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No. 53184-4-II

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STATE OF WASHINGTON  
COURT OF APPEALS, DIVISION II

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SARA VALENCIA  
Appellant,

v.

GUSTAVO VALENCIA  
Respondent.

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APPELLANT'S REPLY BRIEF

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## I. ISSUES

1. The Court's Orders contradict the other orders and the Court failed to properly weigh the factors pursuant to RCW 26.09.520.
2. The finding of intransigence is not supported by substantial evidence.
3. The Parenting Plan is not in the best interest of the children.

## II. ARGUMENT

The trial court highlighted its abuse of discretion with its inability to articulate the evidentiary basis for its findings and decision, relying solely on its statement, "Based on the testimony at trial, my review of 179 trial exhibits, and my observation of the credibility of the parties, the evidence shows and the Court finds that the mother has engaged in a long-term pattern of alienation of the children from their father and has engaged in an abusive use of conflict."<sup>1</sup> The Respondent joins the court with a conclusory statement, "The Trial Court entered detailed Findings and a permanent Parenting Plan."<sup>2</sup> However, there are conflicting findings in the Parenting Plan and Final Order and Findings on Objection about Moving.

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<sup>1</sup> RP 872:1-6

<sup>2</sup> *Response Brief*, at 19.

When pushed for clarification as to the specific facts and evidence in which they rely upon, both the trial court and the Respondent cannot provide the evidence to support the findings.

The Trial Court bought a bank robber's story effectuating the robbery of a 13 and 14 year old child. Instead of providing the specific evidence the court relied upon for its findings, the Trial Court stated that is the role of the Court of Appeals to give us those answers. The trial court stated: "I'm telling you that's what the Court of Appeals is for, Mr. Whalley."<sup>3</sup>

The Appellant now seeks answers from the Court of Appeals, pursuant to the direction of the trial court, how removing two (2) young girls from their mother and essentially eliminating the relationship they built over fourteen (14) years, is in their best interest. We ask, how is that manifestly reasonable?

"A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on

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<sup>3</sup> RP at 888:20-21.

an incorrect standard or the facts do not meet the requirements of the correct standard.”<sup>4</sup> The orders of the court are manifestly unreasonable.

1. The Findings of the Court in the Final Order and Findings on Objection are not supported by substantial evidence and contradict the other findings the Trial Court entered in the Judgment and Parenting Plan.

### Relationships

The Court failed to adequately weigh the relationships of the children, including their relationship with each parent and significant others. There is no dispute at the time of trial the mother had a great relationship with both girls and the father’s relationship with both was non-existent.

An honest assessment of the evidence would weigh in the favor of relocation.

### Agreements

Notable the trial court failed to include the agreement of the parties as detailed in the CR 2A agreement, or the parties agreement to not participate in triple P, approximately two (2) months after the CR 2A agreement was entered.

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<sup>4</sup> *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

The agreements memorialized by the court were, “All professionals are here in Washington. If the mother was allowed to relocate it would block the entire reunification process.”<sup>5</sup> This is entirely false. At the time of trial the children had not been engaged in reunification process for over a year. The Respondent testified no matter what the court decided, he was moving back to the San Diego area.

The trial court made a finding the children needed to stay in Washington, yet the facts and evidence presented establish the children were living in California with the Mother, and the Father was moving back to California.

It is very clear the trial court did not review 176 exhibits, nor did the trial judge listen or review the testimony of the parties when making this finding related to the factors of relocation.

### Contact

“At this point, it would be extremely disruptive to the hopes of reunification if the move were allowed. The move would make it virtually impossible for the children to restore their relationship with their father. The move would basically result in the further alienation

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<sup>5</sup> *Final Order*, 3:17-18

of the children from their father. Allowing the move would be so disruptive it would virtually make the relationship with the father irreparable.”<sup>6</sup>

At the time of trial, the father did not have a relationship with the children. This permeates the entire trial transcript. The facts support the mother had relocated her entire family to California based on her military orders. Based on the actual facts and evidence presented at trial, the court’s finding is not supported.

The facts clearly establish the father and children were not engaged in any type of reunification counseling. No matter the geographic distance between the father and children, the contact would have been the same. The trial court again fails to provide any evidence presented at trial that would support this finding.

The trial court’s finding is unreasonable considering the evidence established the father was moving back to California and he did not have a relationship with his girls.

### Limitations

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<sup>6</sup> *Final Order*, 3:21-24.

The Court failed to identify anything for the “limitations” section of the Final Order.<sup>7</sup> It should be noted that based on two (2) GAL reports, there was never a recommendation for limitations against the mother. Both investigators recommended the children remain in the custody of the mother. In fact, not only did the trial court place the children with the mother after the trial in 2013, and the GAL recommendation in the case at hand recommended that the children reside with the mother.<sup>8</sup> These facts are completely opposite to the court’s findings and decisions.

#### Reasons for Moving

Military orders was the basis for the mother’s move. Absent some evidence the mother mandated a relocation, the court cannot state the move was made in bad faith.

The court based its finding on an assumption, with no testimony from military personnel to support it. “The Mother could ask for a hardship from the Army to not to relocate. It is unknown if the mother has made any efforts to delay her move or ask for a hardship from her command.”<sup>9</sup>

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<sup>7</sup> *Id.* at 4:1-2.

<sup>8</sup> CP 98 at 14.

<sup>9</sup> *Final Order*, 4:4-5.

This finding is not supported by evidence. The testimony of the mother and exhibits related to her previous relocation that she had already requested a hardship waiver in order to stay in the Pacific Northwest. The orders to California came after she had already been able to extend her stay in Washington to assist with the reunification counseling.

The Court had zero evidence presented, besides argument of counsel, which is not evidence, that a hardship waiver was available to the mother.

#### Reasons for Objecting

“The father is objecting in good faith. The father has relocated from the San Diego area to Washington to attempt to reunify his relationship....The father would have no family in the area. The parties would have to start over with all counselors.”<sup>10</sup>

The trial court’s finding now states the father doesn’t have a good relationship with his daughters, that he needs reunification counseling. Something opposite as previously stated. Further the court makes findings the Father would not have family in the area.

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<sup>10</sup> *Final Order*, 4:12-15.

The father's own testimony was he did not have any family in Seattle. He has no family in either area, Seattle or the area where the mother relocated. The court states they would need to start over with counseling, but yet they were not in counseling at the time. Further, if the court listened to the father's testimony, he was moving back to California, the children would be faced with the same problem in either location.

Interesting the court makes its findings when testimony reveals mother and father are both relocating to California. Father's objection does not seem well placed if he too is relocating, never lived in the children's school district, and only had an issue with the parenting plan.

The Court's findings are not supported by the testimony or evidence before the court. How the court can make a finding that the children should stay in Washington when the evidence was clear that both parents were moving to California. Nothing in the findings on relocation reflect the fact the father was relocating and the children would have to relocate no matter the decision of the court.

### Children

The findings related to the “Children” in the final orders contradicts the parenting plan entered and the findings entered in therein.

The court made the specific findings, “The children were receiving services in Washington. Both of the children were seeing private counselors in Washington. This would require them to restart their counseling.”<sup>11</sup>

This is the same basis the court found the mother’s behavior as intransigence. The court’s other findings were that the mother failed to have the children in counseling. The trial court failed to review the temporary orders in the matter that outlined the specific counseling the children should undergo. All counselors testified the mother made all appointments, and the temporary orders related to counseling were entered as agreements of the parties. To say they were not in counseling in one breath, then say they should stay in Washington for that counseling on its face is manifestly unreasonable.

“Any move would disrupt her counseling.”<sup>12</sup> Yet the Father testify he will be taking the girls to live with him in California. So

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<sup>11</sup> *Final Order*, 4:18-19.

<sup>12</sup> *Final Order*, 4:21.

how exactly would the Mother's move be any different to the fathers'? This finding is not supported by any evidence and is false.

The court's basis under this section is "the children's physical, educational, and emotional development can be maintained."<sup>13</sup> The evidence reflects the children were actually performing better in California with their mother based on their school records. Further, there was no possibility of the children staying in Washington.

The Court again signed off on findings that were not based on any of the testimony or evidence admitted. As the trial court instructed the Mother to have the Appellate Court determine what evidence was relied upon, the Mother requests the Appellate Court explain how the court can find the children should stay in Washington when the Mother received military orders to California and had moved with the children, and the father testified he was moving to San Diego. With nobody in Washington, how can the court make a finding that the children should stay in Washington?

#### Quality of Life

The Trial Court then makes findings regarding the Quality of Life in the Final Order which none of the evidence was presented at

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<sup>13</sup> *Final Order*, 4:22-24.

trial.<sup>14</sup> There is not a single shred of testimony or presented evidence that reflects the “statistical” information related to the schools in the record. NONE. ZERO. ZILCH.

Further, the court knew the father was relocating to California as well, but there is no information about the schools in Washington or San Diego. What the evidence reflected was the children were doing well in school in California. The finding is opposite of this evidence, claiming the court had no information related to the children’s school.

#### Other Arrangments

“There are no legitimate alternatives to fostering the reunification counseling and co-parenting counseling that the parents are to be undertaking if the move was allowed.”<sup>15</sup>

This finding is contrary to reunification counselor Lori Harrison’s testimony which specifically stated the parties could do electronic reunification counseling. However, how the court can make this finding when the father has informed the court he will be relocating back to San Diego, which would create the same issue. The court did not consider the Father’s move to San Diego.

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<sup>14</sup> *Final Order*, 5:3-9.

<sup>15</sup> *Final Order*, 5:12-14.

## Alternatives

Again, in the Alternatives findings, the court makes a conclusory statement that the mother could request a hardship, but there is no evidence to support such a finding. The evidence established the Mother and all of her children had relocated to California, but yet the finding includes “the mother has two children from a prior relationship that are young adults who may be staying in Washington.”<sup>16</sup> This isn’t true and the testimony was crystal clear, all children were in California.

Most notably, the court errs in not weighing the relationship with the mother or anyone in the mother’s family. Solely the court attempts to paint the mother in a negative light to substantiate findings which are not supported by any evidence.

Laughable is the finding, “There could be alternatives for the children to stay in Washington.”<sup>17</sup> When both parents have stated they will be living in California, how can a court make this finding? Based on what evidence did the court rely?

## Financial

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<sup>16</sup> *Final Order*, 5:17-19.

<sup>17</sup> *Final Order*, 5:17-19.

“There would be a negative impact to the father of moving.”<sup>18</sup>

The father said he was moving back to California; nobody was going to be in Washington. The same financial impact will exist no matter if the court allows or denies the move.

The Father is a union worker, he testified he was able to stay in the same union here as he was in San Diego. He was returning to the same union; he was returning to his family in San Diego. None of this is reflected, nor was the parenting plan in effect reflected a long distance parenting plan.

Lastly the court fails to make a specific finding as to whether the factors weigh in favor of the move or not, and did not establish whether based on the finding they would make a change to the parenting order.<sup>19</sup>

The trial court was charged to follow RCW 26.09.520. While the Respondent responds by stating there is a group of statutes that deal with relocation, the court shall weigh each factor. This did not happen. When pressed about these issues, the trial court judge could not substantiate its findings based on the evidence.

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<sup>18</sup> *Final Order*, 5:22-24.

<sup>19</sup> *Final Order*, 6:2-8.

Most notably, the findings do not reflect the facts of presented at trial, nor do they reflect the evidence. Some of the facts were created by the trial judge herself, with no explanation. Strangely enough, the trial court does not do any balancing tests, comparing the living arrangement or factor between the two parents.

The final order clearly reflects the trial court judge did not consider the evidence or testimony. The decision of the trial court is egregious and shall be reversed. The decision is not well founded in law or fact, nor is the decision in the best interest of the children.

2. The Court's finding of intransigence is not supported by substantial evidence and shall be reversed.

The Respondent states the costs incurred by the Father was unrefuted. In what world can someone refute something they have no information. There is no way for the mother to refute what was spent, she does not have the information, nor was the information provided to the court. The father still has the burden to substantiate his claims beyond just a statement, after declaring his memory is not very good.

In order for the court to award attorney fees, there must be more than simply the testimony of the person requesting the fees. Most of the costs requested by the father were unsubstantiated.

The award of fees and costs shall be reversed to reflect only those that were supported by substantial evidence.

Further, the finding of intransigence should be reversed entirely.

The trial court's ruling ignored any positive facts about the mother. Father's testimony was taken as gold, even when contradicted by evidence. Here are several of the findings the court relies upon to support intransigence which are flawed:

#### False Claim

The court continually makes an assertion the mother made a claim that the father sexually abused the child. This is false. While that is the story of the father, the facts and testimony of third parties, particularly reunification counselor Jennifer Knight, stated the mother had concerns the child returned home from the father with white discharge. The mother took the child to the doctor, found out it was vaginitis and that was it. There is ZERO evidence the mother ever made a claim with CPS, the Court or anyone. The mother did report the medical situation with the reunification counselor because at the time she was unaware what the diagnosis was. The testimony of Ms.

Knight was that the mother mentioned it as a concern, did not play it up, and found out it was vaginitis.

The court's finding is false. A blatant disregard from the evidence and testimony presented. If a parent is going to be found to have made a claim against another parent because they notify medical professionals where a child was when the medical condition started, then we are changing the standard set by the court. There is no evidence ANYWHERE that the mother made false allegations of the father.

#### Counseling Attendance

The court also made a finding that the mother failed to comply with the reunification counseling or visitations. This too is false. The testimony of Ms. Knight and Ms. Lee reflect the mother consistently pushed for more appointments and standing appointments. The mother would drive two (2) hours each way so the father could have the visits. Most importantly, the mother did not miss appointments.

The Court found the mother failed to comply with the visitation and reunification process, but this was refuted by the counselors themselves. Yes, the mother had an issue with the first reunification counselor learning she had been charged with perjury, but the same

treatment plan was followed by Jennifer Knight, per Ms. Knight's own testimony.<sup>20</sup>

### Trial Continuances

Additionally, the court blamed the mother for delays, yet ALL court orders in this matter related to trial continuances were done by agreement or in the last case, the court's unavailability. How can someone be found to have "foot dragged" when everything was done by agreement. Most notably, the evidence establishes the reason the continuances were made was to try and find a way for the father to reunify with the children.

Common sense indicates that if the court was correct about the mother's attempt to alienate the children from their father, she would have pushed for trial when he did not have a relationship, rather than allow more and more time, trying as many alternatives the court had to reestablish the father's relationship.

The mother admitted to not being consistent with the phone calls, but this is not intransigence.

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<sup>20</sup> RP 380: 22-25; 381:1-9.

If the breakdown of the relationship between the father and children was the solely due to the mother, then why did the problem start following visitation with the father?

The father admitted in his testimony that the problem began following his visitation in the summer. Yet the court places the blame on the mother, when she had no influence on the issue that caused her to file her original motion to modify.

The Court made a finding that the mother made claims of domestic violence, but there haven't been any findings.<sup>21</sup> However in the report of Rochelle Long, the father made an admission related to a domestic disturbance in which he was arrested and charged with something.<sup>22</sup>

The findings of intransigence are not supported by substantial evidence.

The court shall reverse the finding of intransigence as the mother followed the court orders, entered by agreement, which laid out the reunification counseling, visitation, and counseling for the girls. Any finding that the mother didn't have the girls in counseling is false,

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<sup>21</sup> RP 882:4-8

<sup>22</sup> CP 72.

the court dictated the counseling, reunification counseling, and visitation.<sup>23</sup>

3. The parenting plan is not in the best interest of the children.

The parenting plan entered by the court is unconscionable. How can any reasonable mind believe children raised by an individual for 14 years, should be removed almost completely from that person and limited to one (1) fifteen (15) minute phone call a week.

The parenting plan entered by the court fails to reflect the facts and evidence submitted. Further, the court failed to apply the factors under RCW 26.09.187 and 26.09.184. The children have a wonderful relationship with the mother and that is undisputed.

The only real issue the court could find with the mother is the communication between her and the father. Otherwise, the children are healthy and doing well. Both GALs and the original trial court found the best interest of the children is served by residing with the mother.

The trial court judge failed to listen to any of the professionals, only considering what a convicted bank robber had to say. In fact,

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<sup>23</sup> It should be noted the trial court judge was not the assigned judge during the pendency of this matter.

when inquiring about the father's criminal history, the court went so far as to sustain an objection of relevance as to the father's criminal history. The rulings of the court were so far that one must wonder if the trial court judge was listening. Criminal history of any party is always relevant in a family law matter.

The Court's ruling that the mother shall only have supervised four (4) hours a week, in a location five (5) hours from her place of residence is unconscionable. Not only does it not consider factors in RCW 26.09.187, it creates a plan completely contrary to RCW 26.09.184 and the findings in the final order on objection. How can the visitation take place in California, when the court makes a finding/order that the children's best interests are served in Washington. According to the trial court, the court of appeals will explain this to the mother and children.

Further and most importantly, the findings of the parenting plan completely disregard the best interest of the children. The GAL reports provided and entered into evidence clarify what is in the best interest of the children. Both GALs concluded the children's best interests are served with the mother. The finding of the trial court in the Final Order on Objection made a finding the best interest of the

children are served in Washington, yet the parenting plan is contrary to all of that.

When boiled down to the most elementary substance, the court has an issue with trying to reunify the father with the children. At the very least, the mother should have unsupervised visitation with the children on the same schedule as the father had previously. That would resolve any communication issues with the children and father, but provide the children with a similar relationship with their mother. Further, a “reverse” parenting plan would be consistent with RCW 26.09.184.

If the military shall require the mother’s services elsewhere, the mother will have zero physical contact with the children. This is not in the best interest of the children.

The trial court’s ruling was not well based on fact, law or anything presented at trial. A simple review of the GALs reports will reflect the children should have contact with their mother as the relationship with their mother is in their best interest.

The court’s ruling is detrimental to the children and likely to do more harm than good. The court of appeals shall reverse the court’s ruling and remand the matter for entry of a parenting plan that

provides the mother with substantial time with the children, unsupervised.

### III. CONCLUSION

A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons.<sup>24</sup> The trial court orders entered in this matter are so egregious they shall be reversed by this court.

Outside the finding that a parent has sexually or physically abused a child, it is unconscionable a child may be raised by a single parent for fourteen (14) years and ripped out of their custody based on allegations. Reducing the time to supervised visitation for a duration that is less than the one-way travel to that location is ridiculous.

A true review of the 176 exhibits and the testimony reflects the children shall be with their mother, that she has followed the court orders since the filing of her Petition to Modify, to reestablish the relationship with the father. While completely disregarded by the trial court, at some point there is a responsibility of the father to be

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<sup>24</sup> *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010).

accountable for his actions which caused the breakdown in his relationship with his children.

The trial court completely disregarded the behavior of the father. He provided written communication for the mother to save her money and not attend triple P, the court disregarded that piece of evidence and considered the mother's behavior part of her intransigence. Additionally, Ms. Knight stated the reunification sessions ended because the father stated he was giving up.<sup>25</sup> Again, the trial court accuses the mother of not wanting to do reunification counseling.

At trial the father presented as someone who has done everything, yet a real look into his actions and evidence do not show that. What they reflect is he is a convicted criminal with some domestic violence tendencies, an anger problem that got chalked up as something based on his ethnicity. There is no question his anger scares his children, yet this too is ignored by the court.

The mother respectfully requests the court review the findings of the trial court and find they are contradictory between the parenting plan and final order. Further, the mother respectfully requests the court reverse the finding of intransigence, in the alternative, reverse

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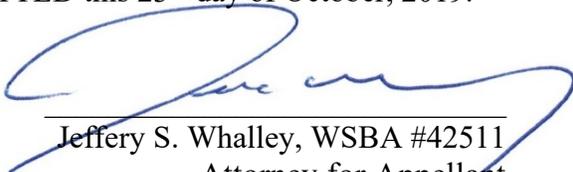
<sup>25</sup> RP414:3-5.

the fees and costs, only providing those supported by substantial evidence.

Most importantly, the mother respectfully requests the court reverse the parenting plan entered with the court, finding the plan is not consistent with RCW 26.09.187 or 26.09.184, remanding the matter to the trial court to provide the children substantial time with their mother, which is in their best interest.

A trial court abuses its discretion when it makes a manifestly unreasonable decision or bases its decision on untenable grounds or untenable reasons.<sup>26</sup> While we will never know what the trial court relied upon to make the findings that the trial court stated the Court of Appeals had the duty to figure out, the trial court removed a fourteen (14) and thirteen (13) year old girl from their mother with whom they have lived their entire lives.<sup>27</sup> We do know the trial court's decision is manifestly unreasonable and shall be reversed.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of October, 2019.



Jeffery S. Whalley, WSBA #42511  
Attorney for Appellant

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<sup>26</sup> *In re Marriage of McNaught*, 189 Wn. App. 545, 552, 359 P.3d 811, 814 (2015).

<sup>27</sup> RP 872:7-12

No. 53184-4-II

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CERTIFICATE OF SERVICE

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**Declaration of Service**

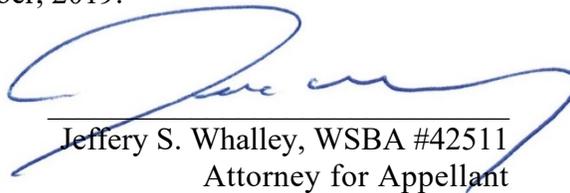
I, Jeffery S. Whalley, hereby declare under the penalty of perjury under the laws of the State of Washington that on October 23, 2019, I served the Appellant's Reply Brief to the Respondent's attorneys by email to the following addresses:

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Dated this 23<sup>rd</sup> day of October, 2019.

  
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Attorney for Appellant

**WHALLEY LAW PLLC**

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