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Division II
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No. 53184-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SARA VALENCIA,

Appellant,

v.

GUSTAVO VALENCIA,

Respondent.

Appeal from the Superior Court for Pierce County
The Honorable Karena Kirkendoll

Brief of Respondent

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Introduction.....	1
Statement of the Case	2
A. Background.....	2
B. Father’s Residential Time	6
C. Telephone Contact.....	9
D. Relocation	10
E. School Contacts.....	11
F. Counseling and Healthcare	11
G. Father’s Psychological Evaluation.....	15
H. Reunification Counselor Rochelle Long.....	16
I. Reunification Counselor Jennifer Knight.....	17
J. Co-Parenting Counselor Lori Harrison	18
K. Supervised Visitation	19
L. Court Ruling.....	19
Argument	20
A. Standard of Review	21
B. Framework of Relevant Statutes	23
1. RCW 26.09.520, the Child Relocation Act.....	24
2. RCW 26.09.191, Parenting Plan Restrictions	27
3. RCW 26.09.260, Modification of Parenting Plan	27
C. Substantial Evidence Supports the Findings Regarding that the Court Properly Analyzed the Factors of RCW 26.09.520, the Child Relocation Statute	29

D. The Court Properly Allowed Jennifer Knight to Testify as to the Correct Course of Action the Mother Should have Taken when Valeria Would Not Speak to her Father on the Phone.....39

E. Substantial Evidence Supported the Finding that the Mother Did Not Participate in the Triple P Program40

F. Trial Court’s Award of Attorney’s Fees40

G. Attorney’s Fees on Appeal44

Conclusion.....44

TABLE OF AUTHORITIES

Cases	Page
<i>In re Marriage of Rostrom</i> , 184 Wn. App. 744, 339 P.3d 185 (2014)	21
<i>In re Parentage of Schroeder</i> , 106 Wn. App. 343, 349, 22 P.2d 1280, 1284 (2001)	21
<i>In re Marriage of Schneider</i> , 82 Wn. App. 471, 476, 918 P.2d 543 (1996)	21
<i>In re Marriage of Littlefield</i> , 133 Wn. 2d 39, 57, 940 P.2d 1362 (1997)).....	21
<i>In re Marriage of Fahey</i> , 164 Wn. App. 42, P.3d 128 (2011).....	21, 22
<i>In re Marriage of Horner</i> , 151 Wn.2d 884, 893, 93 P.3d 124 (2004).....	21,24, 26
<i>In re Marriage of Lawrence</i> , 105 Wn. App. 683, 686, 20 P.3d 972 (2001)	21
<i>In re Marriage of Kim</i> , 179 Wn. App. 232, 240, 317 P.3d 555 (2014)	22, 23
<i>In re Marriage of Chandola</i> , 180 Wn.2d 632, 642, 327 P.3d 644 (2014)	22
<i>Korst v. McMahon</i> , 136 Wn. App. 202, 206, 148 P.3d 1081 (2006).....	22
<i>In re Marriage of Rockwell</i> , 141 Wn. App. 235, 242, 170 P.3d 572 (2007)	22
<i>In re Marriage of Rich</i> , 80 Wn. App. 252, 259, 907 P.2d 1234 (1996).....	22
<i>In re Marriage of Laidlaw</i> , 2 Wn. App. 2d 381, 386, 409 P.3d 1184 (2018).....	23
<i>In re Marriage of Bobbitt</i> , 135 Wn. App. 8, 29-30, 144 P.3d 306, 316-17 (2006).....	23

<i>In re Custody of Osborne,</i> 119 Wn. App. 133, 140, 79 P.3d 465 (2003).....	24
<i>In re Marriage of Wehr,</i> 165 Wn. App. 610, 615, 267 P.3d 1045 (2011).....	24
<i>Bay v. Jensen,</i> 147 Wn. App. at 641, 196 P.3d 753	26
<i>In re Marriage of Watson,</i> 132 Wn. App. 222, 232, 130 P.3d 915, 919 (2006).	27
<i>Bower v. Reich,</i> 89 Wn. App. 914, 946, P.2d 1216 (1997)	27
<i>In Re Marriage of McDole,</i> 122 Wn. 2d 604, 610, 859 P.2d 1239 (1993)	28
<i>George v. Helliard,</i> 62 Wn. App. 378, 383, 814 P.2d 238 (1991).....	29
<i>Anderson v. Anderson,</i> 14 Wn. App. 366, 368, 541 P.2d 996 (1975), <i>review denied,</i> 86 Wn. 2d 1009 (1976).....	29
<i>In re Marriage of Raskob,</i> 183 Wn. App. 503, 513-14, 334 P.3d 30 (2014)	29
<i>In re Marriage of Pennamen,</i> 135 Wn. App. 790, 804, 146 P.3d 466 (2006).....	30, 31
<i>Selivanoff v. Selivanoff,</i> 12 Wn. App. 263, 529 P.2d 486 (1974)	27
<i>In re Marriage of Velickoff,</i> 95 Wn. App. 346, 356, 968 P.2d 20 (1998).....	34, 34, 36
<i>Chapman v. Perera,</i> 41 Wn. App. 444, 455-56, 704 P.2d 1224, <i>review denied,</i> 104 Wn.2d 1020 (1985).....	40
<i>In re Marriage of Crosetto,</i> 82 Wn. App. 545, 550, 918 P.2d 954 (1996).....	40, 41

<i>In re Marriage of Greenlee</i> , 65 Wn. App. 703, 708, 829 P.2d 1120, <i>review denied</i> , 120 Wn.2d 1002 (1992).....	40
<i>In re Marriage of Morrow</i> , 53 Wn. App. 579, 590, 770 P.2d 197 (1989).....	40
<i>Mattson v. Mattson</i> , 95 Wn. App. 592, 606, 976 P.2d 157 (1999).	41
<i>Eide v. Eide</i> , 1 Wn. App. 440, 445-46, 462 P.2d 562 (1969)	41
<i>In re Marriage of Burrill</i> , 113 Wn. App. 863, 873, 56 P.3d 993 (2002), <i>review denied</i> , 149 Wn.2d 1007 (2003).....	41, 42, 43

Statutes

RCW 26.09.191	1, 2, 20, 23, 25, 27, 30, 33, 37, 44
RCW 26.09.520	23, 24, 26, 29, 30, 44
RCW 26.09.430-480	2
RCW 26.09.481	5
RCW 26.09.187	20, 44
RCW 26.09.184	20, 44
RCW 26.09.002	20, 36
RCW 26.09.260	24, 27, 28, 44
RCW 26.09.405-.560	24
RCW 26.09.191(3).....	27
RCW 26.09.191(3)(e)	27
RCW 26.09.191(3)(f).....	27
RCW 26.09.191(3)(g).....	27
RCW 26.09.260(1).....	27
RCW 26.09.260(2).....	29
RCW 26.09.260(6).....	29

RCW 26.09.520(4).....	30
RCW 26.09.520(1).....	31
RCW 26.09.520(2).....	32
RCW 26.09.520(3).....	32
RCW 26.09.520(4).....	32
RCW 26.09.520(5).....	37
RCW 26.09.520(6).....	38
RCW 26.09.520(7).....	38
RCW 26.09.520(8)(9).....	39
RCW 26.09.520(10).....	39
RCW 26.09.620(11).....	39
RCW 26.09.140	40
RCW 26.09	44

Court Rules

RAP 18.9.....	40
RAP 18.1.....	44

I. INTRODUCTION

Sara Valencia and Gustavo Valencia are the Mother and Father of two teenage girls. After a trial on a Petition for Modification of the Parenting Plan and an Objection to the Mother's proposed relocation of the children, the Trial Court entered detailed Findings of Fact, Conclusions of Law, a Final Parenting Plan and final orders. Because there was ample evidence at trial that the Mother's behavior constituted emotional abuse, alienation, and abusive use of conflict, the Trial Court placed the children with the Father and imposed restrictions on the Mother's time with the children and decision-making under RCW 26.09.191. The Mother has appealed the decision, alleging that the Trial Court abused its discretion. However, her challenges to the Trial Court's exercised discretion ignore the plethora of evidence of the Mother's abusive use of conflict and her repeated attempts to alienate the children from their Father, resulting in the RCW 26.09.191 restrictions.

The Trial Court properly awarded the Father his attorney's fees based on the Mother's intransigence.

II. STATEMENT OF THE CASE

A. Background.

The parties were divorced when a Decree of Dissolution was entered on November 13, 2013 after trial before The Honorable Brian Tollefson. (Exh. 1). The Final Parenting Plan entered the same day designated the Mother as the primary residential parent of the parties' two children, Valeria and Natalia, and required joint decision-making for all health and education decisions. (Exh. 1); RP 63, 550. There were no RCW 26.09.191 restrictions in the Final Parenting Plan. (Exh. 1). The Mother resided in Washington and the Father in California at the time the Final Parenting Plan was entered. (Exh. 1); RP 64, 693.

The Final Parenting Plan included the statutory requirements for a relocation of a child, RCW 26.09.430-480, Paragraph 3.14. (Exh. 1). Section 6 of the Parenting Plan, "Other Provisions" included the following:

- 6.1 Both parents desire to remain responsible and active in their children's growth and development consistent with the best interest of the child. The parents will make a mutual effort to maintain open, ongoing communication concerning the development, needs and interests of the children and will discuss together any major decisions which have to be made about or for the children.

- 6.2 The children shall have liberal telephone privileges with the parent with whom the children are not then residing without interference of the residential parent. If the parents cannot agree on the definitions of "liberal" it shall be defined as one telephone call per day at a reasonable hour and for a reasonable duration. The daughters have their own cell phone (one) which shall be accessible to both parents. The children shall also have liberal email and Skype and/or Face Time privileges as well. None of these modes of communication shall be monitored or interfered with by the parent who has the children in his or her home at the time.
- 6.3 Each parent shall have equal and independent authority to confer with school, daycare and other programs with regard to the children's progress and each parent shall have free access to school, daycare, and other records. All education and daycare decisions must be jointly made by the parents (see also 4.2).
- 6.4 Each parent is to provide the other parent promptly upon receipt with information concerning the well-being of the children, including, but not limited to, copies of report cards, school meeting notices, vacation schedules, class programs, requests for conferences, results of standardized or diagnostic tests, notices of activities involving the children, samples of school work, order forms for school pictures, all communications from health care providers, the names, addresses and telephone numbers of all schools, health care providers, regular daycare providers, and counselors, unless this information is available to both parties.

...

6.11 The children shall engage in counseling with an agreed-upon counselor covered by mother's insurance. The children shall not be seen by Pamela Elderain or any other counselor or therapist who has seen mother or father in a therapeutic setting. The children shall remain in counseling as long as it's recommended by their counselor.

...

6.13 Each parent shall keep the other apprised of his or her current residence address and residence telephone number. Notification of any change must be provided within 24 hours of the change.

(Exh. 1).

On June 2, 2015, the Mother filed a Petition to change or modify the Parenting Plan as to Valeria only, alleging that:

The children's environment under the custody decree/parenting plan/residential schedule is detrimental to the children's physical, mental or emotional health and the harm likely to be caused by a change in environment is outweighed by the advantage of a change to the children.

Gustavo Valencia has a history of acts of domestic violence against the Petitioner of which the oldest child, Valeria is aware. Valeria has expressed her desire not to spend time with her father and forcing her to do so may cause irreparable emotional harm to her.

The older child, Valeria, has expressed her wishes not to spend time with her father to both her counselor and her mother. Requiring her to continue to have

visitation with her father will be detrimental to her emotional well-being and is not in her best interest.

(Exh. 3).

The Father filed a Response and Counterclaim to the Mother's Petition to Modify the Parenting Plan, alleging that the Mother had withheld the children from him, interfered with the children's counselor, engaged in a pattern of abusive use of conflict and parental alienation to impair the Father's relationship with the children. (Exh. 109). The Father requested that both children be placed with him. *Id.*

On May 24, 2018, the Mother filed a Notice of Intended Relocation of the children. (Exh. 107). The Father filed an Objection to the Notice of Intended Relocation. (Exh. 108). The objection was treated as a Petition for Modification of the Parenting Plan pursuant to relocation. RCW 26.09.480(1).

The Trial Court set a trial date but the trial date was continued at least seven times. RP 8. Trial occurred before the Court on October 23, November 13, November 14, November 15, November 16, and December 10, 2018. CP 18. Witnesses testifying at trial included the Mother, the Father, the reunification counselor, Jennifer Knight, the visitation supervisor, Kate Lee, and the co-parenting

counselor, Lori Harrison. CP 18. The Trial Court delivered its oral opinion and entered final Orders on January 9, 2019. CP 1-20. The Trial Court reserved for later presentation judgment for daycare, proportionate share of airfare, and attorney fees and costs, which Orders were entered on February 14, 2019. CP 38-42.

Based upon the testimony at trial, the Court's review of 179 trial exhibits and the Court's observations of the credibility of the parties, the Court found that the Mother had engaged in a long-term pattern of alienation of the children from their Father and had engaged in an abusive use of conflict. CP 2; RP 872. The Trial Court found that since the Final Parenting Plan was entered in November, 2013, the Mother repeatedly interfered with the Father's residential time and attempted to use the Court system to restrict the Father's access to the children. CP 2; RP 872.

B. Father's Residential Time.

The Trial Court found that the Mother refused to comply with the Parenting Plan by refusing to cooperate and confirm reservations when the Father wanted to set up long distance visitation over multiple school breaks. CP 2; RP 704, 873. The Mother refused to co-parent. RP 91. The Mother created issues with the Father's attempts to exercise visitation, including having to purchase the

plane tickets with his own money when the Mother was responsible for a share. RP 91, 704, 706. The Mother would not exchange Natalia for visitation exchanges. RP 97. The Mother refused to respond to the Father about what days of travel and flights the children would take, escalating the costs of travel. CP 2; RP 706, 873. The Mother refused to reimburse the Father for at least four of the children's visitation trips to California for which the Trial Court entered judgments in favor of the Father. (Exh. 38, 230, 231, 232); CP 2, 38-42; RP 707-709, 873. The Mother gave the Father the wrong summer vacation dates for Summer 2014, trying to shorten his visitation time. RP 706, 873. The Mother tried to block the Father's 2014 Spring Break visit. CP 2; RP 64, 873. The Father had residential time scheduled with both children for Spring Break 2014 but the Mother could not afford to pay her portion of the required transportation. RP 74-75, 707. Therefore, the paternal grandfather intervened and paid for the Mother's share of the transportation. RP 75, 707.

The Father had summer visitation in 2014 with both girls pursuant to the provisions of the Parenting Plan. RP 75. The day after Valeria returned from her visitation with her Father in the summer of 2014, Valeria allegedly did not want to speak to him on

the phone. RP 99. This incident was when the Father first became aware that issues had arisen regarding Valeria. RP 99. For Valeria not to want to talk to her Father, something must have happened. RP 100.

The Father had visitation with Natalia only in the summer of 2015. RP 78. The Mother shortened the Father's Spring Break visit in 2016 by days and tried to give him the wrong summer vacation dates. RP 107, 709, 710, 873. The Mother attempted to shorten the Father's Thanksgiving break with Natalia in 2015. RP 337.

The Father had not had any regular visitation with his daughter, Valeria, for over four years from 2014 until after the trial date in 2018. RP 66. The remaining visitations in the Parenting Plan occurred with Natalia only, not with Valeria. RP 76-79.

The Father moved to Washington in May 2016 to be closer to the children and to start the reunification process with Valeria. RP 730. The Mother denied visitation to the Father after he relocated to Washington. RP 737.

The Mother failed to show up for exchanges of Natalia in the summer of 2016 causing the Father to miss his residential time. RP 752-754.

C. Telephone Contact.

The Trial Court found that the Mother consistently interfered with the Father's phone contact with the children. CP 2; RP 872. The Father was to have liberal and unmonitored phone contact per the 2013 Parenting Plan. (Exh. 1); RP 872. The Father was never allowed by the Mother to have private conversations with his daughters. RP 720. The Mother monitored the children's phone contacts so that the children had to be secretive in their communications with their Father or abruptly end conversations and delete text messages so the Mother would be unaware of the communication. CP 2; RP 720, 721, 872. The Mother removed approximately four cell phones from the two children that were provided by the Father. CP 2. RP 720, 722, 873. A lost phone or a non-working phone was constantly an issue. RP 250. As a consequence, the Father would lose contact with the girls for weeks, and sometimes, months at a time. RP 247, 722. In February 2016 the Father flew from California to Washington State to personally deliver a cell phone to the children after the Mother had cut off all contact between him and the children. CP 2; RP 727, 873. Another phone that was missing was discovered hidden in a drawer under the

control of the Mother at a later date. CP 2; RP 723, 873. The Mother admitted that she actually read the children's text messages. RP 567.

D. Relocation.

The Trial Court found that the Mother relocated on at least three occasions since the Final Parenting Plan was entered without providing the Father a home address or complying with the provisions of the relocation statute or the Final Parenting Plan. RP 730, 873. Within one week after the 2013 Parenting Plan was entered, the Father emailed the Mother inquiring as to where she had moved. RP 568, 729, 873. The Mother admitted that she did not respond to the Father's text messages or emails. RP 534-535. The Mother admitted that the Court ordered that she provide the Father with her address. RP 350. The Mother moved to the Snohomish County/North King County area and failed to provide the Father with a current address. RP 874. The Mother subsequently provided a Relocation Notice to Pierce County Superior Court, but failed to provide her home address or school address for the children, and never updated the information. (Exh. 92); CP 2; RP 874. The Father flew up from California to Washington in March of 2016, but did not know the children's address or where they lived. RP 728. The Father had to meet the children at a shopping mall. RP 728. In May 2018

the Mother filed another Notice of Relocation, this time to California, and again failed to provide an address or school for the children. (Exh. 107); CP 2-3; RP 764. The Mother had this information by August 2, 2018, but failed to provide or update the relocation information. RP 764, 874. The Mother admitted at trial that she would not give the Father her address. RP 277, 350.

E. School Contacts.

The Trial Court found that the Mother removed the Father from the children's school information so that he was not allowed to have contact with the children at their schools. CP 2, 348, 576; RP 874. The Father was not even listed on school records. RP 578, 580. In one instance, security was called when the Father attempted to visit Natalia at her middle school. RP 734, 735, 874. The girls were removed from their classrooms, located in a room with another teacher and the Father was asked to leave. RP 735. The Mother received several BECCA letters regarding the children's truancy. (Exh. 218); RP 657. The Mother testified that she did not know what a BECCA letter was. RP 657.

F. Counseling and Healthcare.

The Trial Court found the Mother neglected to adequately provide for the children's mental health care. CP 3; RP 875. The

Final Parenting Plan entered in 2013 required the Mother to have the children in counseling immediately. (Exh. 1); RP 699, 875. The Mother refused to comply with the Court's order that the children immediately begin counseling and refused to communicate with the Father concerning this issue. RP 550, 875. The Mother admitted that the Final Parenting Plan provided for joint decisions on non-emergency healthcare. RP 550-551. The Mother admitted that she did not provide the Father with the names of all the counselors, doctors and medical providers of the children. RP 554. The Father testified that he had no idea about how many times his daughters may have been to the hospital, dentist, or orthodontist. RP 105. The Mother admitted that she did not advise the Father of the counseling the children were enrolled in with Military One Source. RP 556. The Mother violated the joint decision-making provision of the Parenting Plan by unilaterally taking the older child, Valeria, to a counselor, Kathi Jackson, in December 2014 and secretly enrolling the child in counseling for purposes other than that of the 2013 Court Order. RP 84, 558, 560, 699, 875. The Mother admitted that she was wrong in not disclosing counseling information to the Father. RP 561. Once the Father learned that Valeria was in counseling, he flew from his home in San Diego to meet with the counselor in

Snohomish County. RP 82, 701. The Father attempted repeatedly to contact the counselor, Ms. Jackson, but was unsuccessful. RP 83, 701.

The Mother agreed that when Valeria returned home at the end of August 2014 and did not want to speak to her Father that this was abnormal. RP 563. The Mother coached the children into writing fake suicide letters to the trial judge stating they would harm themselves if they had to visit their Father. RP 125, 129, 380, 751, 874. The girls wrote in their letters, "I don't want to see him any more." RP 124-125. The Mother gave the letters to her attorney, claiming the children were suicidal, but did not seek mental health counseling, emergency room intervention or an appointment with their pediatrician due to the alleged suicide concerns. RP 874. The girls later recanted, confessing to reunification counselor, Jennifer Knight, that the letters were complete lies. RP 380, 381, 875. The letters caused the Father's reunification process with Valeria to stop. RP 755.

The Mother alleged that after Natalia had a visit with her Father in 2016, she was in pain, unable to walk and was bleeding from her vagina. RP 335, 718. At trial the Mother was asked:

Q: And did you take her to the emergency room?

A: I did.

Q: And did you ever follow up with Mr. Valencia regarding those issues?

A: I did not.

RP 335. The Mother did not file any pleadings with the Trial Court or advise the Father of Natalia's condition. RP 335. The Trial Court intervened with directed questions. RP 342-343. The Mother responded that the Everett police were called. RP 342. Yet, as the Trial Court pointed out, there was no police report, Child Protective Services was not involved, and no medical information that would "indicate anything awry here occurred." RP342-343.

The Mother failed to obtain any mental health counseling for Natalia. RP 875. Natalia has not had individual counseling since November, 2013. RP 626, 875. The Mother admitted wrongdoing by failing to find healthcare providers and counselors for the children. RP 641. When Natalia was actually hospitalized for a week in February 2018 for an apparent suicidal ideation at Children's Hospital in Seattle, the Mother failed to provide any information or medical records to the Father or to the Court. RP 589, 875. At no time since Natalia's discharge has the Mother

obtained counseling for Natalia, despite counseling being recommended. RP 588, 589, 876.

The Mother never communicated with the Father about taking the children to the dentist or orthodontist or the hospital. RP 105. The Mother sought orthodontic treatment from Dr. Kahlon without the Father's knowledge or consent, refused to communicate with the Father concerning Valeria's dental issues or respond to his multiple direct questions concerning such issues as evidenced by emails. RP 703, 704, 876.

G. Father's Psychological Evaluation.

The Court ordered the Father to undergo a psychological evaluation. (Exh. 16); RP 92. The Father submitted to a psychological evaluation during the litigation process. (Exh. 50).

The evaluator concluded that

Based upon the findings of this psychological evaluation, there is no evidence of major psychological disturbances in Mr. Valencia's overall presentation or any propensity for harmful behavior or problems at this time. Consequently, it does not appear that there are any factors that would render Mr. Valencia unfit to care for his young children.

(Exh. 50); RP 261.

H. Reunification Counselor Rochelle Long's Report.

The Court found that the Mother refused to cooperate with scheduled Court ordered reunification counseling with Rochelle Long and instead took Valeria on a month-long trip out of state in the Summer 2016 to ensure that she was not available for the counseling. RP 269, 367,741, 876. The Guardian *ad Litem* referred the parties to Rochelle Long as a reunification counselor. (Exh. 204). Ms. Long began work with the family in June 2016 after the Father moved back to Washington. RP 740. The Mother had to be available promptly since trial was set for later that summer. RP 115. The Mother returned the child for counseling with Ms. Long under the Court Order, but refused to timely respond to the counselor about scheduling. RP 741, 876.

Rochelle Long submitted a treatment plan for the children and their father. (Exh. 204). Natalia described her Father as “loving, kind, and a good dad.” (Exh. 204, page 4); RP 267. She wished her sister would be with her during their Father’s residential time. (Exh. 204, p. 6). Ms. Long recommended that the Mother submit to a psychological evaluation to address issues around parental alienation and to assist with the reunification therapy process. *Id.* After Ms. Long recommended reunification between the children

and their Father, the Mother raised bias and licensing issues against the counselor. RP 751, 876. Due to these issues, the counselor, Ms. Long, was no longer willing to work with the family. RP 876.

I. Reunification Counselor Jennifer Knight.

The reunification counselor, Jennifer Knight, met with the family 24 times. RP 377. The Mother failed to deliver the children to two of the scheduled sessions. RP 755. Ms. Knight testified that the Mother referred to the Father as a monster and that he was not capable of being a nurturing father. RP 376. Ms. Knight testified that the children were unable to indicate any reason why they were not seeing their Father and had not seen their Father in years with any regularity. RP 379, 390, 877. Ms. Knight further testified the children showed all the classic signs of alienation from a parent, including parroting their Mother's negative comments about the Father, including calling him a monster, and being unable to recall any good memories of their childhood with their Father. RP 376-379, 381, 406. This was in stark contrast to the children's statements made to the Guardian *ad Litem*, Sheri Nakashima, in her 2013 report. (Exh. 227); RP 877. Ms. Knight testified that the Mother's conduct regarding the children's phones created concerns about alienation. RP 383-384. Ms. Knight testified that children being

alienated from a parent can have lasting detrimental effects into adulthood, including impacting their future ability to bond with a partner in life. CP 4; RP 87, 379, 391. Ms. Knight opined that removal of the children from the offending parent is the only option for reversing the effects of the alienation and ongoing placement with the offending parent will not allow the children to overcome the alienation from the innocent parent. CP 4; RP 391, 878.

J. Co-Parenting Counselor Lori Harrison.

The parties commenced a co-parenting class with Lori Harrison. RP 134, 275-276, 464. Ms. Harrison opined that a loyalty-bind may be in effect with this family, testifying that if the children perceive their residential parent as having difficulty with the other parent or not liking the other parent, they will also adopt that thought pattern. RP 470. Ms. Harrison was concerned that the two girls were being subjected to a loyalty-bind. RP 470. The Mother refused to schedule future co-parenting sessions that did not interfere with the Father's work schedule out of principle, even though she was off work, the counselor had appointments available, and the Father wanted to schedule appointments. RP 473-474, 878. Thus, due to the Mother's refusal to schedule in good faith, co-parenting counseling with Lori Harrison had to cease. RP 474, 878.

When the Father suggested an alternative counselor, the Mother refused to respond. RP 879. The Father described his willingness to allow the girls to have access to the Mother if he has custody. RP 136.

K. Supervised Visitation.

Kate Lee was selected as a visitation supervisor for the children and their Father. RP 421. As to Court ordered supervised visitation, the Mother feigned being confused as to dates and times, causing the supervisor, Kate Lee, to cancel supervised visitation dates. RP 429-432, 876. During one visitation, one of the girls was observed attempting to bait her Father during the visitation by being extremely disrespectful and surreptitiously recording his response. RP 133, 435-436, 877. The other child made a false accusation of physical abuse against the Father, and although the visitation supervisor indicated the child was lying, the Mother tried to leverage the accusation to restrict the Father's already limited time with the children through further Court action. RP 425-427, 877.

L. Court Ruling.

The Trial Court entered detailed Findings and a permanent Parenting Plan. CP 1-17. Based on the evidence at trial, the new Plan imposed restrictions on the Mother's time with the children

under RCW 26.09.191. CP 2-5. The Court ordered all parenting time to be professionally supervised for four hours on a weekend. CP 5. The Mother was ordered to seek a psychological evaluation with a parenting component to address the conflicts she had created with regard to the Parenting Plan and to acknowledge her role in alienating the children from their Father. CP 5.

III. ARGUMENT

Mother assigns nineteen (19) errors in her Opening Brief, alleging that the Court:

(a) abused its discretion in Assignments of Errors 1, 2, 3, 5, 6, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19;

(b) failed to articulate the evidence it relied upon in Assignment of Error No. 1, 3, 5, 6;

(c) failed to provide for the best interests of the children with entry of the Parenting Plan that is inconsistent with RCW 26.09.187, 26.09.184 and 26.09.002 in Assignment of Error No. 4; and

(d) alleged that findings were based on untenable grounds in Assignments of Errors Nos. 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17.

A. Standard of Review.

Trial Courts have wide discretion to decide where and with what parent a child will reside when it comes to child custody and relocation matters. *In re Marriage of Rostrom*, 184 Wn. App. 744, 751-52, 339 P.3d 185 (2014). Because of the Trial Court’s unique opportunity to observe the parties, the Appellate Court should be “extremely reluctant to disturb child placement dispositions.” *In re Parentage of Schroeder*, 106 Wn. App. 343, 349, 22 P.2d 1280, 1284 (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, 57, 940 P.2d 1362 (1997)).

Accordingly, this Court reviews both the Trial Court’s rulings on child relocation and residential provisions in a Parenting Plan for an abuse of discretion. *In re Marriage of Fahey*, 164 Wn. App. 42, 66, 262 P.3d 128 (2011) (citing *In re Marriage of Horner*, 151 Wn.2d 884, 893, 93 P.3d 124 (2004)) (relocation); *In re Marriage of Lawrence*, 105 Wn. App. 683, 686, 20 P.3d 972 (2001) (Parenting Plan). A Trial Court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds or untenable reason. *Rostrom*, 184 Wn. App. at 750. This can occur if the Trial Court applies an incorrect legal standard, substantial

evidence fails to support its findings, or the findings do not meet the requirements of the correct standard. *In re Marriage of Kim*, 179 Wn. App. 232, 240, 317 P.3d 555 (2014).

Under this standard of review, the Trial Court's findings of fact are verities on appeal as long as they are supported by substantial evidence in the record. *In re Marriage of Chandola*, 180 Wn.2d 632, 642, 327 P.3d 644 (2014). Substantial evidence exists if the record contains evidence of “a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *In re Marriage of Fahey*, 164 Wn. App. 42, 55, 262 P.3d 128 (2011). This is a deferential standard. The Appellate Court views the evidence and all reasonable inferences in the light most favorable to the prevailing party. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006). Where the Trial Court has weighed the evidence, the reviewing Court's role is simply to determine whether substantial evidence supports the findings of fact and, if so, whether the findings in turn support the Trial Court's conclusions of law. *In re Marriage of Rockwell*, 141 Wn. App. 235, 242, 170 P.3d 572 (2007). An Appellate Court should “not substitute [its] judgment for the Trial Court, weigh the evidence, or adjudge witness credibility.” *In re Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234 (1996).

The party challenging the Trial Court's relocation decision – here, the Mother – bears the heavy burden of showing a manifest abuse of discretion on the part of the Trial Court. *Kim*, 179 Wn. App. at 240.

Unchallenged findings of fact are verities on appeal, and unchallenged conclusions of law become the law of the case. *In re Marriage of Laidlaw*, 2 Wn. App. 2d 381, 386, 409 P.3d 1184 (2018).

The Court reviews challenges to an award of attorneys' fees under the same abuse of discretion standard. The Trial Court's attorney fee award under a statute or contract is a matter of Trial Court discretion, which Appellate Courts will not disturb absent a clear showing of an abuse of that discretion. *In re Marriage of Bobbitt*, 135 Wn. App. 8, 29-30, 144 P.3d 306 (2006). A fee award must be accompanied by findings of fact and conclusions of law to establish a record adequate for review. *Laidlaw*, 2 Wn. App. 2d at 392.

B. Framework of Relevant Statutes.

The Mother argues that the Trial Court misapplied RCW 26.09.520, the statute governing a Trial Court's decision on relocation of children; RCW 26.09.191, the statute governing a Trial Court's decision to impose restrictions on a parent's contact with the

children; and RCW 26.09.260, the statute governing a Trial Court's decision to modify a Parenting Plan.

1. RCW 26.09.520, the Child Relocation Act.

Washington's Child Relocation Act is codified at RCW 26.09.405-.560. The Act imposes notice requirements and sets standards for relocating children who are the subject of Court Orders regarding residential time. *In re Custody of Osborne*, 119 Wn. App. 133, 140, 79 P.3d 465 (2003). The Act provides:

A person with whom the children reside a majority of the time shall notify every other person entitled to residential time or visitation with the child under Court Order if the person intends to relocate. Due process is satisfied when a preponderance of the evidence standard is applied to rebut the statutory presumption favoring a primary residential parent's relocation decision.

In re Marriage of Wehr, 165 Wn. App. 610, 615, 267 P.3d 1045 (2011). The Child Relocation Act does not apply a "best interests of the child" standard; instead it applies eleven (11) specific factors for the Court to consider. *In re Marriage of Horner*, 151 Wn. 2d 884, 895, 93 P.3d 124 (2004).

The eleven (11) factors enumerated in RCW 26.09.520 are as follows:

The person proposing to relocate with the child shall provide his or her reasons for the intended

relocation. There is a rebuttable presumption that the intended relocation of the child will be permitted. A person entitled to object to the intended relocation of the child may rebut the presumption by demonstrating that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person, based upon the following factors. The factors listed in this section are not weighted. No inference is to be drawn from the order in which the following factors are listed:

(1) The relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent, siblings, and other significant persons in the child's life;

(2) Prior agreements of the parties;

(3) Whether disrupting the contact between the child and the person seeking relocation 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.

In relocation cases, the Trial Court must consider each of the factors in RCW 26.09.520 and document its findings in the Findings of Fact or, failing that, the record must reflect that substantial evidence was entered on each factor and the Court's oral ruling must reflect that the Court considered each factor. *Horner*, 151 Wn. 2d at 894. The Appellate Court will defer to the Trial Court's ultimate relocation ruling unless it is manifestly unreasonable or based on untenable grounds or untenable reasons under the abuse of discretion standard. *Horner*, 151 Wn.2d at 894; *Bay v. Jensen*, 147 Wn. App. 641, 651, 196 P.3d 753.

2. RCW 26.09.191, Parenting Plan Restrictions.

RCW 26.09.191(3) establishes limitations in a Parenting Plan that are relevant here. Limitations may be based on involvement or conduct that would adversely affect a child's best interests because of a parent's abusive use of conflict. RCW 26.09.191(3)(e). Restrictions may also be based on a parent who has withheld from the other parent access to the child. RCW 26.09.191(3)(f). The statute also allows the Trial Court to limit the terms of the Parenting Plan if it finds a parent's conduct is "adverse to the best interests of the child." RCW 26.09.191(3)(g).

A Court has authority to impose restrictions under RCW 26.09.191 when modifying a Parenting Plan to the same extent it has such authority at the time of dissolution. *In re Marriage of Watson*, 132 Wn. App. 222, 232, 130 P.3d 915, 919 (2006).

3. RCW 26.09.260, Modification of Parenting Plan.

The standards for modifying a Parenting Plan are statutorily prescribed by RCW 26.09.260. *Bower v. Reich*, 89 Wn. App. 914, 946, P.2d 1216 (1997).

Under RCW 26.09.260(1) a Court shall not modify a prior Parenting Plan unless the Court finds "upon the basis of facts that have arisen since the prior decree or plan or that were unknown to

the Court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interests of the child and is necessary to serve the best interests of the child." Subsection (2) provides that the Court shall retain the residential schedule established by the decree or parenting plan unless (c) the child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of change to a child.

A Court has broad discretion in modification proceedings. *In Re Marriage of McDole*, 122 Wn. 2d 604, 610, 859 P.2d 1239 (1993). The Trial Court's Findings of Fact are upheld when supported by substantial evidence. *Id.* The Trial Court's decision to modify the Parenting Plan under RCW 26.09.260 shall be confirmed unless the Trial Court exercises its discretion in an untenable or manifestly unreasonable way. *Id.*

Courts have interpreted RCW 26.09.260 to mean that a modification is permissible only when there is sufficient evidence to support a finding that: "(1) there has been a change in circumstances, (2) the best interests of the child will be served, (3)

the present environment is detrimental to the child's well-being, and (4) the harm caused by the change is outweighed by the advantage of the change." *George v. Helliard*, 62 Wn. App. 378, 383, 814 P.2d 238 (1991) (quoting *Anderson v. Anderson*, 14 Wn. App. 366, 368, 541 P.2d 996 (1975), *review denied*, 86 Wn. 2d 1009 (1976)).

However, the Trial Court is not required to consider the factors contained in RCW 26.09.260(2) when a Trial Court modifies a Parenting Plan in the context of a relocation proceeding and instead RCW 26.09.260(6) applies. *In re Marriage of Raskob*, 183 Wn. App. 503, 513-14, 334 P.3d 30 (2014).

C. Substantial Evidence Supports the Findings that the Court Properly Analyzed the Factors of RCW 26.09.520, the Child Relocation Statute.

The Court entered into evidence the Father's proposed Final Parenting Plan (Exh. 243), his proposed Final Order and Findings on Petition to Change a Parenting Plan, Residential Schedule or Custody Order (Exh. 244) and his proposed Final Order and Findings on Objection about Moving with Children and Petition about Changing a Parenting/Custody Order (Relocation) (Exh. 245). The Court entered these proposed pleadings with the Court's interlineations to each document. CP 1-10, 11-17, 18-20. The record

does not reflect whether the Mother submitted proposed final pleadings for the Court's consideration.

The Court articulated the evidence substantially relied upon for the Findings and Orders of the Court. In the Court's oral opinion, the Court stated that "based upon the testimony at trial, the Court's review of 179 trial exhibits, and the Court's observations of the credibility of the parties, the Court found that the mother had engaged in a long-term pattern of alienation of the children from the father, and had engaged in an abusive use of conflict." CP 2; RP 872. The Court entered specific findings for each of the relocation factors, RCW 26.09.520, on pgs. 2, 3, 4, 5, 6, and 7 of the Final Order and Findings on Objection About Moving with Children and Petition About Changing a Parenting/Custody Order (Relocation). CP 11-17. The Court entered additional specific findings in the Final Parenting Plan entered on January 9, 2019, on pgs. 2, 3, 4, 5 and 6. CP 2-6.

RCW 26.09.520(4) requires the Court to consider whether either parent is subject to RCW 26.09.191 limitations, which include a long-term impairment resulting from drug use that interferes with the parenting functions. *In re Marriage of Pennamen*, 135 Wn. App. 790, 804, 146 P.3d 466 (2006). The Legislature did not weigh the

relocation factors, but this does not preclude a Court from focusing on the factors that are more relevant in a given case. *Id.* The Mother in *Pennamen* argued that the Court improperly gave more weight to some factors than to others including her history of drug use. She essentially asked the Appellate Court to reweigh the factors and come out differently, which the Court declined to do. *Id.* at 803.

RCW 26.09.520(1) Relationships. The Trial Court entered detailed findings in this section. CP 12-13. The Trial Court found that the Father had a very good relationship with Natalia; that the Mother had not supported reunification efforts with the Father in good faith; that the Mother appeared to be engaging in an abusive use of conflict or parental alienation to keep the children from their Father. CP 12-13. The Trial Court described the many attempts the Father made over time to reestablish his relationship with his children. CP 12-13. The Trial Court found that the Mother's obstruction created an environment where the children believed that they have no choice in visiting their Father. CP 12-13. The Trial Court found that there was no legitimate reason why the children should not be reunified with their Father except for the actions of the Mother. CP 11-17. Both the Mother and Father's extended family, including the children's grandparents, uncles, aunts, and cousins

reside in the community where the Father resided. RP 243, 326. The Mother resided at Fort Hunter Liggett, California. RP 624.

RCW 26.09.520(2) Agreements. The Trial Court found there were no agreements between the parties regarding relocation. CP 13.

RCW 26.09.520(3) Contact. The Trial Court found that disrupting the children's contact with the moving parent would not be more harmful to them than disrupting their contact with the Father. CP 13. The Trial Court found it would be extremely disruptive to the hopes of the reunification of the children with Father if the move were allowed. CP 13. The move would make it virtually impossible for the children to restore their relationship with their Father. CP 13. The move would basically result in the further alienation of the children from their Father. CP 13. Allowing the move would be so disruptive, it would virtually make the relationship with the Father irreparable. CP 13.

RCW 26.09.520(4) Limitations. It is clear that the Trial Court was very concerned about Factor 4, due to the Mother's actions. CP 2-5, 12-13.

The Trial Court determined that the Mother's abusive use of conflict and alienation of the children from their Father fell into this

category and weighed in favor of denying relocation. CP 2-5, 12-13. The Trial Court entered limitations on the Mother under RCW 26.09.191 due to abusive use of conflict finding that the Mother used conflict in a way that endangered or damaged the psychological development of the children. CP 1-2. The Trial Court found that the evidence supported a finding that the Mother had engaged in a long-term pattern of alienation of the children from their Father, engaged in an abusive use of conflict. CP 2. The Trial Court entered a litany of specific findings as to conduct that the Mother engaged in, including restricting the Father's phone contact with the children, refusing to cooperate with the Father's residential time, and refusing to provide the Father with her home address. CP 2-5, 12-13. The Trial Court found that the Mother neglected to adequately provide for the children's mental health care, that the Mother failed to obtain any mental health counseling for Natalia, that the Mother sought orthodontic treatment without the Father's knowledge or consent, and refused to communicate with the Father concerning Valeria's dental issues, nor respond to direct questions concerning such issues. CP 3. The Trial Court found that the Mother refused to cooperate with scheduling Court ordered reunification counseling with Rochelle Long. CP 3. The Trial Court found that the Mother's

intentional consistent insidious efforts to alienate the children from their Father created conflict and impeded the Father's normal and loving relationship with his children which rose to the level of an abusive use of conflict. CP 5.

A material change in condition can be deemed to occur where a provision in the original Decree anticipates cooperation and that cooperation is not forthcoming. *Selivanoff v. Selivanoff*, 12 Wn. App. 263, 265, 529 P.2d 486 (1974). The *Valencia* Final Parenting Plan ordered that both parties will make a mutual effort to maintain open, ongoing communication concerning the children and will discuss together any major decisions regarding the children. (Exh. 1.) The Mother blatantly and continuously failed to comply with this provision. CP 2-5, 12-13.

The Court may draw a reasonable inference that destructive behavior by a parent that constituted a detrimental environment at the time the petition for modification was filed would continue absent evidence that it had ceased. *In re Marriage of Velickoff*, 95 Wn. App. 346, 356, 968 P.2d 20 (1998). A finding of a detrimental environment does *not* require a finding of parental unfitness. *Id.*

Under *Velickoff*, "an effort by one parent to terminate the other parent's relationship with the child can be considered

detrimental to the child and modification based on such behavior is appropriate.” *Velickoff*, 95 Wn. App. at 355. Specifically, in *Velickoff*, restricting access to medical records and telephone contact was a factor in finding detriment. *Id.*

The Mother testified as to the children’s health care. Counsel examined the provisions of the parties’ Final Parenting Plan with the Mother:

Q: When we drop down, third full line from the bottom, it says, “All communications with healthcare providers, the names, addresses, and telephone numbers of all schools, healthcare providers, regular daycare providers, and counselors, unless this information is available to both parties.” Did I read that correctly?

A: Yes.

Q: In this trial have you submitted one email or text message that provides a counselor, doctor, hospital, pediatrician, dentist, information to Mr. Valencia in writing with their address and phone number? . . .

...

Finally, the mother answered:

A: I’m not perfect. And I know that we’ve had difficulties communicating back and forth. And no, I don’t think I’ve ever provided him – from the beginning. . .

RP 553, 554.

It is the clear policy of the Washington Legislature to foster post-dissolution relationships between a child and each parent. RCW 26.09.002. Interference with such relationship is detrimental to the child's best interests. *Velickoff*, 95 Wn. App. at 356.

The Mother testified as to where the children resided. The Mother testified about an email the Father sent her:

Q: He says, "First I want the address of where my daughters live." Do you see that?

A: Yes.

Q: And then you respond to it. You don't provide an address in that email; correct?

A: I did not. . .

Q: So we're about four months after trial. He doesn't have the address of where you're living; correct?

A: That is correct.

Q: Exhibit 126. One year later Mr. Valencia's still asking for your address. He emails you on January 8th of 2015.

Q: Second line down. "Why you want my physical address all of a sudden is beyond me, but I will not give it to you. You are not welcome in my home."

Did I read that correctly?

A: Yeah, but there's more to it.

Q: He actually took you to the Pierce County Center for Dispute Resolution to get your address. Bottom of, “We discussed, but we were unable to reach agreement on the following issues: Sara providing her home address to Gustavo.” And this is dated March 18th of 2015; is that correct?

A: There’s been history between –

Q: My question is: Is that correct?

A: Yes.

RP 568-570.

Substantial evidence supported the Court’s entry of restrictions under RCW 26.09.191.

RCW 26.09.520(5) Reasons for Moving. The Trial Court found that based upon the testimony of the Mother that she could have requested a hardship from the Army to stay in Washington for the purposes of the reunification therapy and co-parenting counseling as well as Natalia’s counseling needs. CP 14. The Father objected in good faith. CP 14. The Father could not move to Fort Hunter Liggett, located in an isolated and somewhat inaccessible section of California. CP 14. The Father would not be able to find employment and had no family in the area. CP 14.

RCW 26.09.520(6) Children's Needs. The Court found

that:

The mother's intentional, consistent, insidious efforts to alienate the children from their father, create conflict and impede the father's normal and loving relationship with his children rises to the level of an abusive use of conflict. Based upon the actual detriment to the children and the potential for future harm, the children shall be placed in the primary residential care of the father. The court finds this change is in the best interests of the children. This transition shall occur as soon as possible. The father shall enroll the children in school and individualized counseling as soon as possible.

CP 4.

RCW 26.09.520(7) Quality of Life. The Trial Court entered specific findings as to the children's schooling at their current location which was isolated geographically. The Court found there was no availability of resources for the children at their current location. CP 5. Specific data regarding the children's current school district was considered and entered as findings by the Court. CP 5. The Court found that the Mother had not provided any details concerning the children's school or home so that it was unknown what opportunities or quality of life could be afforded the children at her location. CP 5. The schools where the Father's residence was located were newer and more up to date. RP 784.

RCW 26.09.520(8)(9) Alternative Arrangements. The

Trial Court found that:

The Mother could request a hardship (from the U.S. Army) to stay in Washington for the purposes of the reunification therapy and co-parenting counseling as well as Natalia's counseling needs. Additionally the Mother had two children from a prior relationship that are young adults who may be staying in Washington. There were alternatives for the children to stay in Washington.

CP 15.

RCW 26.09.520(10) Financial. The Trial Court properly analyzed the financial impacts of a potential move. CP 5-6.

RCW 26.09.520(11). This factor is applicable only with a Temporary Parenting Plan.

D. The Court Properly Allowed Jennifer Knight to Testify as to the Correct Course of Action the Mother Should have Taken when Valeria Would not Speak to her Father on the Phone.¹

Ms. Knight testified that in her opinion the best thing to do was to encourage the child to speak to her Father. Ms. Knight had twenty-two sessions with family members and was in a position to be familiar with the issues surrounding the family and the children's relationship with their father.

¹ The Father addresses most of the Mother's nineteen Assignments of Errors above in his argument regarding location and custody. The few Assignments of Error that do not fall within these topics are discussed *infra*.

E. Substantial Evidence Supported the Finding that the Mother did not Participate in the Triple P Program.

The Father did endeavor to participate in the Triple P Program but the Mother refused to participate, cancelling two appointments and never scheduling a third (3rd). RP 526, 648.

F. Trial Court's Award of Attorney's Fees.

Intransigence is a basis for awarding fees on appeal, separate from RCW 26.09.140 (financial need) or RAP 18.9 (frivolous appeals). *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224, *review denied*, 104 Wn.2d 1020 (1985).

Intransigence includes a "continual pattern of obstruction" involving refusing to cooperate with the GAL, refusing to allow visitation, interfering with Court-ordered visitation, threatening administrative action against witnesses, and falsely alleging sexual abuse of a child. *In re Marriage of Crosetto*, 82 Wn. App. 545, 550, 918 P.2d 954 (1996).

The financial resources of the parties need not be considered when intransigence by one party is established. *Matter of Marriage of Greenlee*, 65 Wn. App. 703, 711, 829 P.2d 1120, *review denied*, 120 Wn. 2d 1002 (1992); *In re Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197 (1989). Thus no affidavit of financial need

is required to make the award. *Mattson v. Mattson*, 95 Wn. App. 592, 606, 976 P.2d 157 (1999). Moreover, a party's intransigence in the Trial Court can also support an award of attorney fees on appeal. *Eide v. Eide*, 1 Wn. App. 440, 445-46, 462 P.2d 562 (1969).

Intransigence includes making "unsubstantiated, false and exaggerated allegations against [the other parent] concerning his fitness as a parent, which caused him to incur unnecessary and significant attorney fees." *In re Marriage of Burrill*, 113 Wn. App. 863, 873, 56 P.3d 993 (2002), *review denied*, 149 Wn.2d 1007 (2003).

The Court entered specific Findings and Judgment regarding the Mother's intransigence and the award of attorney fees. The Court entered the following Findings:

The respondent has incurred attorney fees and costs related to the modification of custody. The court has found abusive use of conflict by the mother against the father. The court finds that the petitioner has engaged in intransigence, which includes engaging in obstruction, refusal and interference with court orders concerning visitation and contact. This includes a "continual pattern of obstruction" involving refusal to cooperate with the Guardian ad Litem, refusing to allow visitation, interfering with court ordered visitation, threatening administrative action against witnesses, and falsely alleging sexual abuse of a child. *In Re Marriage of Crosetto*, 82 Wn. App. 545, 550, 918 P.2d 954 (1996). In this case the court has found similar patterns of obstruction which

findings are set forth into the Parenting Plan and incorporated herein. The court's oral ruling in the findings and the parenting plan are incorporated herein by reference as though fully set forth.

The court also notes that where intransigence by a party results in bad faith, which has permeated the proceedings, that can be the basis of an award of attorney fees. *In Re Marriage of Burrill*, 113 Wn. App. 863, 872 (2002). The court finds that these proceedings started in 2013 immediately after the dissolution trial. The mother interfered repeatedly with the father's residential time and ability to see the children. There are numerous examples of the bad faith and intransigence. No credible evidence was presented at the 2013 trial for domestic violence or at the 2018 trial, but the mother continued to make accusations concerning domestic violence. The mother made false allegations of sex abuse against the father. The mother interfered with the father's ability to text and phone the children as well as removed cell phones. The mother had numerous addresses from 2013 to 2017 and refused to provide the father her updated address despite court orders that required it and even gave a slightly altered address when required by the court. The mother interfered with the father's ability to participate in medical decisions and made unilateral decisions concerning the child's orthodontia. The mother encouraged or allowed the children to write letters to the judge making false accusations against the father, which the children later recanted in counseling. The mother obstructed the father's access to the children's school records. In court the mother made false claims of the children being suicidal. The mother disparaged the father in front of the children so that the children mimic those claims. The mother interfered with the father's visitation by being passive aggressive in responding to emails and scheduling trips. The mother was passive aggressive and uncooperative in scheduling co-parenting visits. The

mother demanded co-parenting sessions be scheduled a time when the father was at work even though sessions were available when both she and the father were off w, and refused to participate when her demands weren't met. The mother's conduct was insidious. She engaged in manipulation of the children, the courts, and the respondent. The father had to expend enormous financial resources to defend himself against the mother's actions. When a party's bad acts permeate the entire proceeding such as here, the court need not segregate which fees were incurred as a result of intransigence and which were not. *In re Marriage of Burrill*, 113 Wn. App. 863, 873 (2003). In this case the mother's bad acts permeated everything and took place over an approximate six year period of time. The court finds that the mother has engaged in intransigence and abusive use of conflict. The court finds that Mr. Valencia has incurred \$66,757.84 in attorney fees. He has additional costs of \$1125 for Suzanne Dirks (GAL), \$1000 for Kate Lee as visitation supervisor, \$400 for Beverly Polhamus as co-parenting counselor, \$2000 for Jennifer Knight as a reunification counselor, \$200 for Lori Harrison as a co-parenting counselor, \$200 for Triple P Counseling, \$1000 for Rochelle Long for reunification counseling, \$200 for Kathy Jackson for counseling, \$800 for cell phones, and \$2600 for a court ordered psychological evaluation.

The court awards the respondent a judgment against the petitioner in the amount of \$40,000 based upon her intransigence and bad faith in these proceedings. This judgment shall bear interest and all other judgments in this order shall bear interest at the rate of 12% per annum.

CP 40-42.

The Father testified as to the fees of \$1,125.00 that he paid to the Guardian *ad Litem*, Suzanne Dircks, approximately \$1,000.00 to Kate Lee, approximately \$1,000.00, \$400.00 to Beverly Polhamus, reunification counselor, approximately \$2,000.00 to Jennifer Knight, \$200.00 to Lori Harrison, \$200.00 to Triple P, \$100.00 to Rochelle Long, \$200.00 to Kathy Jackson, \$18,832.84 in attorney's fees to his present counsel, and \$20,000.00 to each of his two (2) previous attorneys. RP 792-794, 798. The Father's testimony was unrefuted. No other evidence was submitted to the Trial Court regarding the Father's attorney's fees. The Trial Court properly awarded the Father his attorney's fees.

G. Attorney's Fees on Appeal.

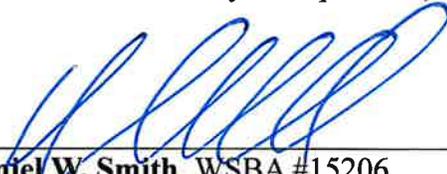
Gustavo Valencia requests his reasonable attorney's fees and expenses as authorized by RAP 18.1.

IV. CONCLUSION

The Mother's appeal has no merit. The Trial Court's findings are based on substantial evidence, and the Parenting Plan is well within its discretion. The Plan complies with RCW 26.09 and protects the best interests of the children. RCW 26.09.184 and .187 identify the factors and criteria when formulating a permanent Parenting Plan. Sections .260 and .520 identify the criteria when

modifying a Parenting Plan either due to a change of circumstances or a proposed relocation. The Plan contains RCW 26.09.191 restrictions which are based on substantial evidence. The award of attorney's fees to the Father was not an abuse of discretion and should be upheld. This Court should award the Father his reasonable attorney's fees for defending against the Mother's appeal.

Respectfully submitted this 23rd day of September, 2019.



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No. 53184-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SARA VALENCIA,

Appellant,

v.

GUSTAVO VALENCIA,

Appellant.

Appeal from the Superior Court for Pierce County
The Honorable Karena Kirkendoll

Certificate of Service

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DECLARATION OF SERVICE

I, **Kimberly E. Wailes**, hereby declare under penalty of perjury under the laws of the State of Washington that I am employed by **Campbell Barnett PLLC**, and that on today's date, September 23, 2019, I served in the manner indicated by directing delivery to the following individuals:

legal messenger

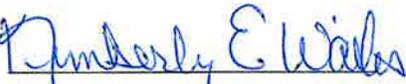
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Dated this 23rd day of September, 2019.

By 
Kimberly E. Wailes

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