

No. 350274
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

Marriage of:

DAVID W. JACKSON
Respondent,

and

RHONDA L. CLARK
Appellant

REVIEW FROM THE SUPERIOR COURT
FOR SPOKANE COUNTY
THE HONORABLE JULIE MCKAY

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT.....	2
1. Pursuant to RCW 26.09.530 and Fahey, Ms. Clark was entitled to the rebuttable presumption that the relocation would be granted	2
2. The Trial court did not consider and make findings on each factors	6
3. The benefits of the relocating party were not appropriately considered and weighed	7
4. The Trial court failed to appropriately analyze the children’s relationship with their siblings and other significant people in their lives and misapplied the facts	8
5. The court erred when it found that the parties had a prior agreement regarding relocation or visitation	10
6. The Evidence does not support a finding that a change of schools would be more detrimental to the children	12
7. There was insufficient evidence to support a finding that the quality of life, resources and opportunities in Spokane were more beneficial to the children and the relocating party	14
8. The court failed to consider significant evidence regarding the financial impact of relocation	15
9. The letter written by Mr. Jackson was not part of a settlement negotiation and was improperly excluded	17
10. The two proposed parenting plans were part of ongoing negotiation and were improperly admitted	18

11. Attorney fees should not be granted	22
III. CONCLUSION	22

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<u>Duckworth v. Langeland</u> 95 Wash.App 1, 5-6 (1998)	17
<u>In re Marriage of Fahey</u> 165 Wn.App. 42, 58-59, 262 P.3d 128 (2011)	2, 4, 5
<u>In re Marriage of Ferree</u> 71 Wn.App. 35, 40-41, 856 P.2d 706 (1993)	19, 20
<u>In re Marriage of Grigsby</u> 112 Wash.App. 1, 10 P.3d 1166 (2002)	6
<u>In re Marriage of Horner</u> 151 Wn.2d 884, 894 P.3d 124 (2004)	6, 13
<u>In re Marriage of Ruff</u> 2017 (Wash. App. LEXIS 750 (Wash. Ct. App. Mar. 28, 2017)	2, 5
<u>Snyder v. Tompkins</u> 20 Wn. App. 167, 169, 579 P.2d 994 review denied, 91 Wash.2d 1001 (1978)	21
Statutes	
RCW 26.09.520	6, 13
Rules and Regulations	
Rules of Appellate Procedure 2.5	19

I. INTRODUCTION

The parties entered into a final parenting plan in Lincoln County, WA on 4/21/15. The Lincoln County parenting plan was registered in Spokane on 6/17/16 and a petition to relocate was filed on 06/27/16. This case involves two children: L.J. (11) and H.J. (8). In its oral ruling issued on 11/18/16, the trial court denied the relocation.

Ms. Clark filed a notice of appeal on 1/12/17 and filed a brief on 10/25/17. In our initial brief we demonstrated the following: (1) Ms. Clark was entitled to the rebuttable presumption pursuant to RCW 26.09.520, in; (2) the trial court failed to adequately analyze the relocation factors, specifically: whether the detriment of relocation outweighs the benefit to the relocating party, the children's relationship with significant people in their lives; if the change in school would be more detrimental for the children; finding that the parties shared a 50/50 parenting plan, permitting evidence of two prior parenting plan to be admitted in violation of ER 408, failed to consider Ms. Clarks financial contribution to airfare, not admitting a letter written by Mr. Jackson, failing to analyze resources and opportunities available to relocating party in the proposed and current geographic region. Further, in our initial brief, we demonstrated, based on case law, if parties truly have a 50/50 parenting plan, the child relocation act does not apply and the action would be a modification. Mr. Jackson is unable to respond to this point and his response to the other arguments are unraveling.

II. ARGUMENT

1. PURSUANT TO RCW 26.09.520 AND FAHEY, MS. CLARK WAS ENTITLED TO THE REBUTTABLE PRESUMPTION THAT THE RELOCATION WOULD BE GRANTED.

“[T]he parenting plan in place at the time of the proposed relocation is used to determine the primary residential parenting status.” In re Marriage of Fahey, 165 Wn.App. 42, 58-59, 262 P.3d 128 (2011). However, if there is a parenting plan in place that that designates the residential time with each parent as 50/50 then the Child Relocation Act (hereafter CRA) does not apply. Id; In re Marriage of Ruff, 2017 (Wash. App. LEXIS 750 (Wash. Ct. App. Mar. 28, 2017)).¹

Mr. Jackson argues that although there is a parenting plan in place designating Ms. Clark as the custodian, in reality the parties followed a 50/50 parenting plan, therefore Ms. Clark should not be entitled to the rebuttable presumption. Mr. Jackson’s arguments are unpersuasive and mimic the arguments made in Fahey. In Fahey, the court stated that there is no authority for the “proposition that actual residential circumstances negate the express intent of a primary residential parents designation in a permanent parenting plan.” Fahey, 164 Wn. App. At 59.

Mr. Jackson next claims that Mr. Clark mischaracterized the record by pointing out to the court that even Mr. Jackson agreed that the parties did not share a 50/50 parenting plan. The fact that Mr. Jackson presented

¹ Pursuant to GR 14.1(a) citations to In re Marriage of Ruff are unpublished opinions and are not binding to the court. These are cited as nonbinding authorities.

inconsistent answers to the questions regarding the shared residential schedule further supports Ms. Clark's assertion that this was not a 50/50 parenting plan. During questioning by his attorney Mr. Jackson stated the he believed the parties shared a 50/50 parenting plan. Brief of Mr. Jackson,14. However, later on during questioning by Ms. Clark's counsel, Mr. Jackson admitted that the parties did not share the children on a strictly 50/50 basis. [RP 417:21-22]

Regarding Child Support. It is true that Mr. Jackson did not pay any child support after the marriage ended. In the responsive brief, Mr. Jackson points to the lack of child support payments to support his assertion that the parties shared a 50/50 parenting plan. The child support order includes a deviation for support payments for the following reasons: possession of wealth, the children spending significant time with the parent obligated to pay support and the payment by Mr. Jackson for extra-curricular activities for the children. [P-50]. "Significant" is not defined as 50/50 and does not mean the parties shared equal residential time.

Finally, Mr. Jackson points out that the parties signed different parenting plans that were never filed with the court. Although these proposed plans should have never been admitted, they support the proposition that the parties did not share a 50/50 parenting plan. In both of these parenting plans, Ms. Clark was designated the custodian and the parent with whom the children spend a majority of their time. [P-25/26]

Furthermore, an attorney did not represent Ms. Clark during the initial dissolution action and Mr. Jackson used to practice law. [RP* 99:13]²

A careful reading of Fahey shows that the case at hand is analogous to Fahey. In an attempt to distinguish Fahey, Mr. Jackson is splitting hairs. He argues that In Fahey the parties had a parenting plan that envisioned *approximately* equal residential time. However, the proposed parenting plans in this case, which was never filed with the court, envisioned *actual* equal residential time. Brief of Mr. Jackson , 16. The court in Fahey did not rest its decision on this. In Fahey, the court focused on the fact that the mother was listed as the custodian in the final parenting plan and that she was designated as the parent with whom the children spend a majority of the time. Specifically the court stated “Although the original parenting plan envisioned approximately equal residential time for Lawrence and Lisa, it granted Lisa more residential time and expressly identified her as the primary residential parent. Fahey, 164 Wn. App. At 33. The court further stated “In addition, the original parenting plan stated that the ‘children named in the parenting plan are *scheduled to reside the majority of the time with the mother.*’” Id. The relevant consideration is not whether it was actual or approximate equal residential time. The court in Fahey acknowledged that it was approximately equal time but the focus should be on which parent is identified as the primary residential parent. In the final parenting plan filed

² RP* refers to the transcript of the first day of trial, October 24, 2016 and was transcribed by Ken Beck.

on 4/21/15 and on both proposed parenting plans discussed by Mr. Jackson, Ms. Clark is designated as the parent with whom the children are scheduled to reside a majority of the time with. [P-25/26] Also, the fact that the father in Fahey exercised a lot of his time during the summer months is irrelevant. According to the court, just because one parent was unavailable to personally care for the children on each and every day did not extinguish their primary residential parenting status under the parenting plan. Fahey, 164 Wn. App. At 35. The parenting plan controls regardless of what happened.

Lastly, the court revisited Fahey in In re Marriage of Ruff. There, the court stated that the CRA does not apply to 50/50 parenting plans. In re Marriage of Ruff at 3-4. Here, the parties did not have a 50/50 parenting plan. However, Mr. Jackson argues that the parties did have a 50/50 parenting plan. If that is the case, then the CRA does not apply and the trial court had no jurisdiction to try the matter because it was the incorrect petition. The court in Ruff also reaffirmed Fahey by stating that the father's argument's were unpersuasive because the parenting plan at the time of the proposed relocation is used to determine primary residential status, not just the past circumstances of a parent's residential time. In re Marriage of Ruff at 17 (citing Fahey, 165 Wn.App at 50). Mr. Jackson does not address the issue of what happens if the CRA does not apply.

Based on precedent, the parenting plan at the time of the proposed relocation determines who is the primary parent and who is entitled to the

rebuttable presumption. Mr. Jackson's arguments are irrelevant because at the time of the proposed relocation in this case, Ms. Clark was listed as the primary parent in the final parenting plan; therefore she is entitled to the rebuttable presumption that the relocation will be granted. The relocation can only be denied if Mr. Jackson is able to show that the detriment of the relocation outweighs the benefit of the change to the child and the relocating person, based upon the listed factors. RCW 26.09.520.

2. THE TRIAL COURT DID NOT CONSIDER AND MAKE FINDINGS ON EACH FACTOR

Mr. Jackson attempts to argue that the trial court adequately addressed and considered each factors in RCW 26.09.520 Mr. Jackson cites several cases to support his argument that the Appellate court is unable to review this case because the findings are subjective. First, Mr. Jackson cites to Grigsby. There, an appellate court denied the mother's petition to relocate to Texas. The Court found that children did not have significant relationship with the mother's fiancée in Dallas and that the kids had never even been to Dallas, TX and the only person they would know in Dallas is their mother's fiancé. In re Marriage of Grigsby, 112 Wash.App. 1, 10 P.3d 1166 (2002) Further, the mother had only visited Dallas once. Id. The appellate court found that the trial courts finding that the children's relationships in WA are more significant is supported by substantial evidence. Id. Although the findings may be subjective, the standard of review requires that the record contain substantial evidence to support the specific findings.

3. BENEFITS OF THE RELOCATING PARTY WERE NOT APPROPRIATELY CONSIDERED AND WEIGHED

Mr. Jackson next argues that the benefits of Ms. Clark were appropriately considered and weighed. He states that because only four of the relocation factors exclusively focus on the children, Ms. Clark's interests were appropriately weighed. Mr. Jackson cites Horner for the proposition that four of the factors focus exclusively on the children best interest. His citation does not reflect that. In fact, the court in Horner stated, "consideration of all the factors is logical because they serve as a balancing test between many important and competing interests and circumstances involved in relocation matters. **Particularly important in this regard are the interests and circumstances of the relocating person.** In re Marriage of Horner, 151 Wn.2d 884, 894 P.3d 124 (2004). (emphasis added). Simply stating that the detriment of the relocation outweighs the benefit to the relocating party is insufficient. Horner, 151 Wn.2d at 897.

Here, the trial courts finding that "[i]t would be more detrimental to these children to relocate to Carson City, Nevada and that detriment outweighs the benefit of any change in them moving and the benefit to Ms. Clark to living in NV." [RP Ruling 34:3-6] There is no substantial evidence to support this conclusion. Mr. Jackson simply states that because, according to him, only four factors focus on the children it is essentially impossible for a court to fail to analyze the benefits of a

relocation to the relocating party. This is false! If this were actually the case there would be no need for case law like Horner. Mr. Jackson completely fails to address how the trial court actually analyzed how the detriment of the relocation outweighs the benefit to Ms. Clark and fails to respond to any of the statements in the opening brief. In this case the trial court completely disregarded Ms. Clark and did not analyze nor explain how the detriment of the relocation outweighs the numerous benefits of the relocation to Ms. Clark. There is no evidence to support the trial courts finding, let alone substantial evidence.

4. THE TRIAL COURT FAILED TO APPROPRIATELY ANALYZE THE CHILDREN'S RELATIONSHIP WITH THEIR SIBLINGS AND OTHER SIGNIFICANT PEOPLE IN THEIR LIVES AND MISAPPLIED THE FACTS

The trial court's finding that the children's relationship center in Spokane are not supported by substantial evidence. Mr. Jackson makes several different arguments to support his contention. (1) He states that he is a good father and does not pawn his children off. However, there was testimony by Mr. Jackson's own stepfather that, prior to Ms. Clark filing for relocation, he would drop the children off at his home and not stay and that the children spent every other weekend with the grandparents. [RP* 69:11-25; 70:21-25] Mr. Jackson would just drop the children off and only stayed once or twice. [RP* 80:5-9] (2) He states that Ms. Clark was not as involved with the children and there was no description on what she did with the kids. Ms. Clark testified that she and the kids would stay in and bake pies and hang out in their pajamas. [RP 68:18-20] Mr. Turnipseed

testified that the kids go biking, ride horses, hike, do archery, play in the yard, play games and watch movies. [RP*160:13-20, 161:5-10] (3) He states that the children and his mother have a close relationship. While this is true, they also have a close relationship with Ms. Clark's mother. (4) He argues that Ms. Clark's mother is still residing in Spokane. This is false. At the time of the trial Ms. Clark's mother was in Spokane however, during the trial it was made clear that she would be relocating to Reno. [RP 161:3] Ms. Clark's mother has been a very significant person in the children's lives. [RP 482:23-24] (5) He states that Ms. Clark's brother lives in Spokane and sees the children regularly. During the trial Ms. Clark's brother testified that he sees Ms. Clark and the children during holidays and birthdays. [RP 176:6, RP*177:2] Since Ms. Clark has relocated, her brother has seen the children a couple times with his mom and noticed that L.J. was distant and not herself. [RP* 181:1-2 &7-8] Although he lives in Spokane, Ms. Clark's brother does not see the children regularly. (6) Mr. Jackson claims that Mr. Clark's oldest son Rowan is still in Spokane and makes regular contact with the children. Rowan and Mr. Jackson do not have a relationship. Rowan is 17 years old and a senior in High School who stayed in Spokane to graduate. Rowan has seen the kids once at Mr. Jackson's for ice cream and has seen them at Jo Albi because he is in High School and Mr. Jackson announces games. [RP 55:20-25] (7) Mr. Jackson claims that Ms. Clark attempted to minimize the relationship between his oldest son Adam and the minor

children in this case. There is no need to minimize the relationship when Adam himself admitted he only sees the children once every couple of months. [RP 337:22] Adam states the children came sledding once last winter and he sees the children at hoopfest. [RP33: 13-17] Adam claims he is distant because of how his parent's relationship has ended, however the parties in this case have been divorced since 2015 and there is no indication that Adam has become any more involved in L.J. & H.J.'s lives. (8) Mr. Jackson claims that the children's relationship is more extensive in Spokane. He fails to acknowledge Mr. Turnipseed's close relationship with the children. The children cry when he leaves [RP Ruling 12:24, 13:3] and Mr. Turnipseed speaks on the phone with the children often. [RP Ruling 13:4] Furthermore, Mr. Turnipseeds family in Reno is close to the children. The children even call Mr. Turnipseeds parent's grandma and grandpa. [RP 67:1-9]

There is no evidence to support that the children's relationships in Spokane are more extensive. Their family is very limited here to their father and maternal grandmother.

5. THE COURT ERRED WHEN IT FOUND THAT THE PARTIES HAD A PRIOR AGREEMENT REGARDING RELOCATION OR VISITATION

In his brief, Mr. Jackson argues that the parties had a prior agreement to share the children 50/50. However, he completely fails to address the issue of statutory interpretation. This leads one to the conclusion that Mr.

Jackson agrees that prior agreements relate to agreements regarding relocation.

However, even if Mr. Jackson does not agree with Ms. Clark's interpretation of prior agreements there is insufficient evidence to support a finding that the parties had an agreement to share the children 50/50. Mr. Jackson places great weight on a text Ms. Clark sent him in May 2016 stating we have 50/50. The parties final parenting plan that was entered in Lincoln County designates the summer schedule as 50/50. [RP 418:5-7] [P-45] Further, even the two parenting plans the parties were negotiating split summer 50/50. [P-26/26]. The text from Ms. Clark was referring to the summer schedule, not the regular visitation schedule the parties shared.

Further, Mr. Jackson states that the negotiated parenting plans mimic the actual schedule the parties followed. He also claims that the parties did not follow a week on week off summer schedule as designated in the parenting plan. [RP 418:9] If this were truly the case, why did Mr. Jackson, not one but twice, agree to a summer schedule that calls for week on week off visitation? Second, Mr. Jackson claims he signed the proposed parenting plans listing Ms. Clark as the custodian because, in a text from November 2015, Ms. Clark assured him she was not relocating. [RP 253:20-22] Mr. Jackson argued that Ms. Clark never informed him of any desire to relocate to Reno, NV. Ms. Clark and Mr. Jackson had a conversation sometime in March 2016 about her intent to relocate somewhere. In fact, when asked if he thought Ms. Clark intended to move

to Reno he said “No. Absolutely Not. No Way.” [RP 409:3] However, during his deposition Mr. Jackson stated that when Ms. Clark spoke to him in March 2016 he “assumed, I kind of figured she was talking about Reno.” [RP 411:22-23] Mr. Jackson is aware that the parties shared a 50/50 schedule during summer. He even signed two parenting plans that divided the summer schedule as week on week off. Ms. Clark’s text sent in May referred to the summer schedule. The record does not support a finding that the parties shared the children on a 50/50 basis.

6. THE EVIDENCE DOES NOT SUPPORT A FINDING THAT A CHANGE OF SCHOOLS WOULD BE MORE DETRIMENTAL TO THE CHILDREN

“The children more than likely based upon their intelligence level could adjust to Carson City, as well.” [RP Ruling 24:23-25] In an attempt to support his position Mr. Jackson makes the following arguments:

1. L.J. has expressed concerns about changing schools and leaving friends. However, Mr. Jackson completely ignores the record. L.J.’s counselor testified that L.J.’s concerns about changing schools have completely disappeared, [RP 13:14, 14:15-17] and her concerns about moving away from her friends have lessened and she has made new friends in Nevada.
2. Ms. Clarks behavior exacerbated L.J.’s symptoms. However, L.J.’s counselor testified that being away from her mother exacerbated L.J.’s symptoms. [RP 18:15-17, 19:2-3]

3. Changing schools would be detrimental. The court found that the children would likely adjust to school in Carson City, NV. [RP Ruling 24:23-25] The court further found that it cannot find that either granting or denying relocation will have any type of significant impact on the children's long term education development and that granting the relocation would have an effect on L.J.'s short term education development and this weighed the factor in favor of denying relocation. L.J.'s counselor, testified that there will be a short-term impact on the children, specifically L.J., if the relocation is granted or denied because any life change can affect adjustment disorder. [RP 14:23-25, 15:1-6] A short-term impact is inevitable.
4. Montessori school provides a close community and children stay with same teachers. Ms. Clark has secured a spot in a Montessori school in Carson City, NV. Furthermore, not all of the teachers in Spokane Montessori are AMI certified, in fact, L.J.'s current teacher is not AMI certified. [RP 502:1] Additionally, when L.J. moves into the 7th grade she will have a different teacher. [RP 501:14]
5. L.J. has developed a relationship with a counselor in Spokane. L.J.'s counselor testified that while L.J. was visiting her mother in NV, they had a phone session and these sessions were not difficult for L.J. and did not seem to be a problem. [RP 16:21-23]

No evidence supports weighing this factor in favor of denying relocation. L.J.'s counselor made it clear that no matter what happens, there will be a short-term impact on L.J.

7. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT THE QUALITY OF LIFE, RESOURCES AND OPPORTUNITIES IN SPOKANE WERE MORE BENEFICIAL TO THE CHILDREN AND THE RELOCATING PARTY

The CRA requires the court to analyze 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 "Particularly important in this regard are the interests and circumstances of the relocating person. Horner, 151, Wn.2d at 894 In its analysis of this factor, the court completely disregarding the quality of life, resources and opportunities available to the relocating person.

Mr. Jackson argues that Ms. Clarks interests were considered because the amount of money she is making in NV is less than what she would have made in Spokane. This is false. In Spokane, Ms. Clark worked more and was paid less. In Spokane, Ms. Clark was a teacher on special assignment with a salary of \$58,000. [RP 38:25, RP 40:1] She performed administrative duties on a teachers salary. [RP 41:15] Mr. Jackson argues that Ms. Clark worked 180 days in Spokane. The evidence does not support this. In Spokane, Ms. Clark signed a teacher contract requiring her to work 180 days. [RP 41:12] However, because she was required to perform administrative duties, she worked at least 218 days a year and was

only paid for 180 days. [RP 41:15 & 21, 41:23-42:3] In Nevada, Ms. Clark obtained a job as a vice principal and signed a contract for \$77,088 and works no more than 218 days. [RP 36:20]

Aside from the pay, Ms. Clark has friends in NV and describes her home there as “a nice, small village like I have here in Spokane.” [RP 48:19-20] Her boyfriend Tyler lives in NV and they plan on getting married. [RP* 165:7-8] Ms. Clark’s mother is also in NV. [RP 49:23] Other than Ms. Clark’s son, who is in Spokane finishing his last year of High school before going to college, her family is in Nevada. Even Mr. Jackson himself agrees that Ms. Clark deserves to be a principal because she has paid her dues. [RP 440:15 & 19-20]

Mr. Jackson fails to realize the importance of the relocating persons interest. Even in the heading of his brief he states that the opportunities in Spokane were ore beneficial to the Children. There is no mention of Ms. Clark. All evidence supports the finding that the opportunities and resources available to Ms. Clark in Nevada are much better than those available in Spokane.

8. THE COURT FAILED TO CONSIDER SIGNIFICANT EVIDENCE REGARDING THE FINANCIAL IMPACT OF RELOCATION

The parties in this case have two children. Due to the children’s age, they must have a companion when flying. Taking into account the two tickets for the children and one ticket for the companion a total of three tickets need to be purchased. According to the parenting plan proposed by

Mr. Jackson, Ms. Clark is to purchase the airfare and he shall reimburse her within fifteen days. [P-46] Mr. Jackson does not suggest splitting the cost 50/50. The final parenting plan adopted by the court splits the travel expenses approximately 50/50. Per the current plan Mr. Jackson and Ms. Clark are splitting the cost of three airfare tickets.

The plan proposed by Ms. Clark, requires Mr. Jackson to only pay 50% of two airfare tickets because Ms. Clark is willing to pay the companion airfare. [RP 157:1-10, 213:7-8] Mr. Jackson argues that the financial impact will be drastic because the parties have to purchase three to four tickets per trip. There is no justification for this and there is no need for four tickets.

Taking Mr. Jackson's example, if roundtrip airfare for one passenger is \$300 the following costs would exist under each party's plan:

	Ms. Clark pays (includes companion airfare)}	Mr. Jackson pays (includes companion airfare)}
Ms. Clark's proposed plan	\$600	\$300
Mr. Jackson's proposed plan	\$450	\$450

Under Ms. Clark's proposed plan Mr. Jackson is saving money. Furthermore, Mr. Jackson testified that health insurance for him and the children would increase from \$350 to over \$500.00 a month. [RP 406:10-

11] If the children were to relocate, Ms. Clark would be responsible for the health insurance [CP 9] Finally, Mr. Jackson argues child support payments would have a financial impact. That is irrelevant. Each parent is responsible for providing for the children and that this would even be a point of discussion is quite ridiculous. The court failed to consider that Ms. Clark would be responsible for paying the companion airfare. Furthermore, there is insufficient evidence in the record to weigh this factor in favor of denying relocation.

9. THE LETTER WRITTEN BY MR. JACKSON WAS NOT PART OF A SETTLEMENT NEGOTIATION AND WAS IMPROPERLY EXCLUDED

The letter written by Mr. Jackson was improperly excluded because it was not part of settlement negotiation. The letter was not received by either Mr. Clark or her counsel until after mediation. [RP* 59:10-12] Mr. Jackson does not deny that this letter was not received until after mediation or does he present any evidence that it was prepared for mediation. The only indication that it is a settlement negotiation is the fact that Mr. Jackson wrote “Jackson Modification/Mediation” on top of the letter. [RP*60:2] Mr. Jackson used to be an attorney [RP 99:13] and this was an attempt to disguise this letter as a settlement negotiation. At the time this letter was received mediation was already over. Furthermore, the intent of the letter was for impeachment and should have been admitted.

Mr. Jackson cites a case to support his proposition that these types of letters are generally excluded. However, a carefully reading of the cited

cases does not support his proposition. First, in Duckworth v. Langland, the court excluded a letter because it was part of a settlement offer. Duckworth v. Langland, 95 Wash.App 1, 5-6 (1998). There, the court held there was no manifest abuse of discretion because in his deposition Duckworth testified that he was fully aware that Langland disputed the existence of a partnership and that the letter was an attempt to purchase his half of the partnership. Duckworth explicitly testified that he “rejected the settlement offer.” Duckworth at 6. The case at hand is distinguishable from Duckworth because here Ms. Clark never testified that she viewed the letter as a settlement, especially since the parties participated in mediation. Furthermore, this letter was discussed during Mr. Jackson’s deposition without any objection from him or his counsel.

10. THE TWO PROPOSED PARENTING PLANS WERE PART OF ONGOING NEGOTIATION AND WERE IMPROPERLY ADMITTED

The court admitted two proposed parenting plans in violation of ER 408. Mr. Jackson argues that the parenting plans had all elements necessary to be considered a binding settlement agreement, not settlement negotiations pursuant to ER 408” This is false. Mr. Jackson states that, based on precedent, a contract is formed if (1) the subject matter has been agreed upon; (2) the terms are all stated in the informal writing, and (3) the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract. Mr. Jacksons brief, 10. Here, there was no settlement. First, one of the proposed parenting plans was not even signed

by Mr. Jackson and contained handwritten notes of his proposed changes. [P-26] Clearly there was no agreement as to the subject matter nor did Mr. Jackson intend that document to be binding because he did not agree with certain provisions. Second, both parenting plans contain a schedule for summer vacation designating a two-week on two week off visitation schedule. During trial, Mr. Jackson stated that the parties never followed a 50/50 schedule during summer and did not do a week on week off schedule. [RP 418:9] Mr. Jackson also stated that the negotiated parenting plans mimic the actual schedule the parties followed. If this were truly the case, why did Mr. Jackson, not one but twice, agree to a summer schedule that calls for week on week off visitation? Clearly the terms were not agreed upon.

Mr. Jackson also attempts to argue that the parenting plans constitute a CR2A agreement. However, Mr. Jackson never made this argument during trial and the court should not consider it. Rules of appellate procedure dictate that claims of error may be raised for the first time on appeal if they relate to jurisdiction, fail to establish relief upon which relief can be granted and effect a constitutional right. [Rule of Appellate procedure, hereafter RAP, 2.5(a)] If for some reason the court does choose to entertain this new argument, it will find that the parenting plans did not constitute a CR2A.

Mr. Jackson cites several cases for the proposition that “the purpose of Cr2A is not to impede without reason the enforcement of

agreements intended to settle or narrow a cause of action; indeed, the compromise of litigation to be encouraged.” In re Marriage of Ferree, 71 Wn.App. 35, 40-41, 856 P.2d 706 (1993). In Ferree, the parties issue related to property. Ferree at 37. The parties participated in a settlement conference before a court commissioner and reached an agreement. However the agreement was never reduced to writing or put on the record. Id. Ms. Ferree brought a motion before the court asking to reduce the agreement to writing. Mr. Ferree argued there was no agreement. Ferree at 38. The court held that the parties agreement, at the settlement conference, before the court Commissioner constituted a settlement. Ferree at 45.

The court also laid out the requirement of a CR2A. CR2A only applied to agreements if: (1) the agreement is made by the parties or their attorneys “in respect to the proceedings in a cause” and (2) “the purport” of the agreement is disputed. Ferree at 49 (citing Graves v. P.J. Taggares Co., 25 Wn.App. 118, 122, 605 P.2d 348, aff’d, 94 Wn. 2d 298, 616 P.2d 1223 (1980)). These elements supplement but do not supplant the common law of contracts Id. An agreement is disputed if the existence or material terms are disputed and the dispute is a genuine one. Ferree at 40. “The purpose of CR2A is to insure that negotiations undertaken to avert or simplify trial do not propagate additional disputes that then must be tried along with the original one. This purpose is served by barring enforcement of an alleged settlement agreement that is genuinely disputed, for such a dispute adds to the issues that must be tried. Ferree at 41. The moving

party has the burden to prove that there is no genuine dispute regarding the existence and material terms of a settlement agreement. Id.

Here, there is no CR2A agreement. The agreement is disputed and the dispute is genuine. The dispute is in regard to material issues because it is about the type of visitation shared by the parties. Both parties did not agree to the terms: Ms. Clark disagreed with the visitation and Mr. Jackson disagreed with the summer visitation schedule and the custodian designation. Both of these disputes are genuine. Based on the foregoing there is no CR2A agreement. Further, this case is distinguishable from Ferree. There, the agreement was made at an actual settlement conference before a court commissioner and here the parties were negotiating a proposed parenting plan that was never filed with the court.

Mr. Jackson also points to Snyder v. Tompkins to support his argument. In that case, one party attempted to challenge a settlement and the court held that a settlement existed when there is an oral stipulation between the opposing attorneys, made in open court, but outside the presence of their clients. Snyder v. Tompkins, 20 Wn. App. 167, 169, 579 P.2d 994 review denied, 91 Wash.2d 1001 (1978). This case is clearly distinguishable from Tompkins. There was no stipulation made in open court regarding a settlement.

The 2 parenting plans constituted an ongoing negotiation. Mr. Jackson did not sign one proposed plan and disagreed with the designation of custodian on the other plan.

11. ATTORNEY FEES SHOULD NOT BE GRANTED

Attorney fees should not be granted in this case. Both Ms. Clark's opening and reply brief demonstrate that there is merit to this appeal. Attorney fees should be denied. Pursuant to RAP 18.1 and RCW 26.09.140, Ms. Clark respectfully requests attorney fees incurred with maintaining this action.

III. CONCLUSION

Based on the record, substantial evidence does not support a finding of denying the relocation. Ms. Clark respectfully asks this court to reverse the trial court and grant the relocation.

Respectfully submitted
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