years, the parents' involvement with caring for the children was conditional on circumstances in regards to their relationship, which dictated their parental responsibilities, including work schedule and physical ability to work.

Finding of fact 2.3 (iii) CP 31.

The trial court found that due to the respondent's limited work history, the appellant provided for the majority of the children's financial support. The trial court erred by not affording that sufficient weight.

Finding of fact 2.3 (iii) CP 31.

The trial court found that the present alternating week-on, week-off residential schedule creates brief and substantially equal intervals of time between the parents and children. The parties' parenting relationship was and has been a substantially equal time parenting residential schedule, essentially a 50-50 residential time split situation. This finding is not relevant to this statutory factor, and is error.

Finding of fact 2.3 (iii) CP 31.

The trial court found that the appellant married, knowing her husband would be transferred out of state before a decision was made regarding the parenting plan and erred by criticizing her for that.

Finding 2.3(vi), CP 32

The trial court found that the appellant had never personally visited Oklahoma and erred by criticizing her for that.

Finding 2.3(vi), CP 32

The trial court erred by finding that the respondent was in a two year relationship and was trying to stabilize his living arrangements and wished to start a blended family with his fiancé.

Finding 2.3(vi), CP 32

The trial court erred by finding this is a 50/50 residential time situation where both parties are the custodians of the children.

Finding 2.3(vi), CP 32

The trial court erred by denying appellant's petition to allow relocation.

Finding 2.3(vi), CP 32

The trial court erred by finding that even if the appellant was deemed primary parent, which would create a rebuttable presumption that the intended relocation would be permitted when the primary residential parent is the person intending to relocate, the presumption was rebutted pursuant to factors one through ten listed in RCW 26.09 .520.

Finding 2.3(vi), CP 32

The trial court erred by finding that respondent's girlfriend was his fiancé.

Finding 2.3(v), CP 32

Finding 2.3(vi), CP 32

ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

Was the final parenting plan entered in error?

Did the trial court err by denying this relocation?

INTRODUCTION

The establishment of a parenting plan underlies this appeal, as does the denial of the appellant's (mother's) request to relocate to Oklahoma with the children to join her husband.

Importantly, in light of relocation being denied, the appellant has chosen to remain in Washington with the children; therefore, this Court may consider her appeal from the order denying relocation moot. However, the trial court only considered the statutory factors enumerated in RCW 26.09.520 in rendering its decision.

A permanent parenting plan had not yet been entered, and the trial court did not consider the statutory factors contained in RCW 26.09.187(3) in rendering its ruling after trial.

STATEMENT OF THE CASE

IDENTIFICATION OF THE PARTIES

Amanda Pellanda (fka Orse) is the petitioner and appellant. Ryan Schwarder is the respondent.

PROCEDURAL HISTORY

On April 22, 2015, Amanda¹ filed a notice of her intended relocation with the children. Exhibit 1. At that time, Amanda was engaged to her husband, Brendan Pellanda. Exhibit 1, at p. 2. Amanda and Brendan met in August of 2014. 1 RP 74, 2 RP 8.

Brendan was serving in the United States Army, and had been transferred to Fort Sill, Oklahoma to become a drill sergeant. Exhibit 1, at page 2. 2 RP 10, 11. Amanda hoped to relocate to Oklahoma with the children to join Brendan on or about August 14, 2015. Exhibit 1, at page 1.

Neither Amanda nor Ryan had sought the establishment of a parenting plan prior to the filing of the notice of intended relocation.

BACKGROUND

Amanda and Ryan began an eight year relationship in late 2005. 1 RP 23. They had three children: R.S. (8 years of age), A.S. (4 years of age) and S.S. (2 years of age). 1 RP 23.

Ryan has an older child, D.C., from a prior relationship. 1 RP 65, 2 RP 59. D.C. was 15 years of age at the time of trial. 1 RP 65, 2 RP 59.

¹ For ease of reference, this writer will refer to the parties by their first names in this brief. No disrespect whatsoever is intended by so doing.

During Amanda and Ryan's relationship, Amanda met D.C. on one occasion. 2 RP 174. R.S., A.S., and S.S. had never met D.C. 1 RP 65. D.C. lived with his mother, and Ryan saw him, on average, one time per year. 2 RP 99-100. Ryan testified that he communicates with D.C. via Facebook message, telephone and mail. 2 RP 103. Ryan testified that he and D.C. have a "great relationship." 2 RP 59.

Ryan paid child support for D.C. very sporadically during the time he and Amanda were together. 1 RP 66. In fact, there had been several contempt motions brought against Ryan in 2012 and 2013 in addition to several bench warrants issued related to Ryan's non-payment of child support for D.C. 1 RP 96; 2 RP 127. Amanda made a number of child support payments on Ryan's behalf in order for him to avoid being incarcerated for non-payment of child support. 1 RP 95.

Throughout the relationship, Amanda was the primary source of financial support for the children and household, paying for rent, utilities, and food. 1 RP 24. Ryan made no financial contribution to the household. 1 RP 23 - 24, 120.

Amanda's father occasionally provided additional financial support. 1 RP 121, 124-25. On more than one occasion, he paid rent

for Amanda and Ryan. 1 RP 125-26. On another occasion, the power had been disconnected and he paid to restore service. 1 RP 124.

Throughout the relationship, Amanda took far greater responsibility for making and taking the children to their medical appointments, even though Ryan contended he took “all the children to their medical appointments over the years.” 1 RP 27, 2 RP 86; Ex. 7. Amanda did the majority of cooking, grocery shopping and house cleaning, although Ryan claims they shared those duties. 1 RP 32-33, 2 RP 66. Amanda chose and enrolled the children in their day care and selected their pediatrician. 1 RP 34.

When Ryan did work, it was sporadic. 2 RP 104-10, 160. A Washington State Department of Labor and Industries work history (utilizing data obtained from the Employment Security Department) indicates Ryan’s work history from 2000 through 2013 is as follows:

<u>Year</u>	<u>Hours of Employment</u>	<u>Employer</u>
2000	248	Jack in the Box
	86	McDonald’s
TOTAL HOURS	334	
AVG PER MONTH	27.8	

<u>Year</u>	<u>Hours of Employment</u>	<u>Employer</u>
2001	23	Dock Street
	50	Top Priority Sales
	33	Hexagon, Inc.
	37	Beye Realty Corp.
	200	Frances Stanley
	4	Labor Ready NW
	5	Sponsor Reps, Inc.
TOTAL HOURS	352	
AVG PER MONTH	29.3	
2002	89	Country Rose Café
TOTAL HOURS	89	
AVG PER MONTH	7.4	
2003	12	Dominos
	231	Circle K (76)
	71	McDonald's
	150	Brown Bear Car Wash
	TOTAL HOURS	464
AVG PER MONTH	38.7	
2004	100	PLU
	42	Papa Murphy's
	72	Albertson's
	66	Bargain World, Inc.
	TOTAL HOURS	280
AVG PER MONTH	23.3	
2005	41	Robert Taylor Heating
	67	5 Diamonds, LLC
	382	Columbia Distributing
	TOTAL HOURS	490
AVG PER MONTH	40.8	
2006	124	NW Great Dane, Inc.
	9	Jack in the Box
	117	NW Cascade
	112	Dock Street
	TOTAL	362
AVG PER MONTH	30.2	

<u>Year</u>	<u>Hours of Employment</u>	<u>Employer</u>
2007	8	Labor Ready NW
	116	Just Sports
TOTAL	124	
AVG PER MONTH	10.3	
2008	149	Metro Rooter & Plumbing
	358	Sears Portrait Studio
TOTAL	507	
AVG PER MONTH	42.3	
2009	133	North China Garden
TOTAL	133	
AVG PER MONTH	11.1	
2010	291	Saks on 6 th /Dirty Oscars
	396	Myko Corporation
	252	Dollar Tree
TOTAL	939	
AVG PER MONTH	78.3	
2011	0	
AVG PER MONTH	0	
2012	306	Volt Management
	16	Harris Rebar
	114	7-11
	67	Ideal Building
TOTAL	503	
AVG PER MONTH	41.9	
2013	213	Sunnie View, Inc.
	573	Brookdale Golf Course
TOTAL	786	
AVG PER MONTH	65.5	

Ex. 50A, p. 4 – 5.

Ryan sustained an on the job injury to his back on February 22, 2007. 2 RP 74; Ex. 50A, p. 2 (Assessment Closing Report). He was diagnosed with a herniated (bulging) disc and a pinched sciatic nerve. 2 RP 74-75. He initiated a claim with the Department of Labor and Industries in March of 2007. 2 RP 75, Ex. 50A, p. 2 (Assessment Closing Report). The claim was closed in May of 2007, due to Ryan's lack of medical follow up. 2 RP 106, Ex. 50A, p. 2 (Assessment Closing Report).

Ryan sought medical care in 2011 after briefly working as a cashier. 2 RP 106, Ex. 50A, p. 2 (Assessment Closing Report) He again sought medical care in June of 2013 due to worsening back pain. 2 RP 106. The claim was re-opened and he underwent surgery. Ex. 50A, p. 2 (Assessment Closing Report). In 2014, Ryan was released to return to work. 2 RP 75, Ex. 50A, p. 2-3 (Assessment Closing Report).

Despite having a back injury that prevented him from working, Ryan was physically active. 1 RP 129. He was "very physical" with the children. 2 RP 183. During Easter of 2007, Amanda's father observed Ryan "hanging upside down and climbing in and out of a tree and later . . . rollerblading while throwing a football, jumping all around[.]" 1 RP

129. On another occasion, Ryan went skydiving with Amanda. 2 RP 174-75.

Amanda became frustrated by Ryan's jealousy of her having contact with her friends and his accusations of her infidelity. 1 RP 42. The relationship ended in October of 2013. 1 RP 23.

Ryan insisted that Amanda and the children move out, so she and the children moved in with her parents. 1 RP 42, 119, 123, 2 RP 67. Amanda's parents came to move her, the children and their belongings. 1 RP 119. Ryan never objected to the children leaving and staying with Amanda. 1 RP 43.

Because Amanda was working at the time and Ryan was not, Ryan would watch the children during the day while Amanda worked, and would have them every other weekend. 2 RP 153-54, 188. The children spent every week night with Amanda. 2 RP 113. Ryan then began to refuse to watch the children, often giving Amanda very short notice, if any, of his "unavailability." 1 RP 44, 2 RP 19-20, 115.

Because Ryan began refusing to watch the children with more frequency, Amanda put the children in full-time day care by April of 2014. 1 RP 45. Ryan never objected to the children attending day care. 1 RP 46.

Ryan did not contribute toward the cost, nor did he ever offer to. 1 RP 45. At the time of trial, he had still not contributed anything toward the cost of the children's day care, despite being required to pursuant to the temporary order of child support. 2 RP 137, Ex. 69.

Once the children began attending day care, Ryan saw the children every other weekend and on Wednesdays. 1 RP 46, 2 RP 19, 115. Amanda provided all of the transportation, because Ryan did not have a vehicle at that time. 1 RP 46.

When any of the children were ill, or when Ryan chose not exercise his time with the children, Amanda was forced to take time from work to care for them. More recently, Brendan and Amanda's parents would sometimes assist with child care so Amanda could work on those occasions. 1 RP 28, 121, 2 RP 20.

Amanda had met her husband, Brendan, in August of 2014. 1RP 19, 2 RP 8. Amanda and Brendan were married in August of 2015. 1 RP 20.

Brendan is a drill sergeant in the United States Army; he had been stationed at Joint Base Lewis McCord (JBLM). 1 RP 19, 2 RP 11. He planned to make the military his career. 2 RP 12. He earns approximately \$4,500 per month. 2 RP 13.

At the time Amanda and Brendan were married, Brendan had received orders to report to FortSill, Oklahoma for drill school. 1 RP 19, 20, 2 RP 11. Brendan's assignment was for two years. 1 RP 56, 2 RP 12. Had Brendan declined this transfer and assignment, he would have been forced to leave the military. 2 RP 30.

Amanda filed her notice of her intent to relocate with the children on April 22, 2015. 1 RP 57. Ex. 1.

Ryan formally objected to the relocation on July 17, 2015. CP 80-87.

A temporary parenting plan was entered on June 25, 2015. Ex. 56. The Court Commissioner ordered a week on/week off temporary residential schedule for the children. Ex. 56.

Paragraph 3.2 provides:

Effective immediately, **until the relocation motion is heard**, the children shall reside with the petitioner/mother,² except for the following days and times when the children will reside or be with the father:

Every other week with the exchange taking place Monday morning at daycare.

Ex. 56 at p. 2.

² Paragraph 3.2 does provide that "the children named in this parenting plan are scheduled to reside the majority of the time with both parents. Ex. 56 at p. 3. However, that paragraph goes on to provide that "This parent is [these parents are] designated the custodian of the children solely for purposes of all other state and federal statutes which require a designation or determination of custody."

On the weeks Ryan had the children, he and the children would stay with Ryan's mother. 1 RP 40. On the weeks he did not have the children, he would "stay[] with friends." 2 RP 189.

Despite this schedule, Ryan did not exercise the residential time provided for him. For example, for Thanksgiving or Christmas 2014, he did not see the children. 2 RP 21. Ryan had even planned to have the children watch the 2015 Super Bowl with him, but cancelled at the last minute. 2 RP 22.

At the time of trial, Amanda did not know where Ryan was living. He apparently primarily lived with his mother, but also claimed to be "staying with friends" and with his on-again, off-again girlfriend, Jenny Lee. 1 RP 40, 2 RP 180, 189.

At the time of trial, Jenny was residing in a two bedroom apartment with her mother and her three children. 2 RP 122. Ryan testified that he and the children would occasionally spend the night at Jenny's apartment with her mother and children. 2 RP 121-22. Jenny testified that Ryan spent the night at her apartment without the children. 2 RP 151.

At the time of trial, Amanda had been working full-time as a dispatcher for Pacific Air Systems for two years, earning \$15 per hour.

1 RP 21. Ryan had started working full time three weeks before trial. 2 RP 79, 104. See also Ex. 16 (pay records for Ryan for 2013 and 2015) and Ex. 36 (IRS transcripts from 2013 and 2014, indicating no records of tax returns having been filed for those years), Ex. 49.

Other than Ryan's mother and her fiancé, the remainder of Ryan's family lives primarily in eastern Washington and did not maintain regular contact with Ryan and the children. 1 RP 52, 2 RP 178. Even while Amanda and Ryan were together, they had little contact with those family members. 1 RP 52.

Amanda and Brendan hoped to relocate with the children to Lawton, Oklahoma, very near Fort Sill. 1 RP 53. Amanda and Brendan had investigated Lawton, although Amanda had not personally visited there prior to her anticipated relocation. 1 RP 53, 84-85. Similar to Tacoma, Lawton is a big military community with shopping centers, malls, a waterpark, etc. 1 CP 54.

Amanda proposed a parenting plan that designated her the primary residential parent and provided that the children would be with Ryan every other Christmas break, every other spring break and 3 weeks in July the first summer. Ex. 2. Given the ages of the children,

Amanda proposed that time would expand over subsequent summers as the children grew older. 1 RP 59-61; Ex. 2.

Amanda was also willing to make the children available to Ryan should he ever travel to Oklahoma for a visit. 1 RP 60. Ryan agreed with her proposed parenting plan “for the most part.” 2 RP 130.

Amanda testified that any of the children’s extended family members would also be welcome to visit in Oklahoma at any time. 1 RP 51, 2 RP 16. She also testified that the children would have access to FaceTime, telephone, Skype and e-mail in order to foster communication with any family members in Washington, especially Ryan. 1 RP 51.

Amanda had investigated the job market in Fort Sill, and was confident there were sufficient job openings she would be qualified to fill. 1 RP 22. Brendan found a home in Lawton and moved there. 2 RP 27-29; Ex. 17.

TRIAL

Trial occurred on October 1, 2015 and on October 8, 2015. 1 RP (October 1, 2015); 2 RP (October 8, 2015).

RULING

Judge Whitener rendered her oral ruling on October 9, 2015. 3 RP.

Judge Whitener based her factual findings on the factors found at RCW 26.09.520. 3 RP 3 – 9.

Judge Whitener also found

that this is a 50/50 residential time situation. But in the alternative, I'm finding that even if the petitioner is deemed the primary parent, which would create a rebuttable presumption that the intended relocation would be permitted when the primary residential parent is the person intending to relocate, the presumption has been rebutted as I have addressed factors one through 10 listed in RCW 26.0 9.520.

3 RP 10; CP 6.

Based on her findings, Judge Whitener denied the relocation. 3 RP 10.

Judge Whitener criticized Amanda for filing her petition on April 17, 2015 and then getting married before a decision was made on the relocation. 3 RP 6. She also criticized Amanda for never personally visiting Oklahoma to investigate living accommodations, the schools or her rights as a military spouse, including benefits available to her as a military spouse. 3 RP 6.

Judge Whitener went on to criticize Amanda for trusting Brendan, because, while Amanda believed Brendan is a good husband, that trust did “not necessarily translate that he will be a good father since he has no children of his own and testified that he did not want to have any more other than the three boys. And he also has no prior marriage, experience raising children, or has never parented children.” 3 RP 7.

Judge Whitener found that Ryan’s lack of a stable living arrangement was “not encouraging to the court,” because Ryan appeared to stay with friends when he did not have the children, but “interestingly has made this arrangement work where it has not affected his time with his children.” 3 RP 7.

FINAL ORDERS

Findings of fact and conclusions of law, a final parenting plan and an order on objection to relocation were entered on November 6, 2015. CP 1 – 6, 20 – 28, 29 – 37.

Amanda appeals the denial of her request to relocate with the children and the final parenting plan. CP 38 – 76.

ARGUMENT

I. THE PERMANENT PARENTING PLAN.

RCW 26.09.187(3) provides the factors a trial court weighs the evidence against when ordering a final parenting plan. It provides as follows:

RESIDENTIAL PROVISIONS.

- (a) The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances. The child's residential schedule shall be consistent with RCW 26.09.191. Where the limitations of RCW 26.09.191 are not dispositive of the child's residential schedule, the court shall consider the following factors:
 - (i) The relative strength, nature, and stability of the child's relationship with each parent;
 - (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
 - (iii) Each parent's past and potential for future performance of parenting functions as defined in RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
 - (iv) The emotional needs and developmental level of the child;
 - (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;
 - (vi) The wishes of the parents and the wishes of a

child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and

- (vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

Factor (i) shall be given the greatest weight.

- (b) Where the limitations of RCW 26.09.191 are not dispositive, the court may order that a child frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time if such provision is in the best interests of the child. In determining whether such an arrangement is in the best interests of the child, the court may consider the parties' geographic proximity to the extent necessary to ensure the ability to share performance of the parenting functions.

A. Standard of Review.

This Court reviews a trial court's decisions concerning parenting plans for abuse of discretion. *In re Custody of Halls*, 126 Wn. App. 599, 606, 109 P.3d 15 (2005). A trial court abuses its discretion if its decision rests on unreasonable or untenable grounds. *Halls*, 126 Wn. App. at 606.

A trial court's decision is "manifestly unreasonable" if it is outside the range of acceptable choices given the facts and the

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

This Court reviews a trial court's decision following a bench trial by evaluating whether the trial court's findings of fact are supported by substantial evidence and whether the conclusions of law are supported by the findings of fact. *Pub. Util. Dist. No. 2 of Pac. County v. Comcast of Wash. IV, Inc.*, 184 Wn. App. 24, 48, 336 P.3d 65 (2014); *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 242-43, 23 P.3d 520 (2001).

Substantial evidence is the "quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

An appellate court does not "retry the facts, weigh conflicting evidence, or judge the credibility of witnesses." *In re Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234 (1996); *In re Marriage of Thomas*, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991).

An appellate court views the evidence and all reasonable inferences therefrom in the light most favorable to the prevailing party below. *Pub. Util. Dist. No. 2*, 184 Wn. App. at 48-49.

“Unchallenged findings of fact are verities on appeal.” *Casterline v. Roberts*, 168 Wn. App. 376, 381, 284 P.3d 743(2012); *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006).

The trier of fact is free to believe or disbelieve any evidence presented at trial, but “[a]ppellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact.” *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009) (citing *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 572, 343 P.2d 183 (1959)), *review denied*, 168 Wn.2d 1041 (2010).

An appellate court reviews questions and conclusions of law de novo. *Sunnyside Valley*, 149 Wn.2d at 880.

A trial court hears evidence firsthand and has a unique opportunity to observe the witnesses; therefore a reviewing court is “extremely reluctant to disturb child placement dispositions.” *In re Parentage of Schroeder*, 106 Wn. App. 343, 349, 22 P.3d 1280 (2001) (quoting *In re Marriage of Schneider*, 82 Wn. App. 471, 476, 918 P.2d 543 (1996), *overruled on other grounds by In re Marriage of Littlefield*, 133 Wn.2d 39, 940 P.2d 1362 (1997)).

Residential provisions must be made in light of the best interests of the children after considering the factors set forth in RCW 26.09.187(3). *In re Parentage of J.H.*, 112 Wn. App. 486, 492-93, 49 P.3d 154 (2002). In this case, Judge Whitener decided the residential provisions in the parenting plan after considering RCW 26.09.520, the relocation factors.

1. The temporary parenting plan should have had no precedential effect on the permanent parenting plan.

RCW 26.09.060(10)(a) provides: “A temporary order ... [d]oes not prejudice the rights of a party or any child which are to be adjudicated at subsequent hearings in the proceeding.”³

Our Supreme Court has ruled that a trial court may not presume that the primary custodial parent under a temporary parenting plan will remain the primary custodial parent under the final parenting plan. *In re Marriage of Kovacs*, 121 Wn.2d 795, 808-09, 854 P.2d 629 (1993). It follows, then, that the trial court in this case was precluded from presuming that because the temporary parenting plan was a “50/50 arrangement,” the final parenting plan should also provide for a “50/50 arrangement” (week-on, week-off residential

³ See also RCW 26.09.191(4) (a trial court may not draw any presumptions from a temporary parenting plan in determining the provisions of the permanent parenting plan or resolving a modification petition).

schedule). CP 4-5 (Finding of Fact 2.10 (iii)).

The temporary parenting plan, entered on June 25, 2015 provided:

Effective immediately, **until the relocation motion is heard**, the children shall reside with the petitioner/mother, except for the following days and times when the children will reside or be with the father:

Every other week with the exchange taking place Monday morning at daycare.

Ex. 56 at p. 2 (emphasis added).

Judge Whitener found that Amanda and Ryan had “essentially a 50/50 residential time split situation[.]” CP 5.

But the temporary parenting plan, providing for a week-on / week-off schedule, had only been entered on June 25, 2015. Ex. 56. Trial occurred on October 1 and 8, 2015. 1 and 2 RP.

It is undisputed that prior to entry of the temporary parenting plan, Ryan had observed agreed-upon residential time with the children every other weekend and ultimately every Wednesday since approximately October of 2013. 2 RP 153-54, 188.

It is also undisputed that Ryan watched the children during the day, but the children still spent every night with Amanda. 2 RP 113.

It is also undisputed that because Ryan became so unreliable in

providing care for the children during the day, Amanda placed them in day care in April of 2014, nearly a year and a half prior to filing her notice of intent to relocate. 1 RP 45.

It is further undisputed that Ryan never objected to Amanda putting the children in day care. 1 RP 46.

Therefore, Judge Whitener's implicit reliance on the temporary parenting plan as a basis for finding Amanda and Ryan had an established 50/50 residential time split was not supported by substantial evidence. The temporary parenting plan should have had no precedential effect on the final parenting plan, or on Judge Whitener's decision to deny Amanda's notice of intent to relocate.

2. The trial court should have made findings based on RCW 26.09.187(3) and not RCW 26.09.520 in determining the final parenting plan.

The factors set out at RCW 26.09.187(3) are not identical to those found at RCW 26.09.520. In addition, RCW 26.09.187(3)(a)(i) is given the greatest weight among those several factors, where the factors found at RCW 26.09.520 are not weighted. 26.09.187(3)(a)(i)-(vii); RCW 26.09.520.

A trial court "must make findings of fact on all material issues." *Fed. Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 422, 886 P.2d

172 (1994). An issue is material if a finding of fact on that issue is necessary to support the trial court's conclusions of law. *See Scott v. Trans-Sys, Inc.*, 148 Wn.2d 701, 707-08, 64 P.3d 1 (2003).

Judge Whitener devoted none of her ruling after trial to any consideration of RCW 26.09.187(3). Her only possible reference to this statute in her ruling was her comment that

[E]ven if the petitioner is deemed the primary parent, which would create a rebuttable presumption that the intended relocation would be permitted when the primary residential parent is the person intending to relocate, the presumption has been rebutted as I have addressed Factors 1 through 10 listed in RCW 26.09.520.

3 RP 10. This was an error of law.

In fact, after rendering the ruling, when counsel inquired of Judge Whitener as to the final parenting plan itself, her response was

I have not ruled on it. I believe, basically, one needs to be put forth, because I have your proposal and I have counsel's proposal. And based on my ruling I think both sides need to look at it again and see if that is, in fact, what they want to put forward. That would be my position on it.

3 RP 10-11.

The findings of fact and conclusions of law related to the final parenting plan entered on November 6, 2015 are not based on Judge Whitener independently weighing the evidence against the factors set forth in RCW 26.09.187(3). CP 20-28.

Instead, the findings of fact and conclusions of law that specifically relate to the parenting plan are duplicated from the findings of fact Judge Whitener made with regard to the relocation. CP 1 – 6. Compare CP 3 – 6 (Findings of Fact and Conclusions of Law) with CP 30 – 35 (Findings on Order on Objection to Relocation).

Had Judge Whitener properly analyzed the substantial evidence adduced at trial in light of RCW 26.09.187(3), she would have and should have designated Amanda the primary residential parent, thus entitling her to the presumption provided for in the CRA. RCW 26.09.520.

(i) The relative strength, nature, and stability of the child’s relationship with each parent favors Amanda.

Judge Whitener found that both Amanda and Ryan have “a strong, close, loving, and healthy bond” with the children, and that both Amanda and Ryan “provided for and created a solid relationship with all three children.” CP 3 (Finding of Fact 2.10(i)).

Amanda does not dispute that the record supports this finding. CP 3 (Finding of Fact 2.10(i)).

In terms of the nature of each parent's relationship with the children, however, Amanda provided the vast majority of actual parenting.

While Amanda and Ryan likely shared many of the day to day parenting functions for the children while they resided together, the record shows that Amanda, in fact, took far greater responsibility for parenting the children.

Amanda was working and Ryan was not, so Ryan watched the children during the day while Amanda worked; after their relationship ended, he had them every other weekend. 2 RP 153-54, 188. The children spent every week night with Amanda. 2 RP 113. After Ryan began refusing to watch the children or being "unavailable," Amanda put the children in full-time day care by April of 2014. 1 RP 44, 45. Ryan never objected. 1 RP 46; 2 RP 19-20, 115.

Ryan did not contribute toward the cost of day care, nor did he ever offer to. 1 RP 45.

Once the children began attending day care, Ryan saw the children every other weekend and on Wednesdays. 1 RP 46, 2 RP 19, 115. Amanda provided all of the transportation. 1 RP 46.

When any of the children were ill, responsibility for caring for the children fell on Amanda, although Brendan and Amanda's parents would sometimes assist with child care so Amanda could work on those occasions. 1 RP 28, 121, 2 RP 20. Amanda took the children to the vast majority of their medical appointments. 1 RP 27, 2 RP 86; Ex. 7.

Therefore, although there may have been times when Ryan arguably spent a large number of hours with the children, but Amanda was primarily responsible for parenting functions and responsibilities. This factor favors Amanda.

(ii) The agreements of the parties, provided they were entered into knowingly and voluntarily.

Judge Whitener found that at the end of Amanda and Ryan's relationship in October 2013, the children resided with Amanda and spent every other weekend with Ryan, and that Ryan provided child care during the day while Amanda worked. CP 4 (Finding of Fact 2.10(ii)).

Judge Whitener also found that once the children were placed

in full-time day care in April 2014, Ryan saw the children every other weekend and every Wednesday, continuing through June 2015. CP 4 (Finding of Fact 2.10(ii)).

Ryan insisted that Amanda and the children move out when their relationship ended, so Amanda and the children moved in with her parents. 1 RP 42, 119, 123, 2 RP 67. Ryan raised no objection to the children leaving and staying with Amanda. 1 RP 43.

It is undisputed that Ryan agreed that the children would be in Amanda's primary care, and he let her take greater responsibility for parenting them. Ryan let Amanda take the role of primary residential parent. It was error to find otherwise.

(iii) Each parent's past and potential for future performance of parenting functions as defined in RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the children.

Judge Whitener found that Amanda and Ryan's involvement with caring for the children has been "conditional on circumstances" which dictated their parental responsibilities, in particular their work schedules and physical ability to work. CP 4 (Finding of Fact 2.10(iii)).

Judge Whitener also found that at the end of Amanda and

Ryan's relationship in October 2013, the children resided with Amanda and spent every other weekend with Ryan, and that Ryan provided child care during the day while Amanda worked. CP 4 (Finding of Fact 2.10(iii)).

Judge Whitener also found that once the children were placed in full-time day care in April 2014, Ryan saw the children every other weekend and every Wednesday, continuing through June 2015. CP 4 (Finding of Fact 2.10(iii)).

Importantly, Judge Whitener also found that due to Ryan's "limited work history," Amanda had provided for the majority of the children's financial support. CP 4 (Finding of Fact 2.10(iii)).

Parenting is not confined to or defined by the quantum of time a parent spends with his or her children.

It is undisputed that Amanda was the primary source of financial support for the household, paying for rent, utilities, and food from the outset. 1 RP 24. Ryan made no financial contribution to the household. 1 RP 23 – 24, 120.

Residential time and financial support are equally important components of parenting arrangements. RCW 26.09.003. Judge Whitener did find that "[d]ue to [Ryan's] limited work history,

[Amanda] provided for the majority of the children's financial support. CP 4 (Finding of Fact 2.10(iii)). However, she apparently gave that little or no weight in rendering her ultimate decision.

Even though the evidence and the findings indicate the contrary, Judge Whitener found that Amanda and Ryan parented the children equally. This finding is not supported by substantial evidence.

(iv) The emotional needs and developmental level of the child.

Judge Whitener found that the children appear to be healthy, smart, active, and are loved not only by their parents, but also by an extensive extended family network. CP 5 (Finding of Fact 2.10(iv)).

Amanda does not dispute this finding.

(v) The children's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities.

Judge Whitener found that Amanda's family and Brendan's family are bonded with the children. CP 5 (Finding of Fact 2.10(v)).

Judge Whitener also found that Ryan's family includes his mother who has "fond feelings" for the children, and his mother's fiancé who "gets along" with the children. CP 5 (Finding of Fact

2.10(v).

Judge Whitener also found that Ryan's "fiancé" has bonded with the children, as have her three children. CP 5 (Finding of Fact 2.10(v)).

Judge Whitener also found that Ryan has a relationship with his oldest son, D.C., "so the boys have a half-brother who's another part of an extended family group." CP 5 (Finding of Fact 2.10(v)).

The evidence showed that the vast majority of Ryan's extended family reside in Eastern Washington, and do not have frequent contact with him. 1 RP 52, 2 RP 178.

Ryan testified to having a close relationship with his oldest son, D.C.; however, he saw him, on average, once a year, and the three young boys had never met him. 2 RP 99-100.

This does not devalue Ryan's family. But the evidence related to this factor strongly favors Amanda.

(vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule.

Although they were included as part of the findings of fact and conclusions of law that pertain specifically to the parenting plan, the findings made by Judge Whitener pertaining to the relocation were

simply copied into the findings related to the parenting plan, under the similar factors. Therefore, as to the parenting plan itself, Judge Whitener made no findings as to this particular factor. CP 5 (Finding of Fact 2.10(vi)).

(vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

Judge Whitener made no findings specifically related to this statutory factor.

The record indicates that Amanda worked consistently throughout her relationship with Ryan and subsequent to it. 1 RP 21.

The record further showed that Ryan has a very poor work history, and his back injury takes up a very small portion of that history. 2 RP 104-10, 160. Ryan testified at trial about being unable to work due to his injury, but his actual work history, based on information from the Employment Security Department, indicates no significant fluctuation in his average hours worked per year over time. 2 RP 104-10, 160.

At the time of trial, Ryan had only been working full-time for three weeks. 2 RP 79, 104.

Amanda was very confident that she could find work in

Oklahoma, and in the meantime, that she could rely on Brendan's income, which was sufficient to support her and the children. 1 RP 22. 2 RP 13.

Ryan's lack of work raises legitimate concern about his ability to financially support the children with any consistency. Amanda has the means and the proven history of financially supporting the children. This factor favors Amanda.

4. Amanda should have been designated primary residential parent.

In addition, RCW 26.09.004 provides:

- (2) "Parenting functions" means those aspects of the parent-child relationship in which the parent makes decisions and performs functions necessary for the care and growth of the child. **Parenting functions include:**
 - (a) Maintaining a loving, stable, consistent, and nurturing relationship with the child;
 - (b) Attending to the daily needs of the child, such as feeding, clothing, physical care and grooming, supervision, health care, and day care, and engaging in other activities which are appropriate to the developmental level of the child and that are within the social and economic circumstances of the particular family;
 - (c) Attending to adequate education for the child, including remedial or other education essential to the best interests of the child;
 - (d) Assisting the child in developing and maintaining appropriate interpersonal relationships;
 - (e) Exercising appropriate judgment regarding the child's welfare, consistent with the child's developmental level and the family's social and economic circumstances; and

(f) **Providing for the financial support of the child.**

Emphasis added.

As already argued above, the record indicates Amanda took far greater responsibility for parenting functions throughout her relationship with Ryan and after it ended. Amanda and Ryan both arguably had and have loving, consistent, and nurturing relationships with the children. RCW 26.09.004(2)(a). Judge Whitener found this to be the case. CP 3, 30.

However, Ryan's lack of a permanent residence was concerning to Judge Whitener. 3 RP 7. But for the kindness of Ryan's mother, Ryan arguably would have had nowhere appropriate to exercise his time with the children.

In fact, the final parenting plan provides:

Until the father has a stable home of his own, all of his residential time must be exercised at his mother's home, with the exception of vacations.

CP 24 (Final Parenting Plan, para. 3.13.1).

As argued above, Amanda took far greater responsibility for parenting the children than Ryan did. The record also shows Ryan was willing for that to be the case. 1 RP 44, 45, 1 RP 46; 2 RP 19-20, 113, 115, 153-54, 188.

Judge Whitener did find that “[d]ue to [Ryan’s] limited work history, [Amanda] provided for the majority of the children’s financial support. CP 4 (Finding of Fact 2.10(iii)). However, she apparently gave that little or no weight in rendering her ultimate decision.

The evidence indicates Amanda was and should have been designated the primary residential parent of the children.

II. THE RELOCATION.

Washington’s child relocation act (CRA), RCW 26.09.405-.560, was enacted in 2000. Laws of 2000, ch. 21, § 1. *In re Marriage of Horner*, 151 Wn.2d 884, 887, 93 P.3d 124 (2004). Analysis under the CRA focuses on both the children and the relocating person, rather than on the best interests of the children. RCW 26.09.520. *Id.*

RCW 26.09.520 provides that

The person proposing to relocate with the child shall provide his or her reasons for the intended relocation. There is a rebuttable presumption that the intended relocation of the child will be permitted. A person entitled to object to the intended relocation of the child may rebut the presumption by demonstrating that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person[.]

The statute enumerates the following factors for the trial court to consider, not listed or weighted in any particular order:

- (1) The relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent, siblings, and other significant persons in the child's life;
- (2) Prior agreements of the parties;
- (3) Whether disrupting the contact between the child and the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation;
- (4) Whether either parent or a person entitled to residential time with the child is subject to limitations under RCW 26.09.191;
- (5) The reasons of each person for seeking or opposing the relocation and the good faith of each of the parties in requesting or opposing the relocation;
- (6) The age, developmental stage, and needs of the child, and the likely impact the relocation or its prevention will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child;
- (7) The quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations;
- (8) The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent;
- (9) The alternatives to relocation and whether it is feasible and desirable for the other party to relocate also;
- (10) The financial impact and logistics of the relocation or its prevention; and
- (11) For a temporary order, the amount of time before a final decision can be made at trial.

RCW 26.09.520; *Horner*, 151 Wn.2d at 887. To overcome this presumption, the trial court must find by a preponderance of the evidence that relocation would be more detrimental than beneficial,

and it must make findings on the record regarding each factor. *Horner*, 151 Wn.2d at 895-97.

In the absence of a parenting plan, whether a party is “a person with whom the child resides a majority of the time” under RCW 26.09.430 is a question of fact. *In re Parentage of R.F.R.*, 122 Wn. App. 324, 330, 93 P.3d 951(2004).

A. Standard of Review.

This Court reviews a trial court’s decision on a notice of intent to relocate for abuse of discretion. *R.F.R.*, 122 Wn. App. at 327.

As already stated above, a trial court abuses its discretion if its decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). *See also In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993); *In re Marriage of Ricketts*, 111 Wn. App. 168, 171, 43 P.3d 1258 (2002). A trial court’s decision is “manifestly unreasonable” if it is outside the range of acceptable choices given the facts and the applicable legal standard. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

B. THE TRIAL COURT SHOULD HAVE PERMITTED THIS RELOCATION.

- 1. Key findings of fact made by the trial court were not supported by substantial evidence.**
 - (i) The relative strength, nature, quality, extent of involvement, and stability of the children's relationship with each parent, sibling and other significant persons in the children's lives.**

Judge Whitener found that during Amanda and Ryan's relationship, "both parents oversaw the daily care for the children." CP 33 (Finding of Fact 2.3.1). The record indicates otherwise.

Arguably, while Amanda and Ryan were still together, they necessarily shared in some parenting activities although Amanda was always the primary source of financial support for the children. 1 RP 23 – 24, 27, 32-33, 34, 45, 120; 2 RP 86; Ex. 7.

Amanda took far greater responsibility for parenting the children. 1 RP 32-33, 44, 45, 46; 2 RP 19-20, 66, 113, 115, 153-54, 188.

The children were and are very closely bonded to both parents; however, the nature of Amanda's relationship with the children includes handling the vast majority of parenting responsibilities,

including their medical care, their day care, their transportation and their financial support.

Within the same finding, Judge Whitener observed that Amanda had never personally visited Oklahoma, and that she had failed to “get an understanding of what her rights are as a military spouse.” She further commented that although Amanda believes Brendan is a good husband, Judge Whitener expressed doubt that he has proved his abilities as step-father to the children. CP 33 (Finding of Fact 2.3.1)).

This criticism was misplaced. Amanda should not be faulted for marrying Brendan, and certainly should not be faulted for marrying a service member. Transfers of duty stations are a common and frequent occurrence in family law cases, and our Legislature has specifically amended certain parenting-related statutes to avoid servicemembers being penalized for their necessary absences and transfers. *See, e.g.*, RCW 26.09.260.

Amanda did not need to travel to Oklahoma to learn what sort of benefits are available to her as a military wife, because Joint Base Lewis McCord could provide her with that information.

Importantly, Judge Whitener also found that Ryan “did not appear to have a stable living arrangement.” Judge Whitener further observed that “this was not encouraging” to her. CP 33 (Finding of Fact 2.3.1). Nonetheless, she declined to find this factor favored either parent.

Substantial evidence adduced at trial clearly shows this factor favors Amanda.

(ii) Prior agreements of the parties.

Judge Whitener found that any agreements made by these parties were “situational at best and dependent on the needs of the parents but at all times appeared to be what was best for the children and favored neither parent’s status as caregiver.” CP 33 (Finding of Fact 2.3.2).

This factor is related to the relocation itself, not the parent’s status as caregivers. As to the relocation, there clearly was no agreement between parties.

(iii) Disrupting contact to hearing the children and the objecting party or parent is more detrimental to the children than disrupting contact between the children and the person with whom the children reside a majority of the time.

Judge Whitener found that disrupting contact between the children and Ryan would be more detrimental than disrupting contact between the children and Amanda. CP 33 (Finding of Fact 2.3.3). She provided no rationale for this finding. Moreover, the evidence adduced at trial indicates that on the basis of Amanda assuming and performing the majority of parental responsibilities for the children, including providing their financial support alone would indicate it would be far more detrimental to the children to separate them from Amanda. Therefore, this factor favors Amanda.

(iv) The objecting party or parent is not subject to limitations under RCW 26.09.191.

Amanda agrees that this factor does not apply. CP 34 (Finding 2.3.4a).

(iv) The following parents or persons entitled to residential time with the children are subject to limitations under RCW 26.09.191.

Amanda agrees that this factor does not apply. CP 34 (Finding 2.3.4b).

(v) The reasons and good faith of each person seeking or opposing the relocation.

Although Judge Whitener did not expressly say so, her finding implies that she found Amanda seeking relocation was done in bad

faith. She found that Amanda was now married to a service member and wanted to relocate in order to build a more stable life for herself and the children. The notice of intent to relocate was filed April 17, 2015. While this matter was pending, and before a decision was made regarding the parenting plan, Amanda married, knowing that her new husband would be transferred to an out-of-state location. CP 34 (Finding 2.3.5).

It was improper for Judge Whitener to criticize Amanda for marrying a service member and seeking to relocate to Oklahoma with the children in order to be with Brendan.

Judge Whitener made no explicit finding as to the good faith or bad faith of Ryan objecting to the relocation.

Judge Whitener should find that neither party sought the relief they respectively requested in bad faith.

(vi) The age, developmental stage, and needs of the children, and the likely impact the relocation or its prevention will have on the children's physical, educational, and emotional development, taking into consideration any special needs of the children.

Judge Whitener confined her findings related to this factor to R.S.'s performance in school. She noted that records produced at trial

indicated his performance in school was “back up again to where it was prior to” Amanda and Ryan breaking up, “showing some sort of stabilization.” CP 34 (Finding 2.3.6).

Judge Whitener further found that the children’s interests would best be served by not allowing the disruption of a relocation, as everything they know and love is in Washington State. CP 34 (Finding 2.3.6).

The record indicated that Amanda had far more extended family who are an integral part of the boys’ lives than does Ryan. Trial testimony indicated that with the exception of his mother and her fiancé, the majority of his family live in Eastern Washington, and that Ryan has little contact with those family members. 1 RP 52, 2 RP 178.

In addition, Ryan saw his oldest son on average one time per year, and the children had yet to meet him at the time of trial. 2 RP 65, 99-100. This factor favors Amanda.

(vii) The quality of life, resources, and opportunities available to the children and to the relocating party in the current and proposed geographic locations.

Judge Whitener found that Amanda now has military benefits and a husband who earns \$4,500 per month. This finding contains the same criticism of Amanda for never personally visiting Oklahoma to

investigate living accommodations, schools for the children, or to even “get an understanding of what her rights are as a military spouse and what benefits and accommodations are available to her as a military spouse.” CP 34 (Finding 2.3.7).

Judge Whitener then found that both school systems are “comparable and offer essentially the same level of academics.” CP 34 (Finding 2.3.7).

Because this factor takes both the children and the relocating party into consideration, the evidence shows that the quality of life and schools are comparable in both locations, but Amanda’s quality of life would be far better in Oklahoma. In light of all of the evidence, and because Amanda was and is the children’s primary caregiver, this factor favors allowing Amanda to relocate to Oklahoma with the children.

(viii) The availability of alternative arrangements to foster and continue the children’s relationship with and access to the other parent.

Judge Whitener found that Skype, FaceTime and other remote modes of communication are available in this situation. CP 34 – 35 CP 34 (Finding 2.3.8). Judge Whitener seems to have found that because “modern technology has been available to the military for years,”

these alternative modes of communication are somehow more available to Amanda. Judge Whitener also specifically found that these alternatives “are not a viable option for these three young children.” CP 34 (Finding 2.3.8). None of the evidence supports this finding.

There was nothing produced at trial to show that civilian technology is somehow inferior to military technology in terms of remote modes of communication between family members. The record indicates that Amanda is the far more responsible parent of the two, and as such, would be far more likely to foster regular communication between the children and Ryan. Based on the record produced at trial, the opposite would not be near as likely. This factor favors Amanda.

(ix) Alternatives to relocation and whether it is feasible and desirable for the other party to relocate.

Judge Whitener found that both parents are currently employed in the State of Washington, and that it is not desirable for Ryan to relocate because his family and fiancé are in Washington. CP 35 (Finding 2.3.9).

Amanda does not dispute that Ryan would not want to move to Oklahoma. 2 RP 87. However, he did testify at trial that his oldest son would soon be moving to Oklahoma as well. 2 RP 100.

Amanda's only alternative to the relocation is to remain in Washington with the children, with the hope that Brendan will be transferred back to Washington after his assignment in Oklahoma is completed. This is not in Amanda or the children's best interest.

(x) The financial impact and logistics the relocation or its prevention.

Judge Whitener found that Amanda will incur expenses traveling between her residences to maintain and support her marriage. CP 35 (Finding 2.3.10).

There was no testimony at trial related to this factor.

2. The legal standard for adjudicating a relocation is different from the legal standard for adjudicating a parenting plan.

The legal standard by which a trial court determines a parenting plan is the best interest of the children. RCW 26.09.184 ("The objectives of the permanent parenting plan are to . . . otherwise protect the best interests of the child consistent with RCW 26.09.002"); RCW 26.09.002 ("In any proceeding between parents under this chapter, the best interests of the child shall be the standard

by which the court determines and allocates the parties' parental responsibilities.").

However, the legal standard by which a trial court determines a parent's request to relocate with their children is the best interest of the children *and the relocating parent*. "Particularly important in this regard are the interests and circumstances of the relocating person. Contrary to the trial court's repeated references to the best interests of the child, the standard for relocation decisions is not only the best interests of the child." *In re Marriage of Horner*, 151 Wn.2d 884, 894, 93 P.3d 124 (2004); *In re Marriage of Rostrom*, 184 Wn. App. 744, 752, 339 P.3d 185 (2014) ("The CRA directs consideration of the best interests of both the child and the relocating person.").

This record is devoid of any indication Judge Whitener gave consideration to Amanda's best interest when making her determination. This is arguably attributable to the fact that Judge Whitener found neither parent was the primary residential parent, entitled to the presumption found in the CRA. 3 RP 10; CP 6.

CONCLUSION

Of necessity, the CRA deprives one parent of the quality and quantity of time with their children they previously enjoyed. Such is the case here.

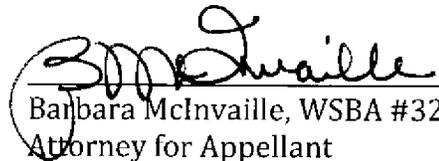
Amanda was primarily responsible for these children from the outset. Ryan assisted, but without any consistency. He never contributed anything toward the children's financial support. It was a manifest abuse of discretion for Judge Whitener not to designate Amanda primary residential parent.

Substantial evidence does not support Judge Whitener's findings regarding the relocation. She did not make findings specific to RCW 26.09.187(3).

This court should reverse the trial court and remand this case for entry of findings of fact that comport with the evidence adduced at trial.

DATED this 6th day of May, 2016.

RESPECTFULLY SUBMITTED,


Barbara McInvaile, WSBA #32386
Attorney for Appellant

Declaration of Transmittal

Under penalty of perjury under the laws of the State of Washington I affirm the following to be true:

On this date I transmitted the original document to the Washington State Court of Appeals, Division II by the e-filing portal, and delivered a copy of this document via United States Postal Service, postage prepaid, to:

Ryan Schwarder
714 - 140th St. South
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and via e-mail to:

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Signed at Tacoma, Washington on this 6th day of May, 2016.


Barbara McInville

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May 06, 2016 - 3:41 PM

Transmittal Letter

Document Uploaded: 3-483386-Appellant's Brief~3.pdf

Case Name: In re Orse (Pellanda) and Schwarder

Court of Appeals Case Number: 48338-6

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Amended brief - only amended to contained proper citation to supplemental clerk's papers.

Sender Name: Barbara Mcinville - Email: barb@hellandlawgroup.com