

FILED  
Court of Appeals  
Division II  
State of Washington  
11/20/2019 3:37 PM

No. 53416-9-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

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In re the Parentage and Support of E.B.

SHELBY BRIGHTHEART  
Appellant

and

DAIN OLSEN  
Respondent

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ON REVIEW FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR JEFFERSON COUNTY

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OPENING BRIEF OF APPELLANT

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## I. INTRODUCTION

When Shelby Brighthouse and Dain Olsen began a relationship in 2010, they both lived what the trial court in this case deemed an “alternative lifestyle.” They did not marry, lived together in an intentional community on a communal farm, moved to small rural cabin, and home birthed their child, E.B., born in 2013, and delivered directly into Dain’s hands. They took E.B. with them to the Fairy and Human Relations Congress, where they volunteered, an event celebrating connection to the earth. Over time, however, Dain gravitated toward a more conventional lifestyle, while Shelby continued to maintain the values she had when the couple started their relationship. The couple separated in 2015.

For more than two years after the separation, by informal agreement, E.B. resided primarily with Shelby and Dain enjoyed residential time as his work schedule permitted. In May 2017 Shelby initiated a court proceeding to establish a formal parenting plan.

In the summer of 2018, before the trial on Shelby’s petition, she received an opportunity to become a part-owner of Skalitude, a retreat center in Okanagan County, the site of the Fairy and Human Relations Congress. This opportunity offered Shelby the chance to live and work at Skalitude with E.B. and H.B., an older son from a prior relationship, along with her fiancé Benjamin Pixie, and his two children. It also gave her the

chance to increase her income and to live with her family in improved housing, free of rent and utilities. Finally, it enabled her to live consistent with her long-held beliefs and values of living a sustainable life in harmony with nature and centered on family.

Dain objected to Shelby's relocation and the parties went to trial. Despite the presumption favoring relocation under the Child Relocation Act (CRA), the trial court restrained the relocation and, without analysis under RCW 26.09.187, made Dain the primary residential parent for the first time in E.B.'s life. In its decision, the court repeatedly approved Dain's superior "stability" and criticized Shelby's "alternative lifestyle." When Shelby, post-trial, sought to prove she would not relocate without E.B., the court refused to consider the evidence and sanctioned her.

The trial court's rulings reflect a fundamental misunderstanding and misapplication of the CRA, particularly the requirement to give substantial weight to the interests of the relocating parent. Instead, pervasively, the court tasked Shelby as "unstable" for living true to her values and making choices the court disapproved of (e.g., not marrying promptly). At the same time, the court extolled Dain's stability, despite his history of multiple and varied jobs and his similar history of intimate relationships. The resulting multiple errors require reversal and remand for an order granting relocation and further proceedings before a new judge.

## II. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion by restraining the mother from relocating the child with her and ordering a parenting plan changing the child's primary residence.
2. The trial court erred by misapplying the factors under the relocation statute, misapplying the statutory presumption in favor of relocation, which requires deference to a fit parent's decision to relocate and implements our state's policy strongly favoring custodial continuity.
3. The trial court erred by making the findings of fact and conclusions of law set out in the appendix (RAP 10.4(c)) and by the related findings in the Memorandum Ruling.
4. The trial court erred by disallowing evidence post-trial of the mother's intent not to relocate, failing to consider the statutory factors mandatory to a residential placement decision, and then denying reconsideration.
5. The trial court erred by sanctioning the mother based on a finding her motion to reconsider was frivolous.

### Issues Pertaining to Assignments of Error

1. Does the Child Relocation Act (CRA) presumption require the court to grant relocation unless rebutted by proof of detriment?

2. Does the CRA require the court to give substantial weight to the relocating parent's interests, not just the child's?

3. Did the trial court relieve the father of the burden of proof required by the statute (i.e., burdens of production and persuasion)?

4. Did the trial court make and rely on findings that are unsupported by substantial evidence and/or are irrelevant under the law?

5. Did the court err when it refused to consider the mother's post-trial proffer that she remain in the same county and sanction her for bringing a motion to reconsider on that basis?

6. Did the court err when it declined to consider this evidence and entered a parenting plan without the statutory best interests analysis?

### III. STATEMENT OF THE CASE

#### A. BACKGROUND

In 2009, Shelby Brighthouse and Dain Olsen met at a spiritual community gathering in Goldendale.<sup>1</sup> RP 25. She was 25 and he was 28. RP 425. The following year they began dating while living on a communal farm in Chimacum; in 2011 they moved into a cabin in Discovery Bay. RP 25. Both have children from prior relationships: Shelby has a son H.B. (11 years old at the time of trial) who lives with her; Dain has two teenage

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<sup>1</sup> The court's findings erroneously state this date as 2003. CP 278.

daughters who live in Colorado. RP 19, 27, 45. In 2008, after leaving the Army, Dain left his job, family, and home, taking only a backpack. RP 46, 513. He has had no contact with his daughters since 2010 and recently relinquished his parental rights in adoption proceedings. RP 515.

In November 2013, Shelby and Dain had a son, E.B. RP 20. Dain opposed getting a social security number for E.B. because he believes it imposes a “debt load” on E.B. RP 540-54. Shelby initially acquiesced but ultimately obtained one in order to secure health insurance for him. RP 540. Dain started a carpentry business (operated until Spring 2016), while Shelby took care of their home life and worked part time at an outdoor school, where her children could accompany her. Together, the family attended the Fairy Congress, an annual event hosted at the retreat facility known as Skalitude located in the Methow Valley (Carlton) where Shelby helped lead children’s activities. RP 530-31, 533-36.

In April 2015, the parties separated and Shelby moved out of the cabin with both children (E.B. was 1 ½ and H.B. was 7 ½). RP 28. Dain spent time with E.B. as his work schedule permitted. RP 32-34, 431-432. She worked her employment so she could be available for the children, earning approximately \$300-\$400/month. RP 42. To make ends meet, she received government food stamps. RP 192. Dain was out of work by Winter 2015 but in 2016 got a job as a security guard at the Indian Island

U.S. Navy installation and, in March 2018, a new job at the Department of Defense. RP 430, 465; see, also, RP 516-518 (work history varied).

#### B. PETITION FOR PARENTING PLAN AND RELOCATION PROCEEDINGS

In May 2017, Shelby petitioned for a parenting plan and child support. CP 1-6. Dain responded and moved for temporary orders. CP 112-149, 150-152. In December 2017 the court entered Shelby's proposed temporary parenting schedule: E.B. residing primarily with her and with Dain a total of five overnights every two weeks, though they continued to adapt to Dain's fluctuating work schedule. CP 50-65 RP 33-34, 174-175, 431-435. In May 2018, they agreed to a summer schedule. CP 178, 184.

By this point Shelby was in a committed relationship with Benjamin Pixie, a beekeeper who operated a honey business and kept bees in organic farms in Olympia. RP 360. The two met at a Fairy Congress in Skalitude and became engaged in 2016 and planned to wed in May 2020. RP 22, 353-54. Mr. Pixie lived in Olympia and the couple spent time together between their two homes. RP 123. Mr. Pixie's two children from a previous relationship (ages 9 and 6) live near him and he shares 50/50 residential time with their mother. RP 353. In Summer 2018, the mother and children moved to Carlton. Mr. Pixie made plans to follow, hoping eventually to establish a bee sanctuary there. RP 353, 360.

That summer he and Shelby also looked into purchasing the Skalitude property and retreat business, owned by a friend, Lindsey Swope. RP 52-57, 345. The property is located on 160 acres in the Methow Valley and the Okanogan forest, RP 57-58, and includes guest lodging facilities, caretaker housing, and a house the family could live in. RP 58-60, 72, 76. Ms. Swope had run the Skalitude Retreat business for nearly 20 years, hosting instructors and students for educational events, yoga retreats, weddings, and vacations. RP 61-68. For Shelby, purchasing Skalitude and running the business would provide a much better living and working situation: work as a caretaker of the property and the business, in addition to working for Mr. Pixie's honey company, and on-site and cost-free housing (including no utilities, since the facility is solar-powered and has its own well). RP 70-77, 120, 270. Additionally, living there and running the business aligned with her values and beliefs. RP 94-95.

She, Mr. Pixie, and other investors formed "Skalitude LLC" for the purpose of purchasing Skalitude and undertook a feasibility study, with promising results. RP 54-57. Once it appeared the LLC would purchase Skalitude, Shelby emailed Dain (7/29/19) of her intent to move in September, the month the real estate purchase would close. CP 167, 178.

On an attorney's advice, Shelby also filed a declaration describing the proposed relocation. RP 172; CP 69-71 (08/20). On September 4,

2018, her attorney filed a notice of intent to relocate and a proposed parenting plan. CP 97, 80. Dain objected and asked to be the primary residential parent if Shelby relocated. CP 112. He also moved for a temporary order restraining the relocation. CP 150-152. Shelby had not moved, but was commuting back and forth to maintain the temporary residential schedule. RP 105, 162-165, 180. In Carlton, she enrolled E.B in preschool for the two days she worked on site at Skalitude. RP 83-84.

On October 5, 2018, the court held a hearing on Shelby's motion for a revised temporary parenting plan and Dain's motion for a temporary order to prevent Shelby from relocating. CP 215-46. Shelby informed the court she had been travelling back and forth to Skalitude with E.B., while still maintaining her residence in Irondale. CP 238-239. The court declined to restrain Shelby from travelling to Skalitude with E.B. during her residential time, but cautioned the court would entertain a motion to change the schedule if she was unable to return E.B. to Dain each weekend. CP 241-42. On October 19, 2018, the court entered a temporary parenting plan giving Dain every weekend and Thursday night every other week. CP 186. Trial was set for the end of December 2018.

### C. TRIAL

Trial began in late December 2018 and ended in early January 2019. At trial, Shelby testified that E.B. lives with her the majority of the

time, which Dain did not dispute. RP 31, 34. The parties testified about their different roles in E.B.'s life and their departures from once shared values and lifestyles. For Shelby, it was important to arrange her life to maximize time spent with her children. RP 188, 36-37. Connection to nature and the environment, natural practices, and connected community are also central to her beliefs and she has raised E.B. with these values. RP 94-95. Dain testified about the activities he shares with E.B. (motocross, fishing, hiking, etc.) and the stability and earning capacity of his new job as a materials handler for the Department of Defense. RP 440-65.

Shelby, Mr. Pixie, and Ms. Swope testified about the purchase of Skalitude, its viability as a business, and the opportunities it makes available to E.B. and Shelby for education, employment, and quality of life. Ms. Swope testified about the financials of the business, noting that after initial start-up costs (delays due to zoning, investment for set up), the business continued to grow each year from 2013-2018, with gross revenue increasing from 2010 on. RP 347, 351. All three also testified the value of Skalitude could not be measured in dollars; not only did it sustain their lives, the work aligned with their values and priorities, the foremost of which for Shelby and Mr. Pixie was family. RP 188, 391-392. Most importantly, the business promised to make ample time available for both parents to spend with the children. RP 33-34, 42-43, 286.

William Dickey, one of the Skalitude LLC owners and investors, testified that he was willing and able, if needed, to contribute additional funds to keep Skalitude operating. RP 567. Mr. Dickey's contribution came from a trust fund with a current value of \$4.2 million. RP 566. Like the investors, Mr. Dickey invested in Skalitude because he believed in the company, not because he expected a profit. RP 571.

Shelby described Skalitude's neighbors as well-connected and the community as centered around school with many opportunities for extracurricular activities. RP 95, 97. She described E.B. as bright and engaged in learning. RP 36-37. She described the schools in the Methow Valley school district where her older son, H.B., and Mr. Pixie's children attended school, noting the district has a program the state has recognized as a school of excellence. RP 88-89. She further testified about her research and comparison of both the Methow Valley and Port Townsend school districts, noting that test scores were comparable but Methow Valley had a higher graduation rate. RP 297.<sup>2</sup> Finally, Shelby testified about E.B's Montessori preschool E.B. in Carlton, noting she and Dain both prefer the Montessori system. RP 82, 88.

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<sup>2</sup> She also sought to introduce the opinion of an educator in Port Townsend (Amber Jones), but the court refused to qualify her as an expert. RP 397-423.

Shelby described the layout of Skalitude and the house she, Mr. Pixie, and the children would share. RP 58-60. Access was by way of a long driveway, similar to the driveway to Dain's cabin in Discovery Bay (i.e., gravel, safe). RP 234, 301-02. The arrangement in Skalitude was also similar geographically to the arrangement in Irondale insofar as both were about 20-25 minutes away from town. RP 95-96, 195.

Shelby compared her employment in Port Townsend, earning \$300-\$400 month, to her employment at Skalitude, earning \$750, with potential for other income from Pixie Honey. RP 100-111, 118-119. She would not be able to fulfill her duties at Skalitude if she resides in Jefferson County, a six-hour drive away. RP 122, 164.

Dain testified about his relationship with E.B., offering multiple photographs depicting E.B. engaged in a variety of activities with him, though Shelby did not dispute they enjoyed quality time together and Dain admitted he would still be able to do these things if Shelby moved. RP 552. He also acknowledged his work schedule would require E.B. to spend 6:00-8:30 a.m. in daycare or on a bus before school. RP 549-550.

Dain expressed concerns about the remoteness of Skalitude, travel time and safety, though did not offer any specific evidence to show it was any less safe than Discovery Bay, also rural. RP 482. He noted there was no cell phone service but acknowledged the house had a landline and

Internet. RP 483; see, also, RP 156 (Internet). He said he did not fear for E.B.'s safety in Jefferson County because he was also in the county. RP 494. Dain also questioned the quality of the Methow Valley schools, but ultimately admitted he could not conclude which school was better or that E.B would be harmed by going to school in the Methow. RP 523-24.

Dain testified Shelby was a good mom, but acknowledged there were just some things he does not like. RP 548. He noted her employment and relationship history.<sup>3</sup> He criticized Shelby's "alternative lifestyle" and participation in events such as Fairy Congress,<sup>4</sup> though acknowledging he attended Fairy Congress with Shelby and E.B. in the past; in fact, he admitted he was okay with it then when they were a family, but he is not okay with it now because they are separated. RP 535-36, 487-88. He also acknowledged his proposed parenting plan had E.B. living at Skalitude nearly all summer (when these events take place). RP 546.

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<sup>3</sup> In particular, he focused on her brief engagement to a long-time friend before she and Mr. Pixie committed to each other. RP 290. As Shelby explained, she accepted his proposal because she thought it would bring more stability to her life but broke it off in the end because she was not doing it for the right reasons. RP 290-91.

<sup>4</sup> Dain characterized the event as involving nudity and drug use, though the event had a no drug and alcohol policy. RP 536, 546. Over Shelby's objection, he offered multiple photographs showing participants at this event in costume, including ones showing Shelby in costumes that exposed parts of her body (similar to what a swimsuit would expose). RP 500. He also offered a photo of himself where he was wearing a unicorn horn (but cropped out the unicorn horn). RP 533, Ex. 235.

Dain testified that “one of the biggest reasons” he does not want E.B. to move to Skalitude is because the distance “limits and almost nullifies” his involvement with E.B.’s education and in extracurricular activities. RP 484. He questioned the financial stability of Skalitude, though admitted he was not positioned to offer an opinion on its viability. Still, he claimed the “tenuous nature” of the business as another reason relocation was not in E.B.’s best interest. RP 486, 538.

#### D. COURT’S RULING AND FINAL ORDERS

The court issued a memorandum opinion on relocation on March 25, 2019. CP 277-97. The court found E.B. resided with Shelby the majority of the time and, therefore, she was entitled to the presumption favoring relocation. CP 290. The court then discussed the CRA factors to determine whether Dain proved the detrimental effect of the relocation outweighed the benefit of the change to the child and to Shelby. CP 291.

Applying the first factor (relative strength, nature and quality of child’s relationship with each parent, siblings, significant person in child’s life), the court found “overall” Shelby is “less stable” than Dain, though did not evaluate the stability of E.B.’s relationship with her as required by the statute. CP 290. Factor (2) did not apply as there were no agreements between the parties about staying or moving. CP 292.

Applying factor (3), the court concluded disrupting the child's relationship with Shelby would not be more detrimental to the child than disrupting contact between the child and Dain, noting disruptions to contact and travel. CP 292. The court noted Dain "is equally capable of dealing with the child's education and medical/dental needs and earnestly wants to be involved with those components of parenting." CP 292. The court acknowledged that "overall the relocation would be disrupting to the child's relationship with both parents to some degree," and "at worst, the detriment to the child would be equal," though ultimately concluded disruption of Dain's relationship would be more detrimental because he "is more stable and presents a more stable situation for the child." CP 292.

Applying factor (4), the court found no limitations under RCW 26.09.191.

Applying factor (5) (reasons for move, good faith), the court found Shelby wanted to move to Skalitude because it comports with her "alternative lifestyle," and while "that is fine for Petitioner," the issue is "whether it is best for the child." CP 293. The court then concluded that "although it is apparently a dream site for Petitioner and she wants this lifestyle, the child does not appear to gain anything by being there." CP 294. The court then questioned Shelby's concern about her financial future and the prospects of better earnings provided by Skalitude. CP 294. The

court further questioned why her marriage to Mr. Pixie has been “deferred so long,” as “it reflects a less than stable situation.” CP 294. Additionally, the court doubted the quality of the Methow Valley schools was a reason for the move and instead was an argument made after the decision to move. CP 294. Finally, the court noted that Shelby claims to still live in Irondale but her older child lives and goes to school in Okanogan County and she commutes during the week to have E.B. attend preschool there. CP 295. The court found this showed “extremely poor judgment” and corroborates the court’s view that the move is for her desire and benefit, not that of the child. CP 295.

Applying factor (6) (age, developmental stage, needs, impact on physical educational social development), the court found both parents agreed either school would be okay and would not harm the child. CP 295.

Applying factor (7) (quality of life, resources, available opportunities in current and proposed location), the court agreed with Dain that “Port Townsend and Jefferson County have unlimited opportunities for children and the Methow Valley does not.” The court also agreed with his concerns about safety and seclusion at Skalitude. CP 295.

Applying factor (8) (availability of alternate arrangements to foster and continue relationship with and access to the other parent), the court found if the child relocates “it is not possible to establish a residential

schedule that permits the strong and stable relationship that the child now has with Respondent,” noting “weekly contact would not be possible,” “the drive is remarkably long,” and due to “the transportation issue,” he would not have the quality time he now has with the child. CP 295.

Applying factor (9) (alternatives to relocation, feasibility of other parent moving), the court found it would make no sense for Dain to leave his “very good and job with the federal civil service” and go to the Methow Valley. The court further found the only alternative for Shelby would be not to move. CP 296.

Applying factor (10) (financial impact), the court found relocation would increase travel time and expense for each parent (CP 296), but ignored the cost of relative costs of daycare and Shelby’s free housing and increased income. Factor (11) did not apply. CP 296.

Balancing all the factors, the court found all but factors (1) and (2) favor Dain and no relocation. CP 296. The court found factors (1) and (2) “neutral” and not favoring either party, and factor (4) “technically neutral” but found that “for the reasons discussed, the fact that Petitioner argued what she did to justify a relocation demonstrates to the Court a lack of good faith and favors Respondent and no relocation.” CP 296. The court concluded: “As much as Petitioner desires to live her lifestyle at Skalitude, the Court finds that the detrimental effects of the relocation outweigh the

benefit of the change to the child in particular and to the Petitioner.” CP 20. The court denied the relocation and approved a parenting plan proposed by Dain that made him the primary residential parent. CP 297.

On April 11, 2019, the parties appeared for presentation of orders. RP 633.<sup>5</sup> Shelby informed the court that given its denial of E.B.’s relocation she would stay in Jefferson County, as it was more important for her to abandon her plans and remain in Jefferson County as E.B.’s primary parent. RP 635-636. She asked the court to enter the plan Dain proposed if she were not to relocate. RP 635-636; Ex. 2. This plan was consistent with the temporary orders, reflects the status quo, and would eliminate any disruption to E.B., keeping him out of daycare in the early mornings. RP 636-37. Dain objected, arguing this request was improper, procedurally and noting that RCW 26.09.530 prevents the court from considering evidence on the issue of whether the person seeking to relocate will forgo his or her relocation. RP 642. But as Shelby explained, the statute further provides that the court may admit and consider such evidence after it makes its decision on the relocation.

That’s specifically where we’re at now. We’re not challenging the Court’s decision to restrain the relocation. We’re asking the court to adopt a different alternative by way of Exhibit 2 parenting plan that was submitted by the respondent in this case.

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<sup>5</sup> By this point, Shelby and Mr. Pixie had legally married. CP 326.

RP 648. Shelby also indicated she would file a motion to reconsider if the court preferred; the court said she could file a motion to reconsider but given everything it heard the court had “no reason to believe she is making a sincere genuine return to Jefferson County.” RP 652. The court then signed the final orders and parenting plan, which incorporated the findings in the court’s memorandum opinion. RP 653; CP 257-67, 248-56.

Shelby filed a motion to reconsider. CP 266-69. The court denied the motion, finding it frivolous and awarding fees to Dain. CP 273-74.

Shelby appeals. CP 275-318, 345-60.

#### IV. ARGUMENT

##### A. INTRODUCTION

There are many reasons why parents seek to relocate after ending a relationship, including the opportunity to improve their quality of life, to improve their economic circumstances, and to join a new partner.

Washington courts struggled for over a decade to devise a framework for decision-making in this context. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47-57, 940 P.2d 1362 (1997).

In 2000, the Legislature enacted its own solution, Washington's child relocation act, RCW 26.09.405-.560 (hereinafter CRA). Under the CRA, the trial court must consider eleven factors to determine if a detrimental effect of relocation outweighs the presumed benefits to both

the child and the relocating parent. RCW 26.09.520. In many respects similar to the Washington Supreme Court's solution in *Littlefield*, the CRA seeks to balance the competing interests of the parents and children but also to implement legislative policies on families.

For example, Washington defers to decision-making by fit parents, places a premium on finality in decisions affecting families, and highly values custodial continuity for children. Repeatedly, the court has emphasized that fit parents are presumed to act in the best interests of their children. *In re Marriage of Horner*, 151 Wn.2d 884, 895, 93 P.3d 124 (2004). The Legislature has instructed that the “best interests” of children are ordinarily served when the “*existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.*” RCW 26.09.002 (emphasis added). That is, protecting “continuity” means continuity in the relationship between the child and a parent who has acted as the child’s primary caregiver. *In re Combs*, 105 Wn. App. 168, 174, 19 P.3d 469, 472 (2001). Accordingly, custodial changes are disfavored as highly disruptive to children. *In re Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993).

The CRA reflects these policies in a number of ways, most prominently by establishing a presumption favoring relocation when

requested by the parent with whom the child resides a majority of the time. RCW 26.09.520 (“There is a rebuttable presumption that the intended relocation of the child will be permitted.”). “This presumption incorporates and gives substantial weight to the traditional presumption that a fit parent acts in his or her child’s best interests, including when that parent relocates the child.” *In re Marriage of McNaught*, 189 Wn. App. 545, 553, 359 P.3d 811 (2015).

Here, the trial court invoked the presumption, but failed to apply it. In particular, the court did not require the objecting parent to prove the relocation decision of the presumptively fit parent “will in fact be harmful to the child – and in fact, so harmful as to outweigh the presumed benefits of relocation to the child and relocating parent.” *Osborne v. Osborne*, 119 Wn. App. 133, 147, 79 P.3d 465 (2003); *accord*, *In re Marriage of Momb*, 132 Wn. App. 70, 79, 130 P.3d 406 (2006).

This standard “‘incorporates and relies on [the] traditional presumption’ that fit parents act in a child’s best interest, so any relocation by the parent with whom the child is scheduled to reside a majority of the time must be in the interests of both that parent and the child.” *Bergerson v. Zurbano*, 6 Wn. App. 2d 912, 920-21, 432 P.3d 850 (2018) (internal citations omitted); *accord* *In re Marriage of Worthley*, 198 Wn. App. 419, 431, 393 P.3d 859 (2017). In short, when a parent “with whom the child

resides a majority of the time” must relocate, “[t]he CRA shifts the analysis away from only the best interests of the child to an analysis that focuses on both the child and the relocating person.” *Horner*, 151 Wn.2d at 887. “Particularly important in this regard are the interests and circumstances of the relocating person.” *Id.* at 894. This presumption favoring relocation necessarily affects a court’s analysis of each of the CRA factors. *In re Parentage of P.J.M.*, No. 79102-8-I, 79500-7-I, 2019 WL 4619903, at \* 26 ( Wn. App. Sept. 23, 2019) (CRA factors “must be viewed with the presumption in mind”).<sup>6</sup>

Here, the trial court repeatedly lost that focus, ignoring or minimizing Shelby’s interest as the primary residential parent. Instead of employing the presumption as intended, the court attempted to micro-manage this family to serve its own preferred values and family configuration. The Supreme Court has warned against precisely this danger – the danger of forgetting the reality of the post-separation family.

A child cannot escape the reality that his or her family is no longer the same. The trial court does not have the responsibility or the authority or the ability to create ideal circumstances for the family. Instead, it must make parenting plan decisions which are based on the actual circumstances of the parents and of the children as they exist at the time of trial.

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<sup>6</sup> Pursuant to GR 14.1(a), this unpublished case is cited for its persuasive value only.

*Littlefield*, 133 Wn.2d at 57 (emphasis added). While the CRA supersedes the mechanism set forth in *Littlefield*, it embraced this wisdom.

#### B. THE STANDARD OF REVIEW

This court reviews relocation determinations for an abuse of discretion. “If the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis it necessarily abuses its discretion.” *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). Here, the trial court failed to implement the statute’s presumption and the relevant relocation factors correctly, leading it erroneously to focus on the wrong facts and inadequate facts to deny the mother’s petition. A court also abuses its discretion “if the factual findings are unsupported by the record.” *Littlefield*, 133 Wn.2d at 39 (“untenable grounds”).

#### C. THE TRIAL COURT FAILED TO EFFECTUATE THE STATUTORY PRESUMPTION IN FAVOR OF RELOCATION AND TO APPLY THE CRA PROPERLY.

The trial court here acknowledged the presumption favoring relocation, yet, at every turn, disregarded its effect. Rather than weighing the factors in light of this presumption, the court instead completely re-organized the family – not based on any harm proven, but on an apparent preference for one lifestyle and one location over another. But the CRA requires of the court an analysis similar to the modification contest, i.e.,

whether “[t]he 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 a change to the child; ...” RCW 26.09.260. Both tests protect the same interests: continuity, finality, and family autonomy. Instead, here, the court faulted the mother for seeking to move and for living an “alternative lifestyle.”

Here, the trial court turned the inquiry into a “lifestyle” contest, pitting the parents against one another in a way that disserves them and E.B. Both of these parents are fit. Together they constructed their lives as they exist today, with Shelby taking the larger role in childrearing. Relocation provides Shelby with a unique opportunity to improve her circumstances, which will benefit E.B. The CRA allows her to do so because the father failed to show that her move would be so harmful to E.B. or to her as to outweigh the benefits of disrupting that primary relationship. The trial court’s failure to apply the presumption pervades its analysis of the pertinent statutory relocation factors, as discussed below.

1) The trial court misapplied the first relocation factor.

The CRA first requires the court to consider “[t]he 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.” RCW 26.09.520(1). The court erred by finding this factor to be “neutral” and not favoring either party. CR 304.

The evidence is undisputed that both parents have a “high quality, strong, and stable relationship” with E.B. CP 299. It is also undisputed that the mother has been the primary caregiver for E.B.<sup>7</sup> CP 299. Absent some limiting factor under RCW 26.09.191, Washington law favors maintaining the continuity of this relationship. Instead, the court focused on its views of the “overall” stability of the mother compared to the father, finding:

In the Court’s view, overall [the mother] is less stable than [the father]. She has hardly ever had a regular, full-time job. She has chosen to live a sustenance lifestyle and to continue to do so. She has been in multiple serious relationships since she and [the father] separated.

CP 299. This is not the test. The court is not supposed to critique the mother’s job or relationship history, but to examine the “stability of the child’s relationship” with her. RCW 26.09.520(1) (emphasis added). This mother is devoted to her children, and the children, including E.B. are thriving. Indeed, some of Shelby’s work history can be attributed to making time with her children a priority. RP 306.

Nor is there evidence the mother’s “sustenance lifestyle” negatively impacted the stability of her relationship with E.B. And the

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<sup>7</sup> The court found that Dain “has the child more than the typical amount of time.” CP 299. This finding is not supported by substantial evidence, as there is no evidence in the record about what a “typical amount of time” would be.

court's criticism of the mother for having "multiple serious relationships" since separating from the father is both irrelevant to the stability of her relationship with E.B., as well as disingenuous. The record shows both Shelby and Dain had an unsuccessful relationship post-separation. CP 124-25, 518-19. Likewise, Dain has a history of serial employment, with periods of unemployment, and a history of abandoning a previous family, but the court did not take him to task for these things, nor should it if there is no effect on the stability of the relationship with E.B.

The trial court continued to rely on irrelevant concerns under this factor by expressing its view that the mother effectively moved to the Methow while this action was pending (CP 258-59), a finding not supported by substantial evidence; instead, the record shows the mother maintained her residence in Irondale, while commuting weekly to Skalitude for work, as she informed the court during earlier proceedings. CP 238-39. Regardless, the court's concern about this issue again has nothing to do with stability of the mother's relationship with E.B.

Finally, the trial court also erred by minimizing the importance of maintaining E.B.'s relationship with his half-brother H.B., an explicit concern of the statute. Although the court correctly found the siblings are "close," the court went on to find "they will remain so regardless of whether [E.B.] remains with Respondent or relocates with Petitioner." CP

259. This finding makes no sense and is at odds with the court's own finding about the effect on the relationship between Dain and E.B. CP 262 (will be disrupted by distance). The court cannot have it both ways.

On these misplaced grounds, the court found the "stability" factor to be neutral when, in fact, the evidence suggests it favors relocation (preserving primary residence with mother and sibling). In any event, if there was a "tie" with respect to this factor, the presumption tips the factor to favor relocation. *See, e.g., P.J.M.*, 2019 WL 4619903, at \*8 (a "neutral" factor "necessarily does nothing to rebut the presumption and thus favors relocation").

- 2) The court erred by finding that disrupting contact between E.B. and his mother would be less detrimental than disrupting contact between E.B. and his father.

The CRA requires the court to consider "[w]hether disrupting the contact between the child and the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation." RCW 26.09.520(3). This analysis must take the family where it finds it, which here means a family where Shelby has been E.B.'s primary residential parent.

Instead, the court began by minimizing and mischaracterizing the amount of time E.B. spent with Shelby. CP 300 ("had the child a slight

majority of the time” and “a relatively small majority of the time”). This finding is contradicted by the court’s own factual finding. CP 300 (Dain had E.B. 5/14 nights and Shelby 9/14 nights). This is not a “slight majority” of the time; it is a supermajority.<sup>8</sup> Unsurprisingly, this arithmetical error skews the court’s analysis of the detriment factor, allowing it to conclude:

[O]verall, the relocation would be disrupting to the child’s relationship with both parents to some degree. However, the disruption between the child and [the mother] would not be more detrimental to the child than the disruption between the child and [the father]. At worst, the detriment to the child would be equal. Because [the father] is more stable and presents a more stable situation for the child, disruption of the child’s relationship with [the father] ultimately would be more detrimental to the child.

CP 292. Whereas Washington policy concerns itself with preserving the continuity of the primary residential caregiver relationship, here the court again trumped that consideration with the father’s lifestyle (“stable”), which does not answer the question the factor poses. Rather, the court must consider the detriment of disrupting the child’s “contact” with each parent. In this analysis, the court must consider the impact on the child of removing him from his mother’s primary care, the only kind of “stability”

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<sup>8</sup> The court further emphasized that when the father has E.B., “he is with the child constantly and has not had to use daycare.” CP 300. But the same is true when the mother has the child, though the court seemed not to credit that fact. CP 240 (Dain’s counsel acknowledging at pre-trial hearing that Shelby is home with E.B. “24/7”).

pertinent to this factor. Again, whatever criticisms the court has of the mother's lifestyle, they do not detract from the duration, consistency, and quality of the mother's caregiving over E.B.'s lifetime. Thus, the court ends up with its "at worst" conclusion that the detriment is equal, which, however dubious, does nothing to rebut the presumption.

3) The court improperly weighed a "technically neutral" factor in favor of the father.

The fourth factor under the CRA requires the court to consider whether either parent is subject to limitations under RCW 26.09.191. *See* RCW 26.09.520(4). Here, neither parent alleged limitations under RCW 26.09.191. As a result, this factor should not weigh in the relocation.

Nonetheless, the court weighed this factor against relocation, based on finding Shelby not credible in raising concerns about Dain's alcohol use during their relationship and in expressing her view of their interactions as contentious and hostile. CP 301, 304. The Court stated that while this factor was "technically neutral," "the fact that Petitioner argued what she did to justify a relocation demonstrates to the Court a lack of good faith and favors Respondent and no relocation." CP 304; *see also* CP 301 ("It appears to the Court from the evidence that Petitioner has attempted to raise issues about the Respondent to buttress her argument to have the relocation approved by this Court"). While Shelby disagrees with

this finding, the main point is that “191” is not a factor either party raised and, therefore, RCW 26.09.520(4) does not factor into the analysis.

4) The court’s analysis of the fifth relocation factor is riddled with errors.

The CRA’s fifth factor requires the court to consider 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.” RCW 26.09.520(5). Shelby sought to relocate to live with her partner, whose children and former partner live in Eastern Washington, and to pursue a business opportunity uniquely suitable to her and her family. Dain did not disprove these benefits. Yet, the court weighed this factor against relocation, following an extended discussion that included criticism of the mother for not yet marrying her partner and for living an “alternative lifestyle.” The court’s analysis relies on irrelevant facts, ignores evidence, shifts the burden of production and persuasion to the mother, and fails to credit the presumption favoring relocation.

First, the court mistook this factor as permitting an exclusive focus on the child. *See, e.g.*, CP 303 (expressing court’s view that “this move is proposed for Petitioner’s desire and supposed benefit and not the benefit of the child”); *id.* (“Although it is apparently a dream site for Petitioner and she wants this lifestyle, the child does not appear to gain anything by being there.”); *id.* at 301 (stating that Shelby has chosen to “live an

alternative lifestyle . . . . that is fine for Petitioner; the issue is, however whether it is best for the child”). This was clear error.

Under the CRA, the interests and circumstances of the relocating parent are not only relevant, but are “particularly important.” *Horner*, 151 Wn.2d at 894; *see also McNaught*, 189 Wn. App. at 555 (“the presumption in favor of relocation operates to give particular importance to the interests and circumstances of the relocating parent, not only the best interests of the child”). As a result, it was error for the court to ignore Shelby’s reasons for wanting to move to Skalitude, let alone ignore how much she benefited from the move, benefits Dain failed to rebut. For example, the court ignored the improvement in housing, the reduction in housing costs, and the considerable improvement in earnings. RP 69-81. Unrebutted were Shelby’s claims that Skalitude offered a “unique opportunity for a home, work, and co-ownership” at Skalitude, which “offers a significant gain and improvement in the quality of life for my family and myself.” CP 164.

Instead of even acknowledging the relevant facts, the court instead expressed its view that Shelby “wanted to move to Skalitude regardless of other considerations” (CP 301), apparently a reference to the schools, business opportunities, etc., as compared to Shelby’s desire to live there. This finding is confusing and not supported by substantial evidence: there were many benefits to the move. But even if this finding is accepted, it

simply is not relevant; the fact that a parent would want to relocate for her own interests and circumstances is not a reason to restrain the relocation. Instead, it is presumed that by acting in her best interests, Shelby as a fit parent is also acting in E.B.'s best interests. *McNaught*, 189 Wn. App. at 555 (“the presumption in favor of relocation ‘incorporates and gives substantial weight to the traditional presumption that a fit parent will act in the best interests of her child.’”).

Yet the court criticized Shelby for putting “the pieces together” in support of the move only after learning of Dain’s objection. CP 301. This finding is not supported by substantial evidence; Shelby informed Dain by email when it looked like the purchase would go through, by which point her husband had moved and they had put forth considerable effort in regard to purchasing the property. But even if this finding were correct, nothing in the CRA suggests that a relocating parent cannot develop additional reasons to “justify” a move to respond to anticipated or actual issues raised by the objecting parent. Any kind of relocation will have multiple moving parts, often being initiated by one event (e.g., a job or educational opportunity). A relocating parent does not have to have all the parts assembled before giving notice.

The court also challenged Shelby’s business decision, expressing skepticism about its viability. But this is not the court’s job. Our law lets

parents decide what is best for them. And this was not a vague startup, but an established business (or two businesses, counting Pixie Honey). Shelby not only knew the business, she knew the owner. RP 112-113, 152.<sup>9</sup> She had investors, a feasibility plan, and devotion to the venture. She does not have to prove anything more. Rather, the burden is on Dain, who offered no evidence to show that Skalitude was not a viable business.<sup>10</sup> *See McNaught*, 189 Wn. App. at 556 (noting the CRA “shifts the burdens of persuasion and production to a party opposing relocation”). Thus, the court’s finding “this deal does not appear to the Court to be particularly stable” (CP 302) is nothing but speculation. Just as easily, given Dain’s employment history, the court could conclude his employment is unstable.

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<sup>9</sup> The court’s skepticism about the viability of the business also ignores testimony by its former owner Lindsay Swope that gross revenues for Skalitude have increased consistently since 2010. RP 351. As Ms. Swope testified in summarizing the benefits of owning Skalitude, “it was a pretty good business. You get to live at home in a beautiful place. You get to set your own schedule. And yes, you make . . . enough money to pay your mortgage and have a nice life.” RP 349. And the record showed that in just the first few months of Shelby and her co-owners operating the business, it was making a profit. RP 273-279, Ex. 253.

<sup>10</sup> The court went so far as to express its skepticism regarding Shelby’s financial interest in Skalitude after the purchase, stating that “[N]o evidence was presented that shows how Petitioner has or will ever acquire a financial interest in Skalitude. . . . From the Court’s view, Petitioner has not established a financial interest of value in either LLC.” CP 302. But this concern ignored that this evidence was provided through uncontradicted testimony, as well as exhibits. RP 52-58, 357; Ex. 245, 246. And once again, it was not Shelby’s burden under the CRA to prove her financial interest in Skalitude as the party seeking to relocate. *McNaught*, 189 Wn. App. at 556.

The court also directs its stability criticism at Shelby for not yet marrying her fiancé, Mr. Pixie. The court stated:

They are not planning to get married until May 2020. No credible explanation was given as to why marriage was and is going to be deferred so long. The only reason it is relevant is it reflects a less than stable situation which, along with the rest, is the basis for a major move by Petitioner and a significant impact on Respondent's ability to parent.

CP 302. Even putting aside the court's unnecessary determination that there was no "credible explanation" for Shelby and Mr. Pixie to marry on their own preferred timeline, the court's criticism of them for not marrying sooner is both irrelevant and offensive. There is no substantial evidence to suggest their stability – whether as a couple, as business partners, or as parents – depended on them marrying on a particular timeline, or marrying at all.<sup>11</sup> People who choose not to marry are not necessarily "less stable" than married people and, certainly, such people are entitled to our courts treating them fairly and respecting their choices. It is even more problematic to hold a relocating parent's deferral of a marriage to an intimate partner as a basis to disfavor relocation.

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<sup>11</sup> Indeed, if the court viewed marriage as relevant to determining a parent's stability, Dain himself disproved that point through evidence that he abandoned his two daughters and his wife. RP 46, 514-516. By contrast, Mr. Pixie moved across state to continue equal parenting with his former wife.

The court further weighed this factor against relocation based on its finding that the educational opportunities in the two locations were “at worst equal” and that “[i]n Jefferson County there are more and much closer towns and cities. From the evidence, there are more activities and socialization activities and opportunities.”<sup>12</sup> CP 303. But even accepting this indictment of Eastern Washington as true, these considerations are to be addressed under factors (6) and (7) of the CRA, rather than factor (5), as discussed below.

The court further found that Shelby’s decision, before trial, to have E.B. attend preschool two days a week in the Methow Valley while she commuted between Skagitide and Jefferson County “strikes the Court as extremely poor judgment and corroborates the Court’s view that this move is proposed for Petitioner’s desire and supposed benefit and not the benefit of the child.” CP 303. Again, the court must consider the benefit to Shelby, not just the child. Moreover, the court’s negative reliance on this point ignores that Shelby had informed the court of these plans at a hearing on October 5, 2018. CP 231 (informing the court that while

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<sup>12</sup> The court also expressed its view that it “does not believe the quality of the schools was a reason for the move; rather, it was an argument that was made after the decision to move was already made.” CP 302-303. But Shelby did not argue that the move was motivated by better schools in Methow Valley compared to Port Townsend; she simply sought to present evidence on the relative quality of the educational opportunities because it is a factor considered under RCW 26.09.520(6) and (7).

“Shelby will do whatever the court says,” she believes “it’s in her best interest and [E.B.’s] best interest to temporarily be allowed to stay there [at Skalitude], temporarily allow him to be enrolled in school”), CP 238-239 (informing the court that she continues to maintain a residence in Jefferson County, but has been traveling between her home there and Skalitude in order to perform work at Skalitude). The court declined to restrain Shelby from continuing with those plans before trial, despite having the opportunity to do so. CP 242. Accordingly, it was for Shelby to decide what was best for her and for her family, which was to pursue her the life she desired while fulfilling her obligation under the temporary parenting plan.

Finally, the court’s conclusion that “this move is proposed for Petitioner’s desire and supposed benefit and not the benefit of the child” again underscores the court’s failure to credit Shelby’s legitimate interest in making the relocation decision.

- 5) The court’s consideration of the sixth relocation factor did nothing more than express the court’s preference for the child to live in an area with more people nearby.

The next factor to consider is 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.” RCW

26.09.520(6). The trial court found this factor weighed against relocation.

After concluding the educational opportunities available in the two locations would both be “okay” and “not harm the child,” the court stated:

The child is 5 years old. Aside from actual education, he is in his formative years; needs socialization with peers; needs stability, structure and a stable environment; and there appears to be more peers, activities and opportunities in Jefferson County and places relatively nearby in the Kitsap and Puget Sound areas than what is available at or near Skagitide.

CP 303. This finding is peculiar if only because both parents live in the country. In any case, the court’s preference for raising children in or near populated areas is irrelevant. Its conclusion that such circumstances better satisfy the needs of children is unsupported by the evidence and likely to provoke dissent from multitudes of Washington’s rural residents. Here, again, the court’s subjectivity obscures the correct analysis of this factor.

E.B. has no special needs. Both counties satisfy his “needs [for] socialization with peers ... stability, structure and a stable environment.” But only one county offered E.B. the opportunity to continue living with his lifetime primary residential caregiver, with his brother, H.B., and with his blended family – including Mr. Pixie’s two children, one of whom is close to E.B.’s age and described as E.B.’s best friend. RP 355. When assessing what E.B. needs, the court is not free to ignore these facts, and certainly not free to override them in favor of living nearer an urban area.

- 6) The court's analysis of the seventh CRA factor wrongly ignored the benefits of the relocation to Shelby and lacked substantial evidence to support its findings of benefits to E.B.

The CRA next requires the court to consider the “quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations.” RCW 26.09.520(7).<sup>13</sup> The court again found that this factor weighed against relocation. However, the court’s analysis again minimized and ignored evidence about the opportunities available to the mother in the new location, while also ignoring the benefits to E.B.

In terms of Shelby’s quality of life, resources, and opportunities in the two locations, the court simply stated that “Petitioner argues that Skalitude has beauty, a philosophy and activities consistent with her values and spirituality. She denies there are any safety issues at Skalitude.” CP 303. This analysis fails to consider what the statute actually requires, and ignores most of her testimony, omitting entirely the requisite comparison of the “quality of life, resources, and opportunities available” to Shelby in her current and proposed geographic locations. In Skalitude, Shelby and her children will live with her husband, with his children nearby, pursuing a promising business opportunity while

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<sup>13</sup> “By its plain language, this factor considers only the relocating parent’s current and proposed circumstances, with no counterbalanced consideration of the other parent’s circumstances”. *Bergerson v. Zurbano*, 6 Wn. App. at 922.

honoring her values and beliefs in family/nature/community. She will enjoy better physical resources (housing) and income and E.B. will benefit from the continuity of his life with his mother and brother, comparable educational resources, siblings (half and step), and a natural setting equivalent in beauty and recreational opportunities. For Shelby and E.B., so long as the evidence is considered, the Methow wins this contest.

7) Concerns regarding the eighth relocation factor could be mitigated.

The next CRA factor is the availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent. RCW 26.09.520(8). As noted, the CRA test already encompasses the reality of disruption caused by distance. *R.F.R.*, 122 Wn. App. at 332-33. Still, the court found this factor weighed against relocation, primarily because the distance and difficulties in travel between the two locations would not permit the child to have as much time with his father as before. CP 304. Obviously, these concerns would apply to Shelby, if she relocates to live with her husband. They are unavoidable. Accordingly, this factor directs the court to examine alternatives, which is just what Shelby did.

While the distance would not make it feasible to permit Dain to have every weekend with E.B., Shelby suggested a residential schedule to provide Dain with significant residential time, which her counsel noted could be further adjusted to provide increased time. RP 100-104, RP 591-

92. Additionally, while Skalitude may not have reliable cellphone service, it does have a landline and internet service. CP 156, 483. As a result, it would be possible to maintain regular and frequent contact between E.B. and his father through other means. Residential schedules overcome much greater distances than involved in this case.

8) The court gave short shrift to the ninth relocation factor, relieving Dain of his burden of proof.

The next factor requires the court to consider the “alternatives to relocation and whether it is feasible and desirable for the other party to relocate also.” RCW 26.09.520(9). The court found this factor weighed against relocation, stating “Respondent says it is not feasible for him to relocate to Methow Valley; he has a very good and stable job with the federal civil service here and it would make no sense for him to leave that and go to Methow Valley. The Court agrees with respondent.” CP 304. But the court’s passing consideration of this factor, and the sparse evidence it relies on, ignore key facts and issues.

The record shows the father has had multiple jobs since relocating to the Northwest in 2009, after he left his wife and children in Colorado and traveled more than a year on foot with a backpack. CP 514-15, 526. This includes working as a caregiver, operating his own carpentry business, and working as a security guard. CP 508-12. Nine months before trial, he started his current job as a federal employee at a U.S. Naval

facility, where he operates a forklift and earns \$23.82 per hour. CP 465-66, 511. He also has prior work experience as an emergency room technician and EMT and prior service in the National Guard. CP 513. His parents live in Wyoming and Colorado, and there was no testimony indicating he has family in Washington State. CP 448, 538. There was no testimony he owns a home or has a committed intimate relationship. In other words, there appear to be no significant impediments to relocating.

Nor did Dain make any effort to show he could not find employment closer to Skalitude, despite it bearing on a relevant factor under the CRA. Notably, there are multiple military facilities in Washington, including in Everett, Yakima, Spokane. Relocation to any number of locations other than the Methow Valley would mitigate the travel issues, perhaps permitting a return to a residential schedule similar to the post-separation schedule, during which these parents also did a lot of driving. This factor merited serious consideration, especially as this is not an interstate relocation and Dain proved no strong ties to Jefferson County. The statute requires Dain to establish his relocation is not feasible. On this burden, the court simply gave him a pass.

9) The tenth relocation factor favored relocation.

The final relevant factor is the “financial impact and logistics of the relocation or its prevention.”<sup>14</sup> RCW 26.09.520(10). Once again, the trial court held this factor weighed against relocation, finding that relocation would “necessarily greatly increase travel expenses and travel time for each parent.” CP 304. Because the court must assume in analyzing the CRA factors that Shelby will relocate, these travel costs are inescapable: she will travel to be with E.B., a burden the court did not credit. Likewise, the court ignored that if Shelby does not move, she relinquishes the financial opportunities described above. And the court ignored the increase in daycare costs if Dain becomes the primary residential parent, which both parents must share. CP 307, 341. Contrary to the court’s selective view, the evidence shows the financial impact of preventing relocation would exceed the financial impact of allowing relocation, this factor should have weighed in favor of the mother’s proposed relocation.

10) Relocation should have been granted.

Our law places the burden on Dain to overcome the presumption favoring Shelby’s relocation. He did not carry that burden. Repeatedly, the

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<sup>14</sup> The final CRA factor (“For a temporary order, the amount of time before a final decision can be made at trial”) was not relevant in this case, nor was the factor pertaining to prior agreements of the parties (RCW 26.09.520(2)).

court ignored the CRA's standards and substituted the court's own preferences for a childrearing environment. In doing so, the court transgressed the important policies behind the relocation statute, which, like our modification statute, favors preservation of custodial continuity.

**D. THE COURT ERRED IN ENTERING THE FINAL PARENTING PLAN AND IN DENYING SHELBY'S MOTION FOR RECONSIDERATION.**

After issuing a memorandum opinion on March 25, 2019 denying Shelby's relocation request, the court held a hearing on April 11, 2019 for presentation of final orders. The court entered a final parenting plan upending E.B.s; life, flipping his primary residence from mother to father. CP 307-315. The only finding the court made to support this dramatic change had to do with the relocation: "the court is not allowing the child to move and the parent who asked to move with the child is moving without the child." CP 305. The court made no findings under RCW 26.09.187(3), meaning it never determined whether this plan served E.B.'s best interests.

The court also refused to allow Shelby to present evidence that she would remain in Jefferson County in light of the court's denial of her relocation request, which she attempted at the presentation hearing on April 11, 2019, informing the court she would forego her own relocation to Skaltitude. RP 635-36. Under the CRA, the court had been precluded from considering at trial whether Shelby would forego moving to

Skalitude if the relocation request was denied, so she had no opportunity to present evidence on this issue during trial. RCW 26.09.530.

At the April 11th hearing, Shelby asked the court to consider entering the parenting plan Dain proposed at trial. CP 635-36. This plan would have essentially maintained the same residential schedule the parties had followed before the relocation trial, with Shelby continuing to have the child more of the time. *See Ex. 2*. Notably, Dain testified at trial this was his “ideal” parenting plan if Shelby’s relocation request was denied. CP 500 (the father’s testimony that this plan “would be ideal or what I would consider ideal”). Shelby’s attorney indicated she would be willing to offer her testimony in support of this request. RP 636.

Dain objected, but noted that Shelby was free to file a motion for reconsideration after the final orders were entered. RP 638-40. Shelby’s attorney indicated that “[i]f the Court feels that this isn’t properly before the Court, I would rather not go down the road of getting into the merits of it” and could couch the request as a motion under CR 59 or CR 60 instead. RP 642. The court then noted that “the petitioner can file a motion for reconsider and so on, and that’s all fine. And then we’ll get a lot of argument and factual material, I guess, about the basis for that and whether there is a basis for it and all that stuff.” RP 652. At the same time, the court expressed skepticism that Shelby would remain in Jefferson

County, stating “given everything I’ve heard and so forth in connection with the trial, I have no reason to believe that the petitioner is making a sincere, genuine return to Jefferson County.” RP 652.

Following this direction from the court, Shelby filed a motion for reconsideration under CR 59 on April 22, 2019, in which she presented a declaration indicating that in light of the court’s decision to restrain her from relocating with E.B., she would remain in Jefferson County and enroll both E.B. and H.B. in school there. CP 266-68. The court refused to consider the motion and found it to be frivolous, faulting Shelby for failing to cite in her motion a specific basis under CR 59. CP 273.

The court was wrong on all counts. Having denied relocation, the court was in the position of having to determine a new residential schedule for the child. RCW 26.09.187(3); *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993) (court must consider these factors in making a residential placement decision in child’s best interests). Moreover, after denying relocation RCW 26.09.530 authorizes the court to consider evidence regarding about the intended relocation before determining the residential schedule. In this context, a parent’s change of plans is of enormous consequence to determining the child’s best interests. *See In re Marriage of Grigsby*, 112 Wn. App. 1, 16–17, 57 P.3d 1166, (2002) (court cannot modify if parent abandons relocation).

Under this authority, the court abused its discretion by refusing to allow Shelby to offer such evidence, contrary to E.B.'s best interests. It was also fundamentally inequitable under the circumstances.

First, the court's decision was based on its clearly erroneous finding that Shelby "is moving without the child."; as noted above, there is no evidence in the record that Shelby would move to Skalitude if her request to relocate with E.B. was denied. Instead, the court effectively pre-judged this issue without permitting Shelby to present evidence.

In addition, the court's refusal to consider this evidence is inconsistent with RCW 26.09.002, which requires the court to consider the child's best interests in entering a parenting plan, which is ordinarily served "when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm." Here, Shelby was prevented from presenting evidence that she would remain in Jefferson County after the relocation request was denied and asked the court to enter a parenting plan Dain described as "ideal." This plan would have provided continuity for E.B., retaining Shelby as his primary residential parent, and plainly would have served E.B.'s best interests after the court denied relocation.

Ultimately, the court appeared unwilling to believe Shelby would remain in Jefferson County without even hearing from her. Under the circumstances, this refusal amounts to a denial of due process, which requires parties to have an “opportunity to be heard and defend before a competent tribunal in an orderly proceeding adapted to the nature of the case.” *In re Marriage of Ebbighausen*, 42 Wn. App. 99, 102, 708 P.2d 1220 (1985) (right protected by Const. art. 1, § 3). Here, the nature of the case is structured by the CRA, which specifically contemplates a parent should be able to present evidence that he or she will not relocate if their relocation request is denied, especially where the court has not undertaken a “best interests” analysis for purposes of entering a permanent parenting plan.

Here, the court entered a parenting plan, radically altering this child’s life, based solely on the fact of the mother’s intended relocation. On similar facts, this Court recently held in an unpublished decision the committed error by doing so. *See In re Pellanda*, No. 48338-6-II, 2017 WL 499470, at \* 8 (Wn. App. Feb. 7, 2017).<sup>15</sup> This point is important because the factors under RCW 26.09.520 are not identical to the factors that a court must consider under RCW 26.09.187(3). In addition, when a

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<sup>15</sup> Pursuant to GR 14.1(a), this unpublished decision is cited for its persuasive value only.

court enters a final parenting plan under RCW 26.09.187(3), it must give the greatest weight to the “relative strength, nature, and stability of the child’s relationship with each parent.” This Court in *Pellanda* reversed and remanded the case to a different judge, instructing the trial court “to properly apply the primary parent designation and rebuttable presumption under RCW 26.09.520, and enter a new permanent residential schedule after considering all factors under RCW 26.09.187(3).” *Pellanda*, 2017 WL 499470, at \*9. If this Court does not reverse the relocation decision, it should remand to allow for a fact-finding on where Shelby will reside and on the residential placement that best serves the child.

Finally, given the court’s refusal to permit Shelby this effort when she proposed it, then directing her to make a motion to reconsider (RP 652), this Court should also vacate the award of fees to Dain. Her motion was not “devoid of merit” (i.e., “frivolous”). CP 273.<sup>16</sup>

**E. THE CHILD SUPPORT ORDER SHOULD BE VACATED AS WELL.**

On June 14, 2019, the trial court entered a final child support order. CP 337-44. This order requires Shelby to pay Dain \$357.82 each

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<sup>16</sup> Although not specifically noted by Shelby in her motion, her motion for reconsideration fell within CR 59(a)(4), which provides that reconsideration may be granted if it is based upon “[n]ewly discovered evidence.” *See, also*, CR 59(a)(9) (“substantial justice has not been done”). As noted, the “best interests” analysis had not been done.

month in child support. CP 339. Shelby requests that the child support order be vacated because, for the reasons set forth above, the trial court erred in restraining her proposed relocation and in entering a parenting plan that made Dain the primary residential parent.

F. ON REMAND, THIS MATTER SHOULD BE ASSIGNED TO A NEW JUDGE.

On remand, this case should be reassigned to a different judge.

Given the trial court's decision, including but not limited to its negative references to the mother's "alternative lifestyle," reassignment is appropriate at a minimum for the purpose of "avoiding any appearance of unfairness or bias" on remand. *In re Marriage of Muhammad*, 153 Wn.2d 795, 807, 108 P.3d 779 (2005); *see also In re Marriage of Black*, 188 Wn.2d 114, 137, 392 P.3d 104 (2017) (reassigning family law case on remand and citing *State v. McEnroe*, 181 Wn.2d 375, 387, 333 P.3d 402 (2014), for the point that reassignment may be sought when "the trial judge will exercise discretion on remand regarding the very issue that triggered the appeal and has already been exposed to prohibited information, expressed an opinion as to the merits, or otherwise prejudged the issue").

Here, the court's distaste for Shelby's lifestyle pervaded its view of the case, leading it to ignore pertinent evidence, to view her critically for behavior similar to Dain's, misapply the statute, and, most importantly,

lose track of the paramount concern. That is, in Washington, residential time “must be determined with reference to the needs of the child . . .” *In re Marriage of Cabalquinto*, 100 Wn.2d 325, 329, 669 P.2d 886 (1983). Parents will not be denied time with their children for qualities or conduct irrelevant to the child’s best interests. *See, e.g., Id.* (sexual orientation); *In re Marriage of Taddeo-Smith and Smith*, 127 Wn. App. 400, 110 P.3d 1192 (2005) (disability); *Tucker v. Tucker*, 14 Wn. App. 454, 456, 542 P.2d 789 (1975) (race). It is the parenting relationship that matters. *In re D.F.-M.*, 157 Wn. App. 179, 193, 236 P.3d 961 (2010) (rejecting state’s concerns about square footage in father’s home as “nonsense”).

Shelby is a good and devoted parent, free to make personal decisions about her life and her family life as she sees fit. E.B. has thrived in her care and that should be the court’s focus.

## V. CONCLUSION

For the foregoing reasons, Shelby respectfully requests this Court reverse the order restraining her proposed relocation, vacate the final parenting plan and child support order, and remand with instructions to enter an order permitting the proposed relocation and directing the trial court to enter a revised parenting plan and child support order. In the alternative, she requests the parenting plan and child support order be vacated and this cause remanded for consideration of the child’s best

interests, including in light of any decision she may make regarding relocation.

Respectfully submitted this 20th day of November 2019

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**Brightheart v. Olsen**  
**In re Parentage of E.B.**  
**No. 53416-9-II**  
**Appendix: Challenged Findings & Conclusions**

The trial court erred by making the following findings of fact and conclusions of law:

- a. “[T]he Court concludes that the planned move would cause more harm to the child than good to the child and the parent who wants to move.” (Finding 4)
- b. The father “has consistently had the child on all of his days off of work from the time the parties separated in 2015. For the most part this has been 5 days every two weeks, consisting of 3 days one week, 2 days the following week, and continuing to alternate in this fashion.” (Finding 4.1)
- d. “. . . Respondent has the child more than the typical amount of time.” (Finding 4.1)
- e. “In the Court’s view . . . she has effectively moved to Skalitude for all intents and purposes.” (Finding 4.1)
- f. “With respect to medical care, Respondent has attempted to be involved but has acquiesced to Petitioner’s choices.” (Finding 4.1)
- h. “With respect to education, Respondent has attempted and wants to be involved; Petitioner has made that impractical since September, 2018 by enrolling the child in preschool in Methow Valley.” (Finding 4.1)
- i. E.B. and his half-brother H.B. will remain close “regardless of whether [E.B.] remains with Respondent or relocates with Petitioner.” (Finding 4.1)
- j. “The third factor asks whether disrupting the child’s relationship with the Petitioner (she has the child a slight majority of the time) would be more detrimental to the child than [sic] disrupting the contact between the child and Respondent. Framed that way, the Court determines the answer is no.” (Finding 4.3)
- k. Ms. Brightheart “has the child a relatively small majority of the time and has chosen to basically be in control of medical decisions regarding the child.” (Finding 4.3)
- l. “Regarding education, Respondent has been precluded from really being involved by virtue of Petitioner placing the child in a preschool in the Methow Valley.” (Finding 4.3)
- m. “[T]he disruption between the child and Petitioner would not be more detrimental to the child than the disruption between the child and Respondent. At worst, the detriment to the child would be equal. Because Respondent is more stable and presents a more stable situation for the child, disruption of the child’s

relationship with Respondent ultimately would be more disruptive to the child.” (Finding 4.3)

n. “It appears to the Court from the evidence that Petitioner has attempted to raise issues about the Respondent to buttress her argument to have the relocation approved by this Court. . . . The Court believes Petitioner is alleging these things to attempt to strengthen her justification for relocating and to put the Respondent in a bad light.” (Finding 4.4)

o. “Based on all the evidence this Court believes and finds that Petitioner wanted to move to Skalitude regardless of other consideration.” (Finding 4.5)

p. Ms. Brighthouse and Mr. Pixie have chosen to “live an alternative lifestyle. Respondent points out, and this Court agrees, that that is fine for Petitioner; the issue is, however, whether it is best for the child . . . .” (Finding 4.5)

q. “Only after anticipating or learning of Respondent’s strong objection to the relocation did Petitioner try to put the pieces together to justify the move.” (Finding 4.5)

r. “[N]o evidence was presented that shows how Petitioner has or will ever acquire a financial interest in Skalitude. . . . From the Court’s view, Petitioner has not established a financial interest of value in either LLC.” (Finding 4.5)

s. “Nothing really suggests that Petitioner suddenly became more concerned about her financial future than she ever has up to now.” (Finding 4.5)

t. “When asked, Mr. Dickey said he might put in another \$100,000. . . . given the property, business and need, the Court does not believe that would be a significant contribution and that more could be needed. The Court also believes Mr. Dickey would expect that his ownership interest would increase if he increased his contribution or, alternatively, he would be owed the additional funds on a note by some other means.” (Finding 4.5)

u. “. . . this deal does not appear to the Court to be particularly stable at this point.” (Finding 4.5)

v. “they are not planning to get married until May, 2020. No credible explanation was given as to why marriage was and is going to be deferred so long. The only reason it is relevant is it reflects a less than stable situation which, along with the rest, is the basis for a major move by Petitioner and a significant impact on Respondent’s ability to parent.” (Finding 4.5)

w. “Although it is apparently a dream site for Petitioner and she wants this lifestyle, the child does not appear to gain anything by being there.” (Finding 4.5)

x. “In Jefferson County there are more and much closer towns and cities. From the evidence, there are more activities and socialization activities and opportunities.” (Finding 4.5)

- y. “This strikes the Court as extremely poor judgment and corroborates the Court’s view that this move is proposed for Petitioner’s desires and supposed benefit and not for the benefit of the child.” (Finding 4.5)
- z. The child “needs socialization with peers; needs stability, structure and a stable environment; and there appears to be more peers, activities and opportunities in Jefferson County and places relatively nearby in Kitsap and Puget Sound areas than what is available at or near Skalitude.” (Finding 4.6)
- aa. “Respondent argues that there overall is a better quality of life in Jefferson County with more resources; more opportunities; less severe weather; more extracurricular activities and opportunities; and proximity to more cities for additional resources, activities and opportunities. Respondent believes Port Townsend and Jefferson County have unlimited opportunities for children and that Methow Valley does not. He also has concerns regarding safety at Skalitude due to the extreme weather; seclusion; and distance from emergency and medical services. The Court agrees.” (Finding 4.7).
- bb. “If the child relocates to Skalitude, it is not possible to establish a residential schedule that permits the strong and stable relationship that the child now has with Respondent.” (Finding 4.8)
- cc. The Court “agrees with Respondent” that it is not feasible for him to relocate to Methow Valley. (Finding 4.9).
- dd. “Of the foregoing 11 factors, the Court finds that Factor 1 and 2 are neutral and do not favor either party; Factor 3 favors Respondent and no relocation; Factor 4 is technically neutral, however, for the reasons discussed, the fact that Petitioner argued what she did to justify a relocation demonstrates to the Court a lack of good faith and favors Respondent and no relocation; Factors 5, 6, 7, 8, 9, and 10 favor Respondent and no relocation; Factor 11 is not applicable and neutral.

The Court finds that Respondent has overcome the presumption that relocation of the child will be permitted by a preponderance of the evidence. As much as Petitioner desires to live her lifestyle at Skalitude, the Court finds that the detrimental effects of the relocation outweigh the benefit of the change to the child in particular and to the Petitioner.” (Summary of Court’s Findings)

- ee. “There are valid reasons to change the parenting plan because: the court is not allowing the child to move and the parent who asked to move with the child is moving without the child. The new *Parenting Plan* changes the parent with whom the child lives most of the time.” (Finding 5)
- ff. “The child must not move with SHELBY BRIGHTHEART.” (Finding 10)

FILED

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IN SUPERIOR COURT  
JEFFERSON COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR JEFFERSON COUNTY

In re Parenting and Support of	)	
	)	
E.B. (dob 11/11/2013)	)	NO. 17-3-00067-4
Child	)	
	)	
SHELBY BRIGHTHEART (fka Shrauner)	)	MEMORANDUM OPINION
	)	
Petitioner	)	
and	)	
DAIN OLSEN,	)	
Respondent	)	

This matter came on for trial on December 31, 2018, and January 2 and 3<sup>rd</sup>, 2019, in this action originally to establish a parenting plan and child support. While the case was pending with a temporary parenting plan in effect, Petitioner gave notice of a proposed Relocation and Respondent objected thereto. The matter proceeded to trial on that basis. Petitioner appeared with her attorney Mark D. Nelson. Respondent appeared with his attorney Peggy Ann Bierbaum.

Witnesses at trial included Petitioner, Lindsey Swope, Benjamin Pixie, Jenimae Hillyard, Amber Jones, Respondent, and William Dickey. The Court took the matter under advisement. The Court has reviewed its notes of the testimony of the witnesses, the exhibits admitted into evidence, and the briefs and arguments of counsel.

**FACTS**

The witnesses testified in relevant part as follows. They are referred to either as Petitioner, Respondent or by last name for convenience with no disrespect intended. Additional facts pertinent to the Court's decision may be set forth in the Discussion below.

Petitioner Shelby Brighthouse

Petitioner is 33 years old; has a high school diploma; attended some college level classes; and had apprentice education and training in the areas of herbal medicine and outdoor education. Her employment history has been primarily part-time work to make a sustenance level of income and has not held a regular, full-time job for years. She has two children, Helios, age 11 and Ero, the subject of this action, born 11/11/ 2013, and presently age 5. She is "engaged" to marry Pixie. He is 36 and has two children ages 9 and 6. They have been together about 3 ½ years; claim to have been engaged for 2 years; and claim to plan to marry in May, 2020.

Petitioner first met Respondent at a spiritual community event in Goldendale, WA, in about 2003. About a year later they both were at a communal farm in Chimacum, and got to know each other. Petitioner eventually moved there in about 2010 and in that year she and Respondent began a romantic relationship. In approximately 2011 they moved to a cabin in Discovery Bay where Respondent continues to reside. They lived together there until approximately April 1, 2015. They separated then. Petitioner moved out and was the primary parent of Ero. Respondent remained at the cabin; had visitation with Ero around his work schedule; and paid child support to Petitioner. Petitioner testified that she and Ero are very close and bonded. She claims to handle Ero's medical and dental care. She claims Ero is her "number one priority" and has chosen work to be able to be available to her children. She described Respondent as present, kind and engaged with Ero. During her testimony she suggested that Respondent was volatile and had a drinking issue. The Court does not find evidence to support that.

The property known as "Skalitude" is located in eastern Washington near the town of Carlton, some distance from Twisp and Winthrop. It is 160 acres with a 3 bedroom lodge, residence and caretaker's cabin. It is surrounded by the Okanogan National Forest and is accessed by a primitive gravel road of some distance. It is "off the grid" so to speak. It was owned by Lindsey Swope and was a location for various retreats. Petitioner has attended those events for a number of years, as has Pixie.

In 2018, she and Pixie formed an LLC titled Brighthouse Pixie LLC and, in turn, their LLC joined 2 other individuals as equal 1/3 members of the Skalitude LLC to purchase Skalitude and the existing retreat hosting business. Each of the members contributed \$200,000 to the down payment and executed a note and deed of trust for the balance of approximately \$583,000. The note is payable with interest in monthly installments of \$2,684 for ten years, at which time the balance of the note then in excess of approximately \$400,000 will be due in full. Retreat-type of events, for which Skalitude is paid rent, include activities such as weddings; a Fairy Human Relations festival; yoga; ecological educational events, and other similar educational groups and activities. Families can come and rent the lodge or rooms to stay for vacations.

Petitioner says she will be caretaker of the land and business and manage the LLC. She expects to be an employee of the LLC and be compensated with free housing and utilities and a wage of from \$750 to \$1,000 per month.

Pixie already lives in the residence at Skalitude. Petitioner plans to move there with Helios and Ero and live with Pixie. Pixie shares custody of his two children with the children's mother, who recently moved to the Carlton area. Petitioner presently, or until recently, has rented and lived in a one-room wooden-walled yurt in Irondale. It has appliances and water, but no bathroom or shower. She says Skalitude would be a much better residence.

She claims to want to relocate to Skalitude from Irondale in good faith and that it would be best for Ero.

Although she claims to have not actually relocated yet to Skalitude, her older son Helios stays there and goes to school at the Methow Valley school district; Ero goes to a Montessori preschool there two days per week; and Petitioner says she is working part-time at Skalitude 2 to 3 days per work.

If she lived there, Ero would go to kindergarten next year possibly at the Montessori school and then go to the Methow Valley public school district school(s). For quality of life, Petitioner says Skalitude is safe; not too remote to raise a family; and reflects her important values in connection with nature, natural processes and the environment. Area towns include Twisp some 20-25 minutes away; Pateros some 30 minutes away; and Carlton in between. She insists Ero would not be secluded and that there are extracurricular activities available.

In this area she has operated the Wild Rose Forest School and Wild Rose Healing Arts. Both are part-time and she makes a very modest income. She believes she'll make more at Skalitude but testified she can't really project that at this point but hopes the retreat business will grow.

Pixie owns the Pixie Company which is involved with beekeeping and bee products. Petitioner testified she is paid \$1,000 per month to work for this company. (However, Pixie testified below that it is still being discussed and he has only gifted funds to her at this point.) Petitioner testified she cannot work at Skalitude or Pixie Company unless she lives at Skalitude.

During cross exam Petitioner testified she and Respondent broke up and separated April 1, 2015, and she and Pixie started dating in July or August, 2015. Sometime after this, she and Pixie broke up and she became "engaged" to a friend named Rick Rawls. She testified she did so because he offered "stability" to her family; she had known him for some years. Within a few months, during the summer of 2016, she broke up with Rawls. She then got back together with Pixie and within 4 to 5 months was

“engaged” to him. When asked why they were not getting married until May, 2020, she claimed Skalitude was booked up for weddings. However, the calendar for Skalitude did not reflect that.

Regarding the \$1,000 she receives per month from Pixie, she testified she’s been receiving it since September, 2018, and that he pays her in cash. Regarding whether Pixie will be compensated by Skalitude, she testified that he’ll receive more equity “as compensation somehow.”

The Skalitude LLC agreement was done in August, 2018. For the 1/3<sup>rd</sup> share of the Brightheart/Pixie LLC, Pixie contributed \$200,00, of which \$100,000 was his from savings and an inheritance and \$100,000 was provided by his mother and stepfather. Petitioner did not contribute any funds to either LLC. She claims she is a part owner, manager and has “provided services.” She acknowledged that when she filed this case in 2017, she did so in forma pauperis and obtained a legal aid attorney with the NW Justice Project to represent her.

She acknowledged that the balloon payment due on the Skalitude note in ten years will be around \$405,000. To pay it, she testified that they would do so with earnings from Skalitude and/or that an LLC member with a lot of money will pay it. They did not do a business plan prior to the purchase. Prior to the purchase they did not request, get or review tax returns of the seller, Dept of Revenue returns or records, nor bank statements for Skalitude and the retreat business. They only obtained some handwritten or typed spreadsheets prepared by the seller. Her testimony did not credibly suggest that she had calculated whether and how Skalitude would be able to pay the Note. Although she testified that current operating expenses are being paid, they do not have any kind of written budget for the business.

She testified that she and Pixie have been engaged and committed to each other for 2 years, since winter 2016/spring 2017. She testified that her current attorneys’ fees per her Financial Declaration of \$18,500 have been paid by Pixie. She claimed that at the time this action was filed in 2017, it was before her and Pixie were engaged or committed or pooled resources.

She testified that the drive from Skalitude to Irondale is 6 hours. She testified that she still resides in Irondale and that she is there 3 to 4 nights per week. She said that she is in Skalitude 2 or 3 nights per week and that Ero goes to preschool in Carlton Tuesdays and Wednesdays, from 8:30 AM to 3:30 PM. However, on further questioning, she testified that she takes Ero to Skalitude on Monday; he’s in school there Tuesday and Wednesday; that they return to Irondale either Wednesday or Thursday, but that sometimes it is Fridays. It appears to the Court that she returns on Thursdays when Respondent is to have Ero on Thursday and she returns on Fridays when Respondent is to have Ero on Fridays. During this entire time, Helios is at Skalitude living with Pixie and going to school Monday thru Friday. Helios seldom if ever comes back to Irondale. It

appears that Petitioner only returns here as needed to accommodate the existing temporary parenting plan schedule.

She testified that Respondent had objected to her proposed relocation as soon as he had heard of it. However, she went ahead with the closing of the Skalitude purchase because it was "an opportunity; she had to go forward on it" and that it couldn't be delayed even though Respondent objected. Although the Skalitude purchase opportunity arose in June, 2018, if not sooner, she waited until July 29 to inform Respondent by email. The evidence also showed that she signed a declaration on July 7 saying she was relocating, but didn't file it until later after emailing Respondent July 29. Why didn't she notify Respondent July 7? She testified because July 29 was the "appropriate date" to notify him; she did not explain why.

She testified that she read the ReLo provisions in the temporary parenting plan but did not understand the 60 day and 5 day provisions. She claims that the ReLo has not occurred.

She testified that other than a part-time job at the Port Townsend Co-op, she has never really had a "regular job."

She acknowledged that Skalitude is a "choice." She testified she does not believe she can do as well here.

Given her claim that Pixie is "family" and makes a good income, when asked why she gets food stamps she said that she and Pixie are slowly combining their assets and resources. She also testified that the nearest hospital facility to Skalitude is in Brewster some 40 minutes away.

She acknowledged that her proposed parenting plan only provides Respondent with alternating weekends rather than every weekend with fewer hours and more transportation time between she and Respondent. She also admitted that the stress of her relationship with Respondent was a reason for her to go to Skalitude.

Regarding schools, she claimed she looked into it during the summer of 2018 by going to the Methow Valley website and talking to other parents. She said she did not compare the Methow school with the Port Townsend school and was not sure if she had looked at the "report cards" on the State Superintendent's website on Washington schools. She testified that she did not know how Methow and Port Townsend compared and that if Port Townsend was better, she says that wouldn't change anything. She testified she believes Methow is better for Ero because she has talked to people in Port Townsend and read about it and had experience with the PT schools. She said she could not be specific.

Although she suggested Respondent had an alcohol issue of some kind, she acknowledged that she never identified that or anything else as a .191 factor on any parenting plan she submitted.

(The trial recessed for the day of December 31 and resumed on January 2, 2019)

Petitioner testified about the Fairy Human Relations congress held annually at Skalitude; she first went to Skalitude some years ago to attend that event. One of the co-buyers, Mr. Demers, wrote that purchasing Skalitude was a "leap of faith". Petitioner says she wants her kids to inherit her interest, although Demers spoke of some kind of land trust possibly for the future of Skalitude.

The Swope financial records suggest that the net income at Skalitude was not going to be adequate to pay the mortgage against the property. Petitioner denied being concerned with this, believing that other businesses would operate at Skalitude and other resources would be available. The other resources include co-investor Mr. Dickey, who is wealthy and who Petitioner believes will financially help Skalitude if needed, but she is not able to say how long or in what amounts he might be willing to commit to. She testified that she did not scrutinize Swopes financial figures. She did not know the appraised or assessed value of the property. She claimed a financial professional told them that the business at Skalitude was financially viable but she did not know who that was.

Earlier in her testimony she described a typical day of activities at Skalitude. She testified that this would occur when her and Pixie and her kids were together. However, testimony showed that most or much of those activities cannot currently be done or done to the extent described because of school, travel, Respondent's visitations each week, and Petitioner and Pixie not actually living together. She said that the current schedule where Respondent has his visitation time weekly in alternating increments of 3 and 4 days is a "real hardship."

She testified about the financial condition of Skalitude and said she has no concerns about the cash flow. Although she admitted several times that she did not put any money into Skalitude and the purchase, she says she has and will put "sweat equity" into it and the LLCs, but she never was able to explain how that would work. She described Mr. Dickey as a "safety net" who can contribute more money and she testified "perhaps" she'd have to get another job if necessary.

She denied wanting to move to get away from Respondent; the language in her 8/20/18 declaration saying she did want space from Respondent she says only relates to her personal quality of life.

She testified dating Pixie the summer of 2015 shortly after separating from Respondent. She had also known Rawls for over ten years and described him like an

uncle to Helios. In the summer of 2016 he proposed and she accepted, thinking this would be a stable situation for her kids. She later decided she wasn't in love with him and terminated the engagement. In January, 2017, she was back in a relationship with Pixie. At the Fairy Congress in June, 2017, they joined 4 others in a small ceremony in the woods for their commitment and have "considered themselves married since then."

When she testified on the 2<sup>nd</sup> day of trial she testified that she did look at the OSPI report cards for the PT and Methow Valley. She denied seeing them the first day of trial. It appeared to the Court that she had only looked at them recently to be able to testify about them. Later on further redirect she said she knew the respective graduation rates of the schools before trial. The Court did not find some of her testimony in this regard credible.

She believes that Skalitude will improve her stability and believes it is a safe place.

She testified that for her the relocation is not just about the money and that is not most important; rather quality of life is. In particular, the property and fixtures and the fact that they can conduct "land-based" businesses there are most important to her. She believes this is her best long-term option and that no similar opportunity exists in Jefferson County. She insists on continuing not wanting to work fulltime because it would impact her availability to her children. She prioritizes child care over a job and does not want to have to use day care for her children.

She testified that if the relocation is denied, going back and forth will be a real hardship, stressful and expensive for her.

She believes that if that were the case and because Respondent works basically full time, that Ero would have to be in daycare a lot.

She testified that she looked at the Pixie Honey Co. tax returns more closely since the first day of trial and she tried to suggest that it would make more money at Skalitude due to certain reduced expenses. The Court did not find this to be particularly credible.

She admitted never looking at Swope's tax returns for the business prior to the purchase.

Regarding Mr. Dickey, she described him as 28 years of age from a wealthy family with a large inheritance who is willing to support Skalitude. But she admitted that he has no legal obligation to do so.

She testified that Respondent does have a committed and consistent relationship with Ero, but she says it is of a different kind than hers because she says she's been the primary parent and says Ero looks to her for his needs primarily.

She acknowledged, referring to Respondent, that parenting includes financial support of the child. In that context, she testified that Skalitude will be a “full-time job.”

She acknowledges that the disruption over the past 4 months (time at Skalitude, the kid’s schooling there, the transportation back and forth to accommodate Respondent’s residential time, etc.) has been because of the choices that she made. But she blamed in part the change in the visitation schedule that she says was made in September. It does not appear to the Court that any significant change was made then.

She testified that Ero is her priority; that Respondent has a different approach but she believes Respondent has made Ero “a” priority but not “the” priority.

Lindsey Swope

She testified that Exhibits 203 thru 206 were business records reflecting the financial condition of Skalitude during 2016 and 2017 and that they were used to prepare her income tax returns. She was a sole proprietorship and reported the business income on Schedule C as such on her individual returns. She did not provide these to the Buyers because the Buyers never asked for them. She said she did provide the Buyers with the spread sheets she had prepared.

Benjamin Pixie

He had some college after getting a GED and characterizes himself as a beekeeper ant teacher. He studied Botanical Medicine. He has two kids and has them ½ time; the mother lives 20 minutes away from Skalitude. He says he and Petitioner got engaged 2 years ago, i.e. early 2017. He said they are going to get married in May 2020 so that they can focus on work during 2019 and prepare family to be able to come to the wedding.

He testified that petitioner and Ero are really close and that she is a solid parent. He describes himself and his kids and petitioner and her kids as “family.”

Skalitude LLC was formed in 2018 to own the land and run the retreat business. The Brighthouse Pixie LLC was created to represent his and petitioner’s ownership in Skalitude LLC. The \$200,000 they put in was \$100,000 from his savings and \$100,000 from his mother and stepfather as a gift. He described the Pixie Honey Co. and is moving it to Skalitude to operate it there. As of trial he had bees and storage in Olympia. His income from the company is modest per the tax returns. He plans to hire petitioner and expects to save and reduce some of the business expenses for materials available at Skalitude. He feels his business will do better at Skalitude. He characterized Skalitude as his “dream come true”; will pay for itself; and allows him to be close to his kids and their mother—she just moved to the area during the summer of 2018. He said he moved to Skalitude on September 1, 2018 because the mother of his children had moved to

Carlton in June. He thinks it's safe, has kid's activities and is not too remote. His kids are in elementary school. He's familiar with petitioner's Irondale residence and said this was a big improvement over that and would benefit Ero.

He said that petitioner will be a member/owner/employee of Skalitude, doing things like caretaking, laundry, operating equipment and maintaining the grounds. However, the details of her compensation are still being discussed. He said that petitioner cannot do those things without living there and she can't work for the Honey Co. unless she lives there also.

He testified that petitioner is not getting paid for any work for Pixie presently and that he is presently giving her money as gifts. For working for Skalitude, he said that they are negotiating with the other owners to value what work petitioner and he will be doing to either get equity or be paid in cash; this is all still being figured out and worked on. He said that if Skalitude needs money, Mr. Dickey and the Demers will pay in more.

He testified that he established a Go Fund Me site to raise \$1 million for a pollination sanctuary area to be created at Skalitude and that he had received \$6,000 so far.

He testified that petitioner was willing to move to the area if they were able to get Skalitude. He said they made an offer in mid-June, 2018 and Swope accepted it immediately.

He testified that parenting is his priority and having a better income tax return each year is not.

#### Jenimae Hillyard

She lives in Irondale near petitioner's yurt. Petitioner is her tenant and has taught her kids apparently in the Wild Rose school petitioner had. Petitioner has rented and lived at the yurt since Spring of 2017 and says petitioner is still her tenant. Ms. Hillyard's husband actually owns the yurt.

#### Amber Jones

She was to testify and provide a report comparing the Port Townsend and Methow Valley schools. However, the Court did not find her to qualify as an expert to be able to express opinions in that regard and so the testimony and report were not allowed.

#### Respondent Dain Olsen

Respondent met Petitioner in 2010. She lived at a farming community in Snohomish and he was a home health provider in Vancouver. In the Fall, 2010, they

began to cohabitate with others in a communal living situation in Chimacum. In the Fall of 2011 they began living in the cabin on Discovery Bay where Respondent continues to reside.

Respondent then did caregiving in Port Hadlock until 2013. They decided to have a child during the summer of 2012. In about March, 2013, Petitioner became pregnant and Ero was born November 11, 2013.

In 2013, Respondent started Dain Construction and continued that work until Spring, 2016. He then got a job as a security officer at the Indian Island naval facility. Earlier he had been in the military/national guard reserve, opted out and was honorably discharged.

On or about April 1, 2015, Petitioner and Respondent split up. Respondent remained in the cabin home. Petitioner moved into Port Townsend. Ero primarily resided with Petitioner; Respondent had him normally 2 or 3 nights per week scheduled around his work schedule. This continued after he was hired at Indian Island.

Petitioner filed this action in May, 2017. However, Respondent was not served until September, 2017. Petitioner proposed a residential schedule based on what they were doing; Respondent would have Ero 2 nights the first week, 3 nights the next week, and continue to alternate so that Respondent would essentially have Ero every day Respondent was not working. Respondent requested to have Ero half-time. In December, 2017, a temporary order was entered basically following Petitioner's proposal. In March, 2018, Respondent's work schedule became regular, working Monday thru Friday one week and Monday thru Thursday the next week. The residential schedule continued with Respondent having Ero every day he was off from work. They were together during the entire residential time. Respondent has never used a day care provider.

His time with Ero is spent doing many varied activities. They go to Port Hadlock and Port Townsend and other nearby areas for a lot of activities or events. When he has Ero he does virtually all parenting functions and duties. Every 4<sup>th</sup> of July he goes to Wyoming for 2 weeks (one week before and one week after) for an annual family reunion that his family has done for years.

In March, 2018, when his job became more regular, he was hired by the Dept. of Defense as a civil service employee; previously he had worked for a private contractor at the naval facility. He's now a material handler with a forklift.

On July 29, 2018, Respondent first heard from Petitioner of her plans and desire to move to Skaltude. Respondent replied to Petitioner and objected and has continued to object throughout these proceedings.

Respondent testified that he understood Petitioner's proposed move may have been a "done deal" because both Ero and Helios were enrolled to start or did start school there on or about September 4, 2018. He did not know that Petitioner claimed the Methow Valley school was better; he thinks she selected that school simply because it was the closest to Skalitude. He testified that he has looked at the OSPI report cards comparing schools and he does not see how Methow Valley would be superior overall to the Port Townsend schools.

Respondent denies abusing alcohol; says Petitioner never claimed it as a reason for them breaking up; and first heard Petitioner allege it in one of her declarations she filed in this case.

He testified he has went to Skalitude two times, first in 2011 or 2012 and then in 2014. He went with Petitioner as a volunteer for the Fairy and Human Relations congress, setting up and taking down equipment for the conference. He described it as consisting of over 100 participants who believe in experiencing an ethereal fairy realm beyond the human realm. They do various activities. He said it is not a religious thing and is not particularly educational. Participants primarily camp in the meadow and aspen grove and costume dress. He described it to be like a festival. He also testified that participants engage in some nudity; a lot of marijuana use; and an all or late night event involving the use of psychedelic drugs.

Respondent does not believe Skalitude is best for Ero to live there. He feels it is very remote; served only by a primitive, narrow gravel road (other evidence suggested the road is a couple miles long); it is far from services, including emergency services; no trauma facility or hospital within an hour's drive; and a lack of cell phone service. He understands that it's "off the grid" and he does not know what utility services it has. He believes the relocation will nullify or limit his involvement with Ero's education and extracurricular activities. Regarding some of the jobs or duties Petitioner claims she would have on site, Respondent testified that Petitioner does not have any mechanical knowledge or skills to maintain any of the equipment or infrastructure at Skalitude. He believes Skalitude has little access to resources and that the retreat business is tenuous.

He testified that Ero should live and go to school here in Jefferson County. He believes Port Townsend school is better or at least as good; Respondent would be able to be involved in Ero's education, sports and extracurricular activities; Ero's opportunities are broader here and limited at Skalitude; and Skalitude represents an alternative lifestyle altogether which Petitioner and Pixie have lived even before this proposed relocation.

Respondent testified that if Ero was primarily with him Ero would be here to attend school in milder and safer weather and spend more time in the Methow Valley during the summer when the weather is much better. Ero's time in day care would be required but limited because he'd either be in school or with Respondent most of the

time. During the summer more day care might be required if Ero is here while Respondent is working. He believes that Ero attending school here is critical.

Referring to Petitioner's assertion that Respondent is somehow hostile, Respondent testified that he didn't feel they had a hostile relationship and described himself as passive and one who does not yell and scream.

He testified that they have had joint decision-making under the temporary parenting plan but that Petitioner has failed to comply. Examples he gave included being excluded from participating in dental care; a lack of access to dental records; Petitioner's refusal to allow Ero to have fluoride treatments at the dentists; and Petitioner's refusal to have Ero vaccinated. Respondent believes vaccinations are essential.

He testified about proposed parenting plans. He characterized the ideal situation being if Petitioner remained here in Jefferson County so that he and she could continue to co-parent as they have thus far.

During cross-examination, Respondent further testified about his employment history; said that he had a federal security clearance while working on Indian Island; was an ER technician and EMT during the 2000's; described traveling with a back pack for about a year in the 2000's; talked about a prior divorce in the early 2000's in Colorado and the lack of a relationship with two daughters from the relationship for whom he has consented to an adoption; and he denied owing any child support or being the subject of any warrant out of the state of Colorado. Other than temporarily allowing a woman and her children to stay at his place while they looked for housing, Respondent has not co-habitated with anyone since separation from Petitioner. Although he believes the Port Townsend school would be as good or better for Ero, he conceded that Ero would not be "harmd" by either school. He characterized his part at the Fairy Congress as more an observer/volunteer than a participant and denied he was minimizing his involvement. He testified he was not criticizing the Fairy Congress but doesn't believe their activities are in the best interest of Ero and he testified he objected to Ero going to it in 2016. He testified that he is not aware of the Fairy Congress claiming to be a drug and alcohol free activity. He expressed concern that the business at Skalitude is not viable based on the trial documents he has looked at. He testified that he and Petitioner agreed Ero should be able to choose at some time whether to have a social security number and that he acquiesced in Petitioner's decisions about fluoridation and vaccinations even though he believes both are necessary. Although he feels some of Petitioner's choices are not safe for Ero, he acknowledges that she is a good mom.

On redirect Petitioner described his security clearance; insisted drugs and alcohol are used at the Fairy Congress; talked more about the large amount of travel times necessary if Petitioner relocates and how quality time with Ero would be reduced greatly; and the activities and parenting with Ero would be reduced from what he is able

to do under the current schedule. He testified that he would not limit Ero's time with Petitioner in any way because of Skalitude but that in a perfect world Ero would not be there in Respondent's view.

William Dickey

He is 28 years old. He testified for Petitioner as a rebuttal witness. He lives in Port Townsend and invested \$200,000 in the purchase of Skalitude as an LLC member. He is not required to invest further. He has told other members he would pay additional funds if needed to run the business. He says he believes in it. He believes Petitioner and Pixie can do better than Swope and will "sustain earth and build community." He denied any inappropriate activities take place at the Fairy Congress and characterized it as an educational experience. On cross he testified that he is unemployed; lives off his trust which is run by managers and apparently is worth \$4.5 million; that he is investing to support a cause and not to make money; he is happy with his \$200,000 investment and would be willing to invest another \$100,000.

Additional facts and the Court's findings relevant to this decision are set forth below.

**DISCUSSION**

Respondent made two arguments to suggest that the Relocation Act, **RCW 26.09.405 thru .560**, and/or the rebuttal presumption set forth in **RCW 26.09.520** should not apply.

First, Respondent argued that this was a case to establish an initial parenting plan; it had been pending since May, 2017; Respondent was served in September, 2017; a temporary parenting plan was ordered in December, 2017; and the case was set for trial before Petitioner disclosed any intent or desire to relocate from Jefferson County to Skalitude in Okanogan County. Therefore, the parties have never been able to argue and the Court has never made an initial custody determination using the criteria set forth in **RCW 26.09.187**. However, the Relocation Act applies when merely temporary orders are in effect. **RCW 26.09.405 and .410**. In this case a temporary order and parenting plan was established in December, 2017. The Relocation Act applies. No authority is cited which establishes otherwise.

Second, Respondent argues that Petitioner failed to timely comply with the notice requirements of the Relocation Act and therefore should not be entitled to the benefit of the rebuttable presumption set forth in **RCW 26.09.520**. It does appear to the Court that Petitioner failed to comply with the notice requirements in a timely way. There are other limited remedies to a party when the Relocation Act is not complied with. **RCW 26.09.470**. However, there is no authority cited in support of Respondent's argument that the rebuttable presumption should not apply.

Whether relocation of the child is permitted or not must be determined by the Court under **RCW 26.09.520**. That statute provides 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 with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation;
- (4) Whether either parent or a person entitled to residential time with the child is subject to limitations under **RCW 26.09.191**;
- (5) The reasons of each person for seeking or opposing the relocation and the good faith of each of the parties in requesting or opposing the relocation;
- (6) The age, developmental stage, and needs of the child, and the likely impact the relocation or its prevention will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child;
- (7) The quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations;
- (8) The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent;
- (9) The alternatives to relocation and whether it is feasible and desirable for the other party to relocate also;
- (10) The financial impact and logistics of the relocation or its prevention; and
- (11) For a temporary order, the amount of time before a final decision can be made at trial.”

**RCW 26.09.520.**

Under the temporary parenting plan Petitioner had custody of the child more than one-half of the time. She proposed to move and relocate to Skalitude in Okanogan County near Carlton, Washington. Under the Relocation Act, there is a rebuttable presumption that the relocation of the child will be permitted.

Respondent has opposed the relocation since he first learned of it on or about July 29, 2018, and continues to oppose it throughout this trial. To rebut the presumption set

forth above, Respondent must demonstrate that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person. Respondent must make this showing by a preponderance of the evidence. Marriage of Wehr 165 Wa App 610, 615 (2011). To make that determination, this Court must analyze and base the determination upon the eleven factors set forth in the statute above. The Court will discuss each factor in numerical order. None of the factors are weighted.

(1) Respondent has a high quality, strong and stable relationship with the child. He lived with Petitioner and the child during the first 1 ½ years of the child's life. He has consistently had the child on all of his days off from work from the time the parties separated in 2015. For the most part this has been 5 days every two weeks, consisting of 3 days one week, 2 days the following week, and continuing to alternate in like fashion. He is with the child virtually 100% of the time when he has the child because he has the child on his days off. He has not had to use day care. He has remained in the same cabin in which the parties lived when the child was born. He has worked consistently since before the parties got together and has had a good stable job at the Indian Island base for some 3 years, first as a contractor's employee and later as a federal civil service employee. He has done and does virtually all parenting functions for the child. He is financially stable and able to financially support the child and has consistently done so. Petitioner argues that Respondent has not been stable over the years. That may have been true sometime or years prior to 2010. Since then, however, he has been quite stable and steady.

Petitioner also has a high quality, strong and stable relationship with the child. She has been the primary caregiver, although Respondent has the child more than the typical amount of time. Petitioner also does virtually all parenting functions. In the Court's view, overall Petitioner is less stable than Respondent. She has hardly ever had a regular, full-time job. She has chosen to live a sustenance life style and to continue to do so. She has moved more frequently. She has been in multiple serious relationships since she and Respondent separated. Respondent denied having moved to the Methow Valley and Skalitude prior to being authorized to do so by the Court, citing the fact that she continues to rent the yurt in Irondale. In the Court's view, however, she has effectively moved to Skalitude for all intents and purposes. Her older son Helios was enrolled in school there starting on or September 4 and continues to go to school full time there. He stays there during the week and virtually all weekends with Mr. Pixie while Petitioner goes back and forth to Irondale with Ero to accommodate Respondent's residential time with the child. Ero is also enrolled in preschool in the Methow Valley and attends every Tuesday and Wednesday. Petitioner takes him to the Methow every Monday. She returns to Irondale every Thursday or Friday, depending upon when Respondent's residential time begins. It is about a 6 hour drive each way. During this winter the weather, snow and mountain pass conditions have been harsh. Petitioner admits that the schedule has been stressful. However, her schedule is what it is by her own unilateral choice. Petitioner argues she has done more for the child regarding education and medical care. With respect to medical care, Respondent has attempted to be involved but

has acquiesced to Petitioner's choices. With respect to education, Respondent has attempted and wants to be involved; Petitioner has made that impractical since September, 2018, by enrolling the child in preschool in Methow Valley.

Ero and his half-brother Helios are close. They will remain so regardless of whether Ero remains with Respondent or relocates with Petitioner.

(2) No agreements have been made between the parties. Petitioner wants to relocate with the child to the Methow Valley. Respondent has opposed and continues to oppose the relocation of the child.

(3) The third factor asks whether disrupting the child's relationship with Petitioner (she has the child a slight majority of the time) would be more detrimental to the child than disrupting the contact between the child and Respondent. Framed that way, the Court determines the answer is no.

Respondent sees the child every week for at least two days and as frequently, three days, for a total of 5 nights every two weeks. When he has the child he is with the child constantly and has not had to use day care. Relocation of the child would end the weekly contact. Relocation of the child will involve long and difficult travel, primarily for the child and secondarily for each parent. Respondent has quality time with the child when he has the child.

Petitioner has been the primary parent. She is so because she has the child a relatively small majority of the time and has chosen to basically be in control of medical decisions regarding the child. Regarding education, Respondent has been precluded from really being involved by virtue of Petitioner placing the child in a preschool in the Methow Valley. Based upon the evidence submitted, Respondent is equally capable of dealing with the child's education and medical/dental needs and earnestly wants to be involved with those components of parenting.

Consequently, over all, the relocation would be disrupting to the child's relationship with both parents to some degree. However, the disruption between the child and Petitioner would not be more detrimental to the child than the disruption between the child and Respondent. At worst, the detriment to the child would be equal. Because Respondent is more stable and presents a more stable situation for the child, disruption of the child's relationship with Respondent ultimately would be more detrimental to the child.

(4) There are no **RCW 26.09.191** limitations that apply to either parent. It appears to the Court from the evidence that Petitioner has attempted to raise issues about the Respondent to buttress her argument to have the relocation approved by this Court. Specifically, first she claims that Respondent has issues with alcohol or is an "alcoholic", which Respondent strongly denies and says that was never a concern or issue. Secondly,

she claimed as a reason for relocating that “For myself, living farther away from my son’s father and getting some space from our contentious relationship and hostile interactions will reduce my stress and benefit my health, well-being and sense of safety.” The Court finds none of this to be credible. The Court believes Petitioner is alleging these things to attempt to strengthen her justification for relocating and to put the Respondent in a bad light. She has never alleged .191 factors in any proposed parenting.

(5) Petitioner says she wants to relocate to Skalitude to operate the retreat business that is located there; to live in the environment that Skalitude provides; and to some degree to separate herself geographically from Respondent. At trial she was asked and testified at length about the schools in the area and the economics and financial outlook of Skalitude and the Pixie Honey Company. Petitioner argued that the schools are better for the child and that financially she will be better off at Skalitude.

Based upon all of the evidence this Court believes and finds that Petitioner wanted to move to Skalitude regardless of other considerations.

She had went there for a number of years, eg for the Fairy Congress. She has lived a sustenance life style for years; only makes enough money to get by or gets financial support or assistance from others; and Petitioner and Pixie both testified their lives are not about making money or having a better tax return. They are both devoted to “land-based” living and education, hence, they’ve chosen a remote and secluded place off of the grid to reside and live an alternative lifestyle. Respondent points out, and this Court agrees, that that is fine for Petitioner; the issue is, however, whether it is best for the child and Respondent does not think that it is. Respondent argues that rather than providing the child with more and better opportunities, Petitioner is choosing to pursue her own lifestyle. Purchasing Skalitude was described by Mr. DeMers as a “leap of faith.” Only after anticipating or learning of Respondent’s strong objection to the relocation did Petitioner try to put the pieces together to justify the move. The evidence suggests that an offer was made and accepted in June, 2018. Petitioner did not inform Respondent of the relocation until July 29, and the sale was to close in September. The purchasers did not request or obtain typical financial records for the purchase of a \$1.1 million asset; they did not request nor receive any income tax returns; Dept of Revenue returns; or similar documents. They received some rough statements of receipts and expenses from the seller. Petitioner admits she didn’t scrutinize the numbers. They did not prepare any kind of written budget. Although there was mention of some “feasibility study”, there was no evidence of one actually being done, what it entailed or whether the purchase and sale was conditioned on any investigations or anything.

Petitioner set forth income in her financial declaration from both the Pixie company and Skalitude. However, she is not receiving that much income at this point; payments to her by Pixie have been gifts. Pixie has paid her legal expenses for this case. Pixie said compensation details still need to be worked out. Petitioner did not invest any money into these LLCs; she insisted she would be accruing or accumulating “sweat

equity” in the property and business. However, she admitted that how that was to be calculated and be accomplished had not been determined and still needs to be worked out. Further, no evidence was presented that shows how Petitioner has or will ever acquire a financial interest in Skalitude. The Brighthouse Pixie LLC documents were not presented in evidence. Pixie apparently put in \$200,000. Pixie and Petitioner are not married. Petitioner did not put anything into the Brighthouse Pixie LLC nor the Skalitude LLC. From the Court’s view, Petitioner has not established a financial interest of value in either LLC. Nothing really suggests that Petitioner suddenly became more concerned about her financial future than she ever has been up to now.

Petitioner was asked what would happen if Skalitude did not financially pan out. She said Mr. Dickey would invest more money and she said, if she had to, she might find a job of some kind. There was no evidence that Petitioner had the skills that would be required to do some of the work she said she’d be doing at Skalitude. Respondent testified to that also. When asked, Mr. Dickey said he might put in up to another \$100,000. Everyone acknowledges that he is not required to do so. Also, given the property, business and need, the Court does not believe that would be a significant contribution and that more could be needed. The Court also believes Mr. Dickey would expect that his ownership interest would increase if he increased his contribution or, alternatively, he would be owed the additional funds on a note by some other means. Although Petitioner testified she would like her interest in Skalitude to pass on to her children, Mr. Dickey testified he anticipates or would like to see the property going into some kind of land trust in the future. Given that and that many details have not been agreed upon, this deal does not appear to the Court to be particularly stable at this point.

Petitioner and Pixie testified that they have been “engaged” for two years; she said that they had a ceremony in the woods to establish their commitment to one another a year or two ago; she said they feel as though they are married; but they are not planning to get married until May, 2020. No credible explanation was given as to why marriage was and is going to be deferred so long. The only reason it is relevant is it reflects a less than stable situation which, along with the rest, is the basis for the major move by Petitioner and a significant impact on Respondent’s ability to parent.

Regarding the schools, Petitioner first testified she had not seen the OSPI “report cards” for the schools, and then testified she looked at them and argued the Methow schools are better. The Court does not believe the quality of the schools was a reason for this move; rather, it was an argument that was made after the decision to move was already made.

Skalitude is remote and secluded. Towns and schools are a considerable distance away. Respondent describes the lifestyle and culture as being highly alternative and not in the child’s best interest. Although it apparently is a dream site for Petitioner and she wants this lifestyle, the child does not appear to gain anything by being there. In

Jefferson County there are more and much closer towns and cities. From the evidence, there are more activities and socialization activities and opportunities. The educational opportunities appear to be, at worst, equal to Methow Valley.

Finally, it is notable to the Court that Petitioner claims to still live in Irondale; she has had her older child basically live and go to school in Okanogan County since this last September; and has commuted with Ero 6 hours each way two times a week during a period when weather conditions are predictably poor, to have him go to preschool in Okanogan County. This strikes the Court as extremely poor judgment and corroborates the Court's view that this move is proposed for Petitioner's desire and supposed benefit and not the benefit of the child.

(6) Plaintiff likes the Montessori school model and has the child in such a preschool now and may have the child attend one of their kindergartens. There was testimony that there is a Montessori school available here or nearby. Both parents ultimately seem to concede that either school here or in Methow Valley would be ok or not "harm" the child.

The child is 5 years old. Aside from actual education, he is in his formative years; needs socialization with peers; needs stability, structure and a stable environment; and there appears to be more peers, activities and opportunities in Jefferson County and places relatively nearby in the Kitsap and Puget Sound areas than what is available at or near Skalitude.

(7) Petitioner argues that Skalitude has beauty, a philosophy and activities consistent with her values and spirituality. She denies that there are any safety issues at Skalitude.

Respondent argues that there overall is a better quality of life in Jefferson County with more resources; more opportunities; less severe weather; more extracurricular activities and opportunities; and proximity to more cities for additional resources, activities and opportunities. Respondent believes Port Townsend and Jefferson County have unlimited opportunities for children and that Methow Valley does not. He also had concerns regarding safety at Skalitude due to the extreme weather; seclusion; and distance from emergency and medical services. The Court agrees with Respondent.

(8) If the child relocates to Skalitude, it is not possible to establish a residential schedule that permits the strong and stable relationship that the child now has with Respondent. Weekly contact would not be possible. The drive is remarkably long. During the winter the weather is cold in Methow Valley, but it's warm and nice in the summer. Because of the transportation issue, it does not appear possible nor practical for Respondent to have nearly the quality time he now enjoys with the child.

(9) Petitioner argues that Respondent has had varied employment experience and could possibly get a job in the Methow Valley. Respondent says it is not feasible for him to relocate to Methow Valley; he has a very good and stable job with the federal civil service here and it would make no sense for him to leave that and go to Methow Valley. With respect to Petitioner, the only alternative to relocation would apparently be not to relocate. The Court agrees with Respondent.

(10) The relocation, if it were to occur, would necessarily greatly increase travel expenses and travel time for each parent. The evidence was that it's a six hour drive from Skagitide to Irondale. Respondent argues that if the relocation is denied, there would be no impact on Petitioner. It would appear to the Court that would only be true if Petitioner did not relocate herself.

(11) This factor regarding temporary orders is not applicable and was not argued by the parties.

#### SUMMARY

Of the foregoing 11 factors, the Court finds that Factors 1 and 2 are neutral and do not favor either party; Factor 3 favors Respondent and no relocation; Factor 4 is technically neutral, however, for the reasons discussed, the fact that Petitioner argued what she did to justify a relocation demonstrates to the Court a lack of good faith and favors Respondent and no relocation; Factors 5, 6, 7, 8, 9 and 10 favor Respondent and no relocation; Factor 11 is not applicable and neutral.

The Court finds that Respondent has overcome the presumption that relocation of the child will be permitted by a preponderance of the evidence. As much as Petitioner desires to live her lifestyle at Skagitide, the Court finds that the detrimental effects of the relocation outweigh the benefit of the change to the child in particular and to the Petitioner.

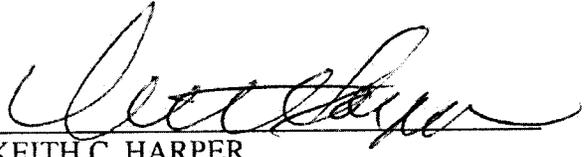
The Court has reviewed the parenting plans submitted or argued by the parties. Based upon the foregoing, the Court would approve the Parenting Plan submitted by Respondent as Exhibit No. 1. The transportation provision will be as set forth in that Plan; the need for the substantial transportation burden has been brought on by Petitioner's choice. The plan designates joint decision-making. Respondent testified regarding Petitioner's refusal to allow the child to receive vaccinations and Respondent believes vaccinations are essential. Whether there should be sole decision-making for this issue under RCW 26.09.187(2)(b) and (c) was not litigated. The provisions for joint decision-making will remain.

The issue of any child support or the modification thereof was not before the Court.

**CONCLUSION**

Based upon the foregoing, the proposed relocation of the child is denied; and the Court will approve of Respondent's proposed Parenting Plan, Exhibit No. 1.

Dated March 25, 2019.

  
\_\_\_\_\_  
KEITH C. HARPER  
SUPERIOR COURT JUDGE

**Brightheart v. Olsen**  
**In re Parentage of E.B.**  
**No. 53416-9-II**  
**Appendix: Pertinent Statutes**

**RCW [26.09.520](#)**

**Basis for determination.**

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.

[ [2019 c 79 § 3](#); [2000 c 21 § 14](#).]

## **RCW [26.09.530](#)**

### **Factor not to be considered.**

In determining whether to permit or restrain the relocation of the child, the court may not admit evidence on the issue of whether the person seeking to relocate the child will forego his or her own relocation if the child's relocation is not permitted or whether the person opposing relocation will also relocate if the child's relocation is permitted. The court may admit and consider such evidence after it makes the decision to allow or restrain relocation of the child and other parenting, custody, or visitation issues remain before the court, such as what, if any, modifications to the parenting plan are appropriate and who the child will reside with the majority of the time if the court has denied relocation of the child and the person is relocating without the child.

# NOVOTNY APPEALS

November 20, 2019 - 3:37 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53416-9  
**Appellate Court Case Title:** Shelby Brightheart, Appellant v. Dain Olsen, Respondent  
**Superior Court Case Number:** 17-3-00067-4

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