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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Marriage of:

DAVID W. JACKSON
Petitioner,

and

RHONDA L. CLARK
Respondent/Appellant

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION	1
II. ASSIGNMENT OF ERROR.....	1
III. ISSUES RELATED TO ASSIGNMENTS OF ERROR.....	3
IV. STATEMENT OF THE CASE.....	4
i. Factual Background	4
ii. Procedural Background	8
V. STANDARD OF REVIEW.....	8
i. Abuse of Discretion	8
ii. De novo	10
VI. ARGUMENT... ..	11
1. Ms. Clark was entitled to the rebuttable Presumption pursuant to RCW 26.09.520.....	11
2. Trial court failed to analyze whether the detriment Of relocation outweighs the benefit to the Relocating party	18
3. The trial court erred when it failed to analyze The children’s relationship with their siblings And other significant people in their lives.....	22
4. The Trial court erred when it determined that a Change in school would be more detrimental For the children.....	30
5. The trial court erred when it found that the parties Had an agreement to share the kids 50/50	33

6. The trial court erred when it failed to determine Whether disrupting contact with one parent would Be more detrimental than disrupting contact with The other parent.....	36
7. The trial court erred when it permitted evidence of Two prior parenting plans to be admitted thereby Violating ER 408.....	42
8. The trial court erred when it failed to consider That Ms. Clark would be paying for companion Airfare for the children to travel to Spokane.....	44
9. The trial court erred when it failed to admit a letter Written by Mr. Jackson suggesting that the parties Separate the children.....	45
10. The trial court erred when it failed to fully analyze Whether Mr. Jackson can relocate.....	46
11. The trial court committed reversible error when it Failed to analyze how, if Ms. Clark was given the Rebuttable presumption, Mr. Jackson overcame it..	47
12. The trial court erred when ti failed to analyze the Recources and opportunities available to the Relocating party in the proposed and current Geographic region.....	48
VII. CONCLUSION	50

TABLE OF AUTHORITIES

Cases	Page(s)
<u>Koon v. United States</u> , 518 U.S. 81, 100 (1996).	9
<u>Bulaich v. AT&T Inof. Sys.</u> , 113 Wn.2d 254, 263, 778 P.2d 1031 (1989).	42
<u>Council House, Inc. v. Hawk</u> , 136 Wash. App. 153, 159, 147 P.3d 1305, 1307 (2006), citing <u>Estate of Treadwell v. Wright</u> , 115 Wash.App. 238,251, 61 P.3d 1214 (2003).	9
<u>Curhan v. Chelan Cty.</u> ,156 Wash. App. 30, 35,230 P.3d 1083, 1085 (2010)	9
<u>Horner</u> , 151 Wn.2d 884, 894 P.3d 124, (2004)	18,19,37-38, 43-44, 47, 48 50
<u>In re Parentage of C.A.M.A.</u> , 154 Wn.2d 52, 57, 109 P.3d 405 (2005).	10, 36
<u>In re Marriage of Chandola</u> ,180 Wn.2d 632, 642, 327 P.3d 644 (2014) (quoting <u>In re Marriage of Katare</u> , 175 Wn.2d 23, 35, 283 P.3d 546 (2012)).	9
<u>In re Marriage of Dunn</u> , 2015 Wash.. App. LEXIS 1712 (Wash. Ct. App. July 28, 2015) (Unpublished).	12
<u>In re Marriage of Fahey</u> , 164 Wn. App. 42, 58-59, 262 P.3d 128 (2011);	12-17
<u>In re Marriage of Griswold</u> , 112 Wn. App. 333 (2002).	10
<u>McDonald v. State Farm Fire and Casualty Co.</u> , 119 Wn.2d 724,730-31,837 P.2d 1000 (1992).	10
<u>In re Marriage of McNaught</u> , 189 Wn. App. 545, 552, 359 P.3d 811, 814 (Wash. Ct. App. 2015).	8, 17-18, 22, 29, 43, 45

<u>In re Osborne</u> , 119 Wn. App. 133,146-147, 79 P.3d 465 (2003)	18-19
<u>In re Parentage of Jannot</u> , 110 Wn. App. 16,22, affirmed in part, 149 Wn.2d 123 (2002)	9
<u>In re Marriage of Ruff</u> , 2017 Wash. App. LEXIS 750 (Wash.Ct. App. Mar. 28, 2017). (Unpublished)	12-14, 17
<u>Schoonover v. Carpet World, Inc.</u> , 91 Wn.2d 173, 177, 588 P.2d 729 (1978).	37
<u>State v. Horrace</u> , 144 Wn. 2d 386, 392, 28 P.3d 753 (2001).	32

Statutes

26.09.520.	4,8, 11, 13, 18, 23, 29-30, 33-34, 38-39
------------	--

Rules and Regulations

GR 14.1	15
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Other Authorities

Kelly Kunsch, <i>Standard of Review (State and Federal): A Primer</i> , 18 Sea. L. Rev. 11, 42 (1994), citing <u>Ridgeview Properties v. Starbuck</u> , 96 Wash. 2d 716, 719, 638 P.2d 1231, 1233 (1982).	9,10,37,42
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I. INTRODUCTION

The trial court erred in looking beyond the party's unambiguous parenting plan and failing to apply the "rebuttable presumption" in favor of relocation to the Appellant. RCW 26.09.520. Further, the trial court erred when it failed to properly apply the child relocation act and analyze the benefits of relocation to the moving party. RCW 26.09.520. The child relocation act was amended and now requires courts to analyze the benefits of relocation to the moving party as well as the children involved. Ultimately, the trial court erred when it found that the detriment of relocation outweighs the benefit of relocation to the children and the relocating party.

II. ASSIGNMENT OF ERROR

1. The honorable Judge McKay (hereinafter Judge), erred when entering her 11/16/16 oral ruling, denying Appellant's Petition for Relocation.
2. The Judge erred when in entering her 11/16/16 oral ruling she did not apply the rebuttable presumption in favor of the Appellant. [RP Ruling 8:11-23]
3. The Judge erred, when in entering her oral ruling on 11/16/16, she failed to analyze whether the detriment of the relocation outweighs the benefit of the relocation to the relocating party. [RP Ruling]

4. The Judge erred, when in entering her oral ruling on 11/16/16, she failed to consider the relationship between the children and their siblings and Appellant's significant other. [RP Ruling]
5. The Judge erred, when on entering her oral ruling on 11/16/16, she made a finding that a change of school would be more detrimental to the children. [RP Ruling]
6. The Judge also erred when, on 1/12/17, she entered paragraph 4 of "final order and Findings on Objection about Moving with Children and Petition about Changing a Parenting/Custody Order (Relocation)" (hereinafter Final Findings), which erroneously provided "there was an agreement that the parties wanted to share the children on a 50/50 basis." [RP Ruling]
7. The Judge also erred when, on 1/12/17, she entered paragraph 4 of the Final Findings, which states "The children will suffer a detriment when the contact with either of their parents is reduced." [RP Ruling]
8. The Judge also erred when she, over objection of the Appellant, permitted evidence of a previously negotiated parenting plan to be admitted. [RP Ruling]
9. The Judge erred, when on entering her oral ruling on 11/16/16, she failed to consider that the Appellant would be financially responsible for companion airfare when the children travel from Nevada to Washington. [RP Ruling]

10. The Judge erred, when on entering her oral ruling on 11/16/16, she failed to analyze, if Ms. Clark was given the rebuttable presumption, how the Mr. Jackson overcame it. [RP Ruling]
11. The Judge erred, when on entering her oral ruling, on 11/16/16, she found that Ms. Clark will work more hours as a vice principle. [RP Ruling]
12. The Judge erred, when on entering her oral ruling, on 11/16/16, she found that the parties were sharing the children 50/50. [RP Ruling]
13. The Judge erred, when entering her oral ruling on 11/16/16, she found that the qualify of life, resources and opportunities available to the children and to relocating party in current proposed geographic locations weighed in favor of denying the relocation.

III. ISSUES RELATED TO ASSIGNMENT OF ERROR

1. Whether, based on the record, the Judge manifestly abused her discretion when denying Ms. Clark's Petition to relocate.
2. Whether, under Fahey, Ms. Clark was entitled to the rebuttable presumption pursuant to RCW 26.09.520.
3. Whether the trial court erred when it failed to analyze whether the detriment of relocation outweighs the benefit of the relocation to the relocating party.
4. Whether the trial court erred when it failed to consider relationship with siblings or Ms. Clark's significant other.
5. Whether the trial court erred in finding that a change of school would be more detrimental to the children than staying in Spokane without their mother.

6. Whether the trial court erred when it found that there was an agreement to share the children on a 50/50 basis.
 7. Whether the trial court erred when it failed to find whether disrupting contact with one party would be more detrimental than disrupting contact with the other parent.
 8. Whether the trial court erred by allowing evidence of a previously negotiated parenting plan to be entered as evidence.
 9. Whether the trial court erred when it failed to consider that Ms. Clark would be paying for a companion ticket for the children's travel.
 10. Whether the trial court erred when it failed to admit a letter written by Mr. Jackson.
 11. Whether the trial court erred when it failed to find that it is feasible for Mr. Jackson to relocate.
 12. Whether the trial court erred when it failed to analyze how Mr. Jackson overcame the presumption if Ms. Clark was given it.
 13. Whether the trial court committed reversible error when it failed to analyze the resources and opportunities available to Ms. Clark in Reno versus Spokane.
- [See Assignments nos. 1-11]

IV. STATEMENT OF THE CASE

1. Factual Background

On 06/27/16 Rhonda Clark, in accordance with RCW 26.09.520, filed a petition to relocate. [CP 5] A final parenting plan was entered on 4/21/15 in Lincoln County, WA, and that parenting plan was registered in Spokane County on 6/17/16. [CP 4] The parties have two children L.J. (11) and H.J. (8). According to the Parenting Plan, Ms. Clark is the designated custodian of the children. [CP 4] Pursuant to that parenting plan, Mr. Jackson was entitled to visitation every other

weekend and every Tuesday and Thursday from 2:30p.m to 8:00p.m.
[CP 4] Both parties participated in preparing the final parenting plan.
[RP 224:23-25]¹

Since the final parenting plan was entered the parties were flexible with visitation. The children would sometimes spend overnights with Mr. Jackson during the week and in the morning Mr. Jackson would transport the children to Ms. Clark's home so that they could be driven to school. [RP 167:23-25; RP 168:1-6; RP 237:25-238:5] Both Ms. Clark and her Mother would transport the kids to school. [RP 267:23-168:6; RP 482:23-24] Based on the visitation schedule, all parties agree that they did not share a 50/50 visitation schedule. [RP 417:21-22]

Since the divorce, Ms. Clark sought to have the final parenting plan amended to include specific other provisions. [Ex P26] This parenting plan contained the same visitation schedule as the party's final parenting plan and designated Ms. Clark as the custodian. [Ex P26] It also had a number of provisions added regarding how communication between the parties is to take place. [Ex P26] Mr. Jackson made handwritten changes to this amended plan seeking to change the visitation schedule and the custodian designation. [Ex P26; RP 245:4-6] After these proposed changes, Ms. Clark and Mr. Jackson continued negotiating and Ms. Clark agreed to some of Mr.

¹ Citations designated as RP refer to the page and line numbers of the transcript for October 25-26 Trial days.

Jackson's changes with the exception of the custodian designation. [Ex. P25] The parenting plan was never filed with the court and lists Ms. Clark as the custodian. [Ex P25] Mr. Jackson does not recall signing this parenting plan. [RP 251:4-5]

Mr. Jackson has resided in Spokane for most of his life and his mother, older son and older daughter all reside in Spokane. [RP 330:23; RP 507:15] Mr. Jackson's oldest son Adam sees the children in this case once every couple of months. [RP 337:22] Adam's children have attended Christmas at his grandmother's home once or twice. [RP 341:22] A majority of Ms. Clark's family will be residing in Nevada, including her mother and her significant other, Tyler. [RP 49:23; RP* 165:7-8]² Ms. Clark's oldest son is in his last year of high school and in order to ensure timely graduation, remained in Spokane with his father. [RP 52:20-23]

Both parties work in education. Ms. Clark has worked in education for 20 years. [RP 40:17] Ms. Clark was offered a vice Principal job in Reno, NV on June 9th and she did not accept at that time. [RP 81:10] Ms. Clark signed an agreement for employment with the Washoe School District in Reno, NV on August 9, 2016. [RP 81:16; Ex P 12] Ms. Clark's starting salary is \$77,088. [Ex R104] During her employment in Spokane, Ms. Clark was a teacher on special assignment. [RP 37:7-8] She performed administrative duties and

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

worked administrative hours while earning a teacher salary. [RP 41:15; RP 41:21] Ms. Clark's salary as a teacher on special assignment was \$58,000. [RP 38:25, RP 40:1]

The children currently attend Spokane Montessori. In anticipation of relocation, Ms. Clark reserved a spot for the children at Carson City Montessori School in Nevada. [Ex R102] Carson City Montessori School is among the higher performing schools in Nevada and is a 4 star school. [Ex R111]

L.J. has been diagnosed with Adjustment disorder with anxiety and depression. [Ex P30; RP 9:3-4] An Adjustment disorder is any life change where the individual is dealing with it in a less than average manner. [RP 9:7-10] It can occur after any kind of a basic stressor. [RP 9:16] L.J. has been seeing a counselor, Stacey Bussard, since February 2016. [RP 7:14] Consistency is really important for therapy and it is important for L.J. to come in as scheduled. [RP 8:21-24] It can be affected by any life change. [RP 9:18] L.J. has more difficulty sharing feelings with Ms. Jackson. [RP 11:16-18] L.J.'s concerns about changing schools from Spokane to Carson City have completely disappeared. [RP 13:14] Prior to the relocation, Ms. Clark or her mother have always brought L.J. to her counseling appointment. [RP 17:24-25] During this time, L.J. has not missed any appointments. [RP 17:2-3] Since the relocation, L.J. has missed one appointment. [RP 8:3-7]

2. Procedural History

In light of obtaining a position as vice principal, in accordance with the provisions of RCW 26.09.520, Ms. Clark, on 6/27/16, filed a Notice of Intent to relocate with the children. [CP 5] A motion for a temporary order permitting the relocation was filed on July 11, 2016, and on July 15, 2016, Mr. Jackson filed a motion for a temporary order preventing the relocation. [CP 11] A hearing was held on July 26, 2016, and the court Commissioner entered a temporary order preventing relocation. [CP 13] On 8/4/16, Ms. Clark filed a motion to revise the court Commissioner's order and on 8/11/16, the Honorable Julie McKay upheld the commissioner's ruling. The trial on this matter was three days and took place October 24, 2016 – October 26, 2016. On 11/18/16, the court issued its oral ruling denying the relocation. On 12/16/16, the court entered a final parenting plan, final child support order and worksheet, and findings and conclusions on relocation. On 1/12/17, a notice of appeal was timely filed. [CP 28]

V. STANDARD OF REVIEW

1. Abuse of Discretion

A trial court's parenting plan decision is reviewed for abuse of discretion. In re Marriage of McNaught, 189 Wn. App. 545, 552, 359 P.3d 811, 814 (Wash. Ct. App. 2015). A trial court abuses its discretion when it makes a manifestly unreasonable decision or bases its decision on

untenable grounds or untenable reasons. Id.

“A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the **factual findings are unsupported by the record**; it is based on untenable reasons if it **based on an incorrect standard or the facts do not meet the requirements of the correct standard.**”

Id. (emphasis added). A failure to apply the law correctly in reaching a decision is always an abuse of discretion. Koon v. United States, 518 U.S. 81, 100 (1996). "Untenable reasons include errors of law." Council House, Inc. v. Hawk, 136 Wash. App. 153, 159, 147 P.3d 1305, 1307 (2006), citing Estate of Treadwell v. Wright, 115 Wash.App. 238,251, 61 P.3d 1214 (2003). Errors of law are reviewed de novo. Curhan v. Chelan Cty,156 Wash. App. 30, 35,230 P.3d 1083, 1085 (2010).

Questions of fact are also reviewed for abuse of discretion. A "substantial evidence" test is used to decide whether or not to uphold a trial court's findings of fact. Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 Sea. L. Rev. 11, 42 (1994), citing Ridgeview Properties v. Starbuck, 96 Wash. 2d 716, 719, 638 P.2d 1231, 1233 (1982)). Appellate court's findings of fact as “verities on appeal so long as they are supported by substantial evidence”. In re Marriage of Chandola, 180 Wn.2d 632, 642, 327 P.3d 644 (2014) (quoting In re Marriage of Katare, 175 Wn.2d 23, 35, 283 P.3d 546 (2012)). Evidence is "substantial" when it is "sufficient to persuade a fair-minded person of the truth of the matter asserted." Id.

The standard of review for issues of trial procedure, including questions about admissibility of evidence, is abuse of discretion. Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 Sea. L. Rev. 11, 34 (1994), Citing State v. Oxborrow, 106 Wash. 2d 525, 530-31, 723 P.2d 1123, 1127 (1986). As set forth in In re Parentage of Jannot, 110 Wn. App. 16,22, affirmed in part, 149 Wn.2d 123 (2002):

The abuse of discretion standard is not, of course unbridled discretion. Through case law, appellate courts set parameters for the exercise of the judge's discretion. At one end of the spectrum the trial judge abuses his or her discretion if the decision is completely unsupportable, factually. On the other end of the spectrum, the trial judge abuses his or her discretion if the discretionary decision is contrary to the applicable law.

The trial court's challenged findings are reviewed for a determination of whether there is a sufficient quantity of evidence to persuade a fair-minded, rational person that the premise is true. In re Marriage of Griswold, 112 Wn. App. 333 (2002).

2. De Novo

An appellate court reviews questions concerning issues of law and issues of statutory construction de novo. In re Parentage of C.A.M.A., 154 Wn.2d 52, 57, 109 P.3d 405 (2005). The de novo standard is applied when the appellate court is in as good a position as the trial court to judge the evidence. Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 Sea. L. Rev. 11, 37 (1994).

Questions of law are subject to de novo review by the appellate court. McDonald v. State Farm Fire and Casualty Co., 119 Wn.2d

724,730-31,837 P.2d 1000 (1992). Issues that involve both a question of law and fact are treated as a question of law, to be viewed in the light of the facts and evidence presented. State v. Horrace, 144 Wn. 2d 386, 392, 28 P.3d 753 (2001).

VI. ARGUMENT

1. UNDER FAHEY, MS. CLARK WAS ENTITLED TO THE REBUTTABLE PRESUMPTION PURSUANT TO RCW 26.09.520

When determining which parent is entitled to the rebuttable presumption pursuant to RCW 26.09.520, the Appellate court is determining a question of law and is in as good of a position as the trial court to determine the issue by analyzing the parties final parenting plan. Therefore, the standard of review is de novo.

The first issue presented in any relocation matter is whether either parent is entitled to the rebuttable presumption pursuant to RCW 26.09.520.

RCW 26.09.520 states (emphasis added):

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.

When there is a parenting plan in place that designates the residential time with each parent as 50/50, then the Child Relocation Act (hereafter CRA) does not apply. In re Marriage of Fahey, 164 Wn. App. 42, 58-59, 262 P.3d 128 (2011); In re Marriage of Ruff, 2017 Wash. App. LEXIS 750 (Wash. Ct. App. Mar. 28, 2017).³ (see also In re Marriage of Dunn, 2015 Wash.. App. LEXIS 1712 (Wash. Ct. App. July 28, 2015).

However, if there is a parenting plan in place that designates one parent as

³ Pursuant to GR 14.1(a) citations to In re Marriage of Ruff and In re Marriage of Dunn, are unpublished opinions and are not binding to the court. These are cited as nonbinding authorities.

a primary parent then that parent is entitled the rebuttable presumption pursuant to RCW 26.09.520. Fahey, 164 Wn. App. at 60. In Fahey, the court specifically held that **“the parenting plan in place at the time of the proposed relocation is used to determine primary residential parenting status.”** Id.

In Fahey, the parties had a parenting plan that designated the mother as the primary parent. However, the children spent more than 50% of their time with their father. In that case, the mother sought to relocate and the father argued that the trial court should not have considered the mother the primary residential parent because in practice the children have been spending more than 50% of their time with the father. Fahey, 164 Wn. App. at 58. The court ruled that there is no authority for the **“proposition that actual residential circumstances negate the express intent of a primary residential parent designation in a permanent parenting plan.”** Fahey, 164 Wn. App. at 59 (emphasis added).

More recently, the court had an opportunity to revisit Fahey in In re Marriage of Ruff. In In re Marriage of Ruff, the primary question presented was whether the CRA applies to a 50/50 parenting plan. The court held that the CRA does not apply “when the child’s residential time is designated **equal or substantially equal in the parenting plan** and when the proposed relocation would result in a modification of this designation.” In re Marriage of Ruff at 3-4 (emphasis added). The court further re-affirmed its statements made in Fahey that “the father’s

argument was unpersuasive because the parenting plan in place at the time of a 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 60). The court in Ruff, stated: "Fahey recognized that the CRA's plain language suggests that if neither parent qualifies as a parent with whom a child resides a majority of the time, then neither parent can invoke the child relocation statute and receive the rebuttable presumption in his/her favor." In re Marriage of Ruff at 18. Although In re Marriage of Ruff, is an unpublished opinion, its review of Fahey, is persuasive in this matter. The analysis is relevant and helpful when interpreting the rebuttable presumption issues.

Here, the parties had a parenting plan in place that designated the Ms. Clark as the primary parent of the children [CP 4] Mr. Jackson and Ms. Clark sat down and reached an agreement regarding the parenting plan. [RP 224:23-225:1] The Parenting Plan stated that the children are to reside with Ms. Clark and designated visitation with the Mr. Jackson every other weekend and Tuesday's and Thursday from 2:30p.m. until 8:00p.m. [CP 4] In this case, the trial court ruled that Fahey is distinguishable for the following reasons: (1) the State of Washington does not require a custodial parent but instead uses primary and secondary parent designations (RP

Ruling 9] ⁴ (2) cannot say that the parties did not share a 50/50 parenting plan because Ms. Clark's mom, not Ms. Clark drove kids to school Id. and (3) the parties signed a different parenting plan in January of 2017. Id.

First, although Washington State may not require a custodial parent, it still requires a primary and secondary parent. A primary parent is considered a custodial parent. A secondary parent is a parent the child has visitation with. Either way, this is irrelevant in this matter. **The parenting plan in place at the time of the proposed relocation is used to determine primary residential parenting status.**" Fahey, 164 Wn. App. at 60. Here, Ms. Clark was the primary parent and was designated as such in the final parenting plan entered in Lincoln County. Mr. Jackson's arguments that the parties did not follow the parenting plan and he had more visitation than what is designated in the final parenting plan is unpersuasive and it is the same argument used by the father in Fahey. There, the court ruled held there is no authority for the "**proposition that actual residential circumstances negate the express intent of a primary residential parent designation in a permanent parenting plan.**" Fahey, 164 Wn. App. at 59 (emphasis added). Because the parties' parenting plan at the time of the relocation designated Ms. Clark as the custodian, she was entitled to the rebuttable presumption.

Second, the trial court ruled that it couldn't say that the parties did not share a 50/50 parenting plan because Ms. Clark's mother drove the kids to

⁴ Citation to RP Ruling refer to the record of proceedings of Honorable Julie McKay's oral ruling on November 18, 2016.

school in the mornings. Due to Mr. Jackson's work schedule, even when the children did stay the night with him during weekdays, he would bring the children to Ms. Clark's home in the morning for transportation to school. [RP 237:17-25-238:1-5] The trial court fails to acknowledge that Ms. Clark's mother did not always drive the kids to school. Ms. Clark also drove the kids to school in the mornings during the 2014/'15 and 2015/'16 school year. [RP 167:23-25, 168:1-6] During the mornings when the children were at Ms. Clarks' home she was always present and had breakfast with the children. [RP 23-25, October 26, 2016] Also, when Mr. Jackson participated in marathons or other athletic events, Ms. Clark would keep the children for two weekends in a row. [RP 137:17-25] Mr. Jackson himself admits that the parties did not have a 50/50 parenting plan. [RP 417:21-22] Ms. Clark was responsible for transporting the children to and from school. Mr. Jackson was not able to participate in transportation until his unfortunate accident in September 2015. [RP 106:6] He himself says "...and so yea, probably I was at the school more often after the accident, that would be accurate." Jackson Dep. 91:2-8, October 5, 2016. There is insufficient evidence in the record to support a finding that the parties had a 50/50 parenting plan and this finding is based on untenable grounds. Mr. Jackson himself admits that it was not a 50/50 parenting plan.

Third, the trial court distinguishes Fahey because the parties signed, but never filed, a different parenting plan eight months before the trial.

The court should not have considered this parenting plan and that argument is addressed below. However, if the court believes that the trial court properly admitted the parenting plan signed in January 2017, it would not change who is entitled to the rebuttable presumption. Fahey makes it clear that when there is a parenting plan in place, it controls. Fahey at 59. That parenting plan designated Ms. Clark as the custodian.

Based on the foregoing, Ms. Clark is the parent entitled to the rebuttable presumption prescribe in the CRA. She was designated the primary parent in the permanent parenting plan [CP 4], she spent more time with the children, she and her mother transported the children to and from school and Mr. Jackson himself admits that the parties did not have a 50/50 parenting plan. There is simply insufficient evidence in the record to support a finding that the parties shared a 50/50 parenting plan.

This court is in as good of a position as the trial court to determine whether the Ms. Clark is entitled to the rebuttable presumption. Fahey made it clear and was later clarified in Ruff, the parenting plan at the time of the relocation controls who is entitled to the presumption. What the parties practiced does not negate the intent of a final permanent parenting plan signed by both parties. Here, both parties signed the final plan that designated Ms. Clark as the primary Custodian. Therefore, she is entitled to the rebuttable presumption. The only way a court can deny a relocation is if Mr. Jackson shows that the **detrimental effect 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 COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO ANALYZE WHETHER THE DETRIMENT OF RELOCATION OUTWEIGHS THE BENEFIT TO THE RELOCATING PARTY.

A trial court's parenting plan decision is reviewed for abuse of discretion. In re Marriage of McNaught, 189 Wn. App. at 552. The trial court committed reversible error when it failed to analyze whether the detriment of relocation outweighs the benefit to the relocating party. Prior to its amendment, the CRA required courts to analyze only whether the detriment of relocation outweighed the benefit to the children. However, the legislature amended the CRA to include weighing the relocating parent's interest as well. In Horner the court stated,

“[c]onsideration 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.** Contrary to the trial court's repeated references to the best interests of the child, the standard for relocation decisions is not only the best interests of the child.”

In re Marriage of Horner, 151 Wn.2d 884, 894 P.3d 124, (2004). (emphasis added).

The CRA now requires proof that:

“the decision of a presumptively fit parent to relocate the child, thereby interfering with residential time of a parent or visitation time with a third party that a court has previously determined to serve the best interests of the child, **will in fact be harmful to the child—and in fact, so harmful as to outweigh the presumed benefits of the relocation to the child and relocating parent.**”

In re Osborne, 119 Wn. App. 133,146-147, 79 P.3d 465 (2003) (emphasis added). This change in the CRA creates a change in policy and makes legislative intent clear. Any detriment to relocation must outweigh any benefit to the relocating person. This is in line with the historically view that a “fit parent acts in his or her child’s best interest, including when the parent relocates the child.” In re marriage of Mcnaught, 189 Wn. App. at, 553. “The burden of overcoming that presumption is on the objecting party, who can prevail only by demonstrating that the detrimental effect of the relocation upon the child outweighs the benefit of the change to the child and the relocating person. Osborne, 119 Wn. App. at 144. Additionally, 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 court simply stated “It 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 & the benefit to Ms. Clark to living in NV.” [RP Ruling 34:3-6] The trial court makes no analysis and fails to make any findings. The court in Horner made it clear that simply stating that the detriment of the relocation outweighs the benefit to the relocating party is insufficient.

Furthermore, this conclusion is not supported by any evidence, let alone substantial evidence. Ms. Clark has worked in education for twenty years, [RP 40:17] and while in Spokane, WA, she was employed as a

teacher on special assignment. [RP 7:8] Prior to that she was employed at the Libby Center and also oversaw credit recovery for the whole district. [RP 38:3-9] During this same time she was asked to share her restorative practices with another school and split her time there too. [RP 38:14-19] Essentially, Ms. Clark was working two full time jobs at a teacher's salary of \$58,000. [RP 38:25, 40:1] While employed as a teacher on special assignment, Ms. Clark signed a teacher's contract, which required her to work 180 days. [RP 41:12] However she worked a full time schedule from 7:30/8:00 a.m. to 3:30 p.m. [RP 41:1-2], and performed administrative duties and was expected to work 218 days a year, [RP 41:15 & 21] but was only paid for 180 days of work. [RP 41:23-42:3] On top of that, she was expected to attend family night for both of the schools she worked for and this amounted to more than a total of 218 days worked. [RP 46:18-20] Ms. Clark made numerous attempts to obtain new employment in Spokane and within the surrounding school districts. [RP 43:6, 44:7-24] The principle at the Libby center even advocated for Ms. Clark to become a full time counselor or full time assistant principle but the district denied the request. [RP 46:1-4]

In Nevada, Ms. Clark obtained a job as a vice principal, [RP 34:25] with a starting salary of \$77,088. [RP 36:20] She has friends in Nevada and describes her home as “.. a nice, small village like I have here in Spokane.” [RP 48:19-20] Further, her current boyfriend resides in Nevada and they plan on getting married in the near futures. [RP* 165:7-8] Ms.

Clark's mother is also in Nevada. [RP 49:23] Other than her son, who is finishing his last year of high school and then going away to college, Ms. Clark does not have any family in Spokane. Mr. Jackson himself agrees that Ms. Clark deserves to be a principal. He stated that Ms. Clark deserves to be a vice principal and that she deserves to be a principal because she has paid her dues. [RP 440:15 & 19-20]

Furthermore, Lauren Ford, who is the principal Hugh High School, stated Ms. Clark was selected out of a pool of in State candidates, [RP 82:22] and was offered the job because "she fit into our family," her experience, professional development and belief system that all kids can achieve. [RP 82:25, 83:1-8] Ms. Ford also stated that she hired Ms. Clark with the idea that she would move into the principal position in two years. [RP 83:17-25, 84: 2-4] Hug High School was described as a family first, family friendly school and all teachers and administrators bring their kids to school events. [RP 94:17-21] Additionally, Administrators hours were described as 7:30 a.m. – 3:00 p.m, [RP 91:2], and hours are very flexible. [RP 91:3-14] Ms. Clark was obviously qualified to become a vice principal but was unable to obtain that position in Spokane. In Nevada, Ms. Clark has a job that will has placed in her a position to become a school principle, allows her to work a flexible schedule, pays her for all 218 days she actually works, has her significant other with her, does not have to pay a mortgage [RP* 164:10-12], and her mother lives in Nevada.

Even when Ms. Clark becomes principal her hours will not increase. Mr. Ford, the Principal, testified that school also works 7:30 a.m. to 3:00 p.m. [RP 97:10] and she does not always get to work at 7:30; sometimes she will show up at 8:00 a.m. [RP 98:4-9] As a vice principal, Ms. Clark will be working 218 days while students are in school only 180 of those days, [RP 98:12-13] and due to the school's focus on family first, a vice principle can make up the additional 38 days by working a few days during certain breaks, [RP 98:17-25] or on weekends [RP 99:13-19] or work from home. [RP 101:3-4] As the Vice Principal, Ms. Clark would be able to start work everyday at 8:30/9:00 a.m. and this would allow her to drop the kids off at school first. [RP 100:23-101:2]

All parties in the matter agree that Ms. Clark deserves to be a vice principal and a principal. She had attempted to move up in her career in Spokane and even had her superiors advocate for her without any success. The benefit to Ms. Clark with the relocation outweighs the short-term detriment to the children. The trial court failed to analyze why the detriment of the relocation outweighs the benefit to the relocating party. Taking into account the substantial evidence presented at trial, it shows that any detriment is significantly outweighed by the benefit.

3. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO CONSIDER THE CHILDREN'S RELATIONSHIP WITH SIBLINGS AND MS. CLARK'S SIGNIFICANT OTHER WHEN ANALYZING THE RELATIVE STRENGTH, NATURE, QUALITY & EXTENT OF INVOLVEMENT & STABILITY OF THE CHILD'S RELATIONSHIP WITH EACH PARENT, SIBLINGS & OTHER SIGNIFICANT PERSONS IN THE CHILD'S LIFE.

A trial court's parenting plan decision is reviewed for an abuse of discretion. In re Marriage of McNaught, 189 Wn. App. at 552. In any relocation matter the trial court must analyze eleven factors when determining whether to grant or deny relocation. RCW 26.09.520. One factor requires the court to consider "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." RCW 26.09.520(1).

The trial court here held that "[F]or the most part the testimony would indicate that the children's relationships with anybody other than their parents & perhaps Ms. Clark's fiancée are here in Spokane." [RP Ruling 14:17-20] In coming to this conclusion the trial court made the following findings:

(1) the children have a significant relationship with both of their grandmothers [RP Ruling 12:20]. However, the trial court failed to recognize that Ms. Clark's mother would be relocating to Nevada. [RP 161:3] Ms. Clark's mother has been a significant person in the children's lives since birth. She was present and transported the children to school often.[RP 482:23-24]

(2) Ms. Clark is a loving, caring parent who creates a comfortable environment for her children and meets their emotional needs [RP Ruling 11:5-7]) and is open in general terms and dealing with emotions. [RP Ruling 14:10]

(3) That her brother referred to her as the rock that the family stands upon [RP Ruling 11:9-10] and stated kids should “probably” move instead of empathetically saying it. [RP Ruling 11:11-15] During his testimony Ms. Clark’s brother stated that she is an “outstanding parent” who is nurturing for her kids, cares about them, provides them great structure and is the rock on which they stand. [PR* 179:12, 14-17] When asked whether the children should move or stay in Spokane he responded “I would say probably Rhonda.” [RP* 182:8] because she is nurturing, provides structure, participates, sets boundaries and is around them. [RP* 182:10-15. However, in determining the children’s significant relationships the trial court focused on the fact that Ms. Clark’s brother used the word “probably.” The trial court stated “I think it was more probably a misspeak on his part than anything intentional. As I take notes, I make note of some of these things.” [RP Ruling 11:11-15] This should not have been of any significance in making the decision concerning relationships. The Judge herself admits that this was a misspeak but then states that she kept the fact that Ms. Clark’s brother used the word “probably” in mind when making her decision.

(4) Her significant other, Tyler Turnipseed, loves spending time with the children and they are affectionate with him and cry when he leaves [RP Ruling 12:24, RP Ruling 13:3] and speak on the phone with him often. [RP Ruling 13:4]

(5) All of this indicates that the children have a solid relationship with Mr. Turnipseed. [RP Ruling 13:4-6]

(6) She described L.J. as being special because she is the only girl in a family of boys. [RP Ruling 12-13:25-2) Tyler's parents only have grandsons and L.J. is the only girl. Tyler's parents have a great relationship with the L.J. & H.J. They are affectionate, they laugh together,, take pictures [RP 66:24-25] and the kids call his parents "grandma and grandpa." [RP 67:1-9] This demonstrates that the relationship between Tyler's family and the children is extremely close and the children have become a part of the family. They even spend Thanksgiving together. [Ex R114]

(7) Children appear to have developed some relationships in Nevada. [RP Ruling 13:12] [Ex R118, R119, R121] L.J.'s counselor, Stacey, testified that L.J. has made new friends in Nevada. [RP 14:18] Further, Ms. Clark testified that both children have made friends in Nevada. [RP 68:25, 69:1-11]

(8) Children's friends live in the neighborhood in Spokane. [RP Ruling 13:20-21] While the children have friends in Spokane, WA, their relationships are not as close as the Mr. Jackson attempted to portray. Courtney Kerr Smith testified that her youngest daughter plays with L.J. and H.J. and has stayed the night with them. [RP 24:4-6] However, her daughter and L.J. are not as close anymore and their last sleepover was over a year ago. [RP 33:5] Additionally, Mary Robinson, testified that her

granddaughter and L.J. are close and have maintained a close relationship although her granddaughter does not live in Spokane. [RP 264:20] Ms. Robinson's granddaughter lives in Elk, WA and is only in Spokane during the weekend every two to three weeks and will stay in Spokane during the summer months. [RP 265:12, 265:8-12] If the children were to relocate to Nevada, they would be in Spokane at least one weekend a month, during breaks and during the summer. There would be no change to L.J. and Ms. Robinson's granddaughter's relationship. If the close friendship between L.H. and Ms. Robinson's granddaughter continues to flourish despite the distance and lack of contact, there will be no change if the kids relocate to Nevada.

(9) The children are strongly connected to both parents and cannot say that relationship with either parent is better/stronger. [RP Ruling 13:24-25]

(10) There wasn't enough detail about day-to-day activities regarding Ms. Clark and kids. [RP Ruling 14:10-14] During her testimony, Ms. Clark described that when the kids have visited Nevada they would stay in and bake pies or stay in their Pajama's. [RP 68:18-20] Further, Tyler testified that when he is together with the kids they go biking, hiking, ride horses, do archery with L.J, play catch, play in the yard, play games, watch movies, etc... [RP* 160:13-20, 161:5-10]. Further, exhibits provided by Ms. Clark show that the children and her spend time together

at sporting events, [Ex R112] children riding horses, [Ex R122] at a park, etc...[Ex R124, 126]

(11) Believes kids are connected to other persons in their lives, their family members, and their siblings. [RP Ruling 14:15-17] The Trial court failed to recognize that the only other family member the children have contact with in Spokane, other than their father, is their paternal grandmother. The children have never met Mr. Jackson's oldest daughter Arianne. The kids only see their older half-brother Adam once every couple of months. [PR 337:22] Additionally, Adam does not refer to L.J and L.H as his brother and sister, instead he says "...they're my half brother and sister.." [RP 338:16] and couldn't even identify the children's eye color when asked. [RP 338:18-21] Adam has been to his grandmother Marilyn's home, while L.J and H.J were there, maybe once or twice, [RP 339:11] and his children have never attended Christmas at her home. [RP 341:22] There was no talk about the children's relationship with any other relatives. If the children remain in Spokane they will have their father and their grandmother. On the other hand, if the children were to relocate to Nevada, they would have their mother, Tyler Turnipseed and his family, their brother Rowan would visit, their sister Gabby will visit from college and their maternal grandmother is there. The trial court found that the children have a solid relationship with Mr. Turnipseed. [RP Ruling 13:4-6] Ms. Clark's mother has been a huge part of the children's lives and transported them to school. [RP 482:23-24]

When the children visit Nevada they see Mr. Turnipseed's family every single time at least once during the trip. [RP* 158:24] Mr. Turnipseed's family love L.J. and H.J. and L.J. is very special because she is the only girl. [RP* 158:24, 159:1-3] Mr. Turnipseed has spent significant time with the children both in Nevada and in Spokane. [RP* 160:20-24, 151:2] and they go bike riding, hiking, ride horses, archery with L.J., play catch, play in the yard, play games, watch movies, etc... [RP* 160:13-20, 161:5-10] The kids tell Mr. Turnipseed "I love you" and cry when he leaves, [RP*161:18-20] and they speak on the phone several times a week. [RP* 162:17-19] It is evident that the children have significant relationships with many people in Nevada. The Children have their own rooms in Ms. Clark and Tyler's home. [Ex R120] While they also have significant relationships in Spokane, WA, they are minimal. They have their father and paternal grandmother here. In Reno they have their mother, Tyler, Tyler's family and nephews, their siblings Gabby and Rowan and their maternal grandmother.

The trial court's finding that the children's relationship with anyone other than their parents is in Spokane is not supported by the record, therefore is constitutes an abuse of discretion.

The trial court also placed significant weight on the children's relationship with their friends, stating that the children have overnight sleepovers. [RP Ruling 13:7-10] The trial court further stated "They have in addition to that, appear to develop some relationships with children in

the Nevada area, but the main information that I got was those relationships have centered here in Spokane.” [RP Ruling 13:10-14] It is clear that the children have relationships with friends both in Spokane, WA and Carson City, NV. The trial court recognized the fact that the children have made friends in Nevada. However, the Trial court incorrectly focused and placed significant weight on the children’s relationships in Spokane. In any relocation matter, the children and the family will have more significant relationships with friends in the area where they have resided. The children have lived in Spokane their whole lives and for the last few years have been visiting Nevada. In drafting RCW 26.09.520, the legislature was aware of the fact that any person’s relationship will center in the place they live, yet the legislature still provided for a rebuttable presumption in favor of relocation. Using the children’s relationship with friends in the city they live in as a basis to deny relocation will cause all relocation petitions to be denied. Whenever one parent is trying to relocate, the children will have closer relationships with friends in the city or state that has been their home for years. This is not the intent of the legislature and is against public policy. Considering the fact that the children have only visited Nevada for a short period of time and have already made friends, it is clear that they are capable of developing close friendships elsewhere.

Based on the foregoing, there is insufficient evidence in the record to support a finding that the children’s relationships in Spokane are more

significant than the relationships they have in Nevada. In fact, the record supports a finding that the children's relationships in Nevada are more significant.

4. THE TRIAL COURT ERRED WHEN IT FOUND THAT A CHANGE OF SCHOOL WOULD BE MORE DETRIMENTAL TO THE CHILDREN

A trial court's parenting plan decision is reviewed for abuse of discretion. In re Marriage of McNaught, 189 Wn. App. at 552. The trial court erred when it found that changing schools would be more detrimental to the children. Specifically, the factor requires the court to analyze the age & developmental stage & needs of the children & the likely impact the relocation or its prevention will have on the child's physical, educational & emotional development taking into consideration any special needs of the child. RCW 26.09.520. The evidence presented in this case does not support a finding that a change in school would be more detrimental to the children.

First, the trial court misstated the facts. The trial court stated, "Stacey also testified that L.J. has difficulty sharing feelings with anybody, and anybody included both her parents." [RP Ruling 21:13-15]. However, Stacey testified that **L.J. had more difficulty sharing her feelings with Mr. Jackson.** [RP 11:16-18] This misstatement of what the counselor said played a role in determining this factor. The facts do not support a finding that L.J. has difficulty sharing feelings with Ms. Clark.

The record supports a finding that L.J. has a harder time sharing feelings with her father.

Second, L.J.'s counselor Stacey 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. Since Ms. Clark has moved away L.J.'s adjustment disorder and anxiety has gotten worse and this could potentially be due to her being without her mother. [RP 18:15-17, 19:2-3] In its ruling, the trial court stated that **“The children more than likely based upon their intelligence level could adjust to Carson City, as well.”** [RP Ruling 24:23-25] Additionally, the trial court found that it cannot put a finding that either granting or denying relocation will have any type of significant impact on the children's long term education development. However, it went on to hold that based on L.J.'s diagnosis of an adjustment disorder, granting the relocation would certainly have an effect on her short-term education development and ruled that the factor weighed in favor of denying relocation. Based on the record, there is no evidence to support the final finding.

The Trial court also fails to analyze what the impact on the children will be if they stay in Spokane without their mother. A short-term impact will exist regardless of whether the children stay or move. L.J.'s counselor has stated that any life change can affect adjustment disorder,

[RP 14:23-25] and that staying in Spokane or moving could have an affect on L.J.. [RP 15:1-6]

Third, L.J.'s counselor Stacey testified that Ms. Clark, and sometimes her mother, were the only people who brought L.J. to her counseling appointments. [RP 17:24-25] Mr. Jackson did not bring L.J. to any appointment until after Mr. Clark relocated. Id. Furthermore, the counselor testified that it is vital for L.J. to keep all her appointments because she needs consistency. [RP 8:21-24] She also testified that L.J. never missed an appointment during the time Ms. Clark was bringing her. [RP 17:2-3] However, in the short period of time that Mr. Jackson has been bringing L.J. to counseling she has already missed one appointment, [RP 8:3-7] and he did not cancel the appointment until after the scheduled time and the reason for the cancellation as that he got held up at work. Id. Furthermore, while L.J. was visiting Ms. Clark in Nevada, she arranged phone sessions between L.J. and the counselor. [RP 16:21-23, 19:5-7] The Counselor testified that these phone session were not difficult for L.J. and did not seem to be a problem. [RP 16:21-23] Based on this evidence there is significant proof that Ms. Clark provides the children, especially L.J., the consistency they need. Mr. Jackson has only met L.J.'s counselor once! [RP 434:6]

Furthermore, Spokane Montessori school teachers are not all AMI certified, in fact, L.J. current teacher is not AMI certified. [RP 502:1]

Also, when L.J. moves into the 7th grade she will have a different teacher than before. [RP 501:14]

Based on the foregoing, the record does not support the factual findings nor does it support weighing this factor in favor of Mr. Jackson. The Judge herself states that any impact on change of schools will be short-term and the children, based on their intelligence level, will likely be able to adjust to school in Carson City. There is absolutely no factual basis to support weighing this factor in favor of denying relocation.

5. THE COURT COMMITTED REVERSIBLE ERROR WHEN IT FOUND THAT THE PARTIES HAD AN AGREEMENT TO SHARE THE CHILDREN 50/50

Issues that involve both a question of law and fact are treated as a question of law, to be viewed in the light of the facts and evidence presented. State v. Horrace, 144 Wn. 2d 386, 392, 28 P.3d 753 (2001).

In analyzing the factor regarding prior agreements, the trial court found that the parties had no agreement regarding relocation or what the visitation schedule would look like if one of the parties relocated. [CP 82] However, the court went on to hold that there was an agreement that the parents wanted to share the children on a 50/50 basis. Id.

First, this issue consists of statutory interpretation and requires de novo review. The term Prior Agreements as used in RCW 26.09.520(2) refers to prior agreements regarding relocation. All of the factors listed in RCW 26.09.520 focus on the impact relocation will have on the children and their needs. It would be outside the standard prescribed in RCW

26.09.520 to consider any prior agreements not concerning relocation.

Here, the court found that the parties had no prior agreements regarding relocation. [RP Ruling 14:23-25]

Second, the record does not contain sufficient evidence to support a finding that the parties shared a 50/50 parenting plan. On occasion the children did spend overnights at Mr. Jackson's home. However, while he was employed, Mr. Jackson was unable to transport the children to school in the mornings so he would bring them to Ms. Clark's home in the mornings. Ms. Clark was present in the mornings and had breakfast with the children [RP 3:23-25] and sometimes drove the kids to school in the morning during the 2014/'15 and 2016/'16 school year. [RP 167:23-25, 168; 1-6] Additionally, while Mr. Jackson participated in marathons or other athletic events, Ms. Clark would keep the children for two weekends in a row. [RP 137:17-25] Prior to his accident in September of 2015, Mr. Jackson participated in 15 marathons in 2015 alone. [RP 381:16-18] During these marathons, the children spent time with Ms. Clark. Mr. Jackson continues to participate in marathons so he will not be available to spend time with the children, in fact, he already ran a half-marathon since his release from physical therapy. [RP 384:6-7]

Mr. Jackson himself admits that the parties did not have a 50/50 parenting plan. [RP 417:21-22] Further, Mr. Jackson's stepfather testified that the children spent the night at his home on the weekends but NOT Tuesday and Thursday nights. [RP*69:18 and 24-25] There is

insufficient evidence in the record to support a finding that the parties had a 50/50 parenting plan and this finding is based on untenable grounds.

However, even if the trial court believed that the parties agreed to a residential schedule in which they shared the children on a 50/50 basis, based on the testimony of the parties, Ms. Clark still had the children more than 50% of the time. If according to the court, both parties start with sharing the children 50% of the time. There is no evidence in the record that Ms. Clark did not utilize all 50% of her time with the children. However, there is evidence in the record that Mr. Jackson did not utilize all of his time with the children. Taking into account that Ms. Clark had the children multiple weekends when Mr. Jackson participated in athletic events and marathons and that she spent time with the children in the mornings when Mr. Jacksons was allegedly supposed to have the kids, she utilized her time and some of Mr. Jackson's time.

Mr. Jackson did not utilize the time he had with the children. Mr. Jackson's stepfather, Ron Akerhielm, testified that prior to Ms. Clark filing the Petition to Relocate, the children would be at his home every Tuesday and Thursday and every other weekend. [RP* 65:13-20] During these times, Mr. Jackson's mother would pick up the kids. Id. Mr. Akerhielm stopped seeing the children as much around May or June. [RP* 67:1-3]. Ms. Clark filed for relocation on June 26, 2016. [CP 5] The children spent so much time at their grandparent's home that Mr. Akerheilem expected to see the children every Tuesday and Thursday.

[RP* 79:23-25] Further, the children would stay the night at his home on the weekends but not on Tuesday and Thursdays. [RP* 69:18 and 24-25] Most of the time Mr. Jackson would just drop the children off. [RP* 80:7-9] It is important to note that Mr. Jackson describes his relationship with Mr. Akerheilem as “fantastic” and says they’re “extremely tight” and have “almost a father-son kind of relationship.” [RP* 50:13-15] There was evidence presented that Mr. Jackson used to play trivia. One of Mr. Jackson’s witnesses testified that Mr. Jackson played trivia once or twice a week. [RP 279:17-18] This further supports Mr. Akerheilem’s statement that Mr. Jackson would leave the children at his home Tuesdays and Thursdays.

Based on the foregoing, even if the court believes that the parties intended to share a 50/50 parenting plan it is clear that they did not. Ms. Clark utilized her time with the children 50% of the time and then also utilized a portion of Mr. Jackson’s time. Further, Mr. Jackson did not spend time with the children during his portion of the visitation. The evidence in the record does not support a finding that the parties shared a 50/50 parenting plan and if it does, the evidence shows that Mr. Clark spent more time with the children.

6. THE TRIAL COURT ERRED WHEN IT FAILED TO FIND WHETHER DISRUPTING CONTACT WITH ONE PARENT WOULD BE MORE DETRIMENTAL THAN DISRUPTING CONTACT WITH THE OTHER PARENT.

An appellate court reviews questions concerning issues of law and issues of statutory construction de novo. In re Parentage of C.A.M.A., 154

Wn.2d at 57. The de novo standard is applied when the appellate court is in as good a position as the trial court to judge the evidence. Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 *Sea. L. Rev.* 11, 37 (1994).

The trial court erred when it failed to make finding of whether disrupting contact with one parent would be more detrimental than disrupting contact with the other parent. Ideally a court should enter a finding of fact for each factor. In re Marriage of Horner, 151 Wn.2d 884, 895, P3d 124 (2004). Finding of fact are vital and play an important role on review. "[t]he purpose of findings on ultimate and decisive issues is to enable an appellate court to intelligently review relevant questions upon appeal, and only when it clearly appears what questions were decided by the trial court, and the manner in which they were decided, are the requirements met." Schoonover v. Carpet World, Inc., 91 Wn.2d 173, 177, 588 P.2d 729 (1978).

In Horner, the Supreme Court stated:

When this court considers whether a trial court abused its discretion in failing to document its consideration of the child relocation factors, we will ask two questions.
Did the trial court enter specific findings of fact on each factor? If not, was substantial evidence presented on each factor, and do the trial court's findings of fact and oral articulations reflect that it considered each factor? Only with such written documentation or oral articulations can we be certain that the trial court properly considered the interests of the child and the relocating person within the context of the competing interests and circumstances required by the CRA.

Homer, 151 Wn. 2d at 896 (emphasis added). In Horner the court held that the trial court failed to satisfy either method because it failed to enter specific findings of fact on each child relocation factor, because the record did not reflect that substantial evidence was presented on each child relocation factor, and the written findings and oral ruling to not reflect that it considered each factor. Homer, 151 Wn.2d at 896.

Here, when the trial court analyzed this factor it stated that disrupting contact with either the Mr. Jackson or the Ms. Clark would be detrimental to the children. (Ruling P. 15 L. 21-25) Additionally, the trial court stated that the children have spent considerable time with both parents and both parents bring something different to the table. (Ruling P. 15 L. 12-15). The trial court failed to make any findings of fact and made a conclusory statement. This does not satisfy the test set forth in Horner. Furthermore, the language of the RCW is unambiguous; the court is to determine whether disrupting contact with one parent is **MORE** detrimental than disrupting contact with the other parent. RCW 26.09.520(3). Additionally, evidence presented by Mr. Jackson on this issue is extremely limited. When asked whether it would be more disruptive to disrupt contact with him than it would be with the Ms. Clark, he responded "Absolutely." [RP 298:22]

The trial court failed to properly analyze this factor. Considering that the factors are not weighted, each factor is significant and decisive. This is one of the main reasons Horner, requires a through analysis of each

individual factor. The trial court reviews issues of statutory interpretation de novo. Here, based on the findings, the trial court failed to abide by the language of RCW 26.09.520.

In a majority of relocation cases that go to trial, disrupting contact with both parents would be detrimental. Based on the record, it would be more detrimental to disrupt the children's contact with Ms. Clark. This matter involves two children. Both are equally important, however one child suffers from Adjustment disorder and anxiety therefore much of the testimony is related to her. Here, Ms. Clark has worked and continues to work with children who are gifted and have anxiety issues. [RP 87:6, 138:20-22] The counselor from her prior employer stated that Ms. Clark accepts children as they are, in terms of anxious state, calms them down when they are ready and sees them through the process. [RP 87:6, 138:24-139:5] Additionally, her current employer stated that Ms. Clark is a safe place for students, and they now go to her with issues instead of coming to the principal. [RP 88:4-23] Considering that L.J. has anxiety issues, Ms. Clark is in a position to be present and help her daughter when needed. Further, the children, especially L.J. need consistency. [RP 8:21-24] Prior to her relocation, Ms. Clark or her mother brought L.J. to her counseling appointments and L.J. never missed an appointment. [RP 17:2-3] However, in the short time that Mr. Jackson has been bringing L.J. to Counseling she has already missed one appointment. [RP 8:3-7] Ms. Clark understands the need for consistency. During the time the children were

visiting Ms. Clark in Nevada, she arranged phone session between L.J. and her counselor. [RP 19:5-7] These phone session were not difficult for L.J. and did not seem to be a problem. [RP 16:21-23] Mr. Jackson has stated that if the children were to relocate with Ms. Clark, Nevada would be their home. [RP 437:11] Additionally, the court pointed out that Mr. Jackson made attempts to manipulate Ms. Clark's visitation prior to trial. Ms. Clark was attempting to pick up the children prior to trial but was unable to get a hold of Mr. Jackson. The Court stated that it conveyed manipulation on Mr. Jackson's party to prevent the mother from seeing the children. [RP 29:24-30:1] The Judge stated that communication is imperative and that it doesn't make a lot of sense for Mr. Jackson to say he didn't get a text when people are glued to their phone. [RP 30:11-12]

Furthermore, the record shows that Ms. Clark is the parent who has had more time to spend with the children and has been more involved. Ms. Clark has been in contact with both L.J.'s teacher and counselor on a regular basis. L.J.'s teacher states that when L.J. did poorly on an assessment, Ms. Clark contacted her for a meeting so that they could discuss the issue and how L.J. could improve. [RP 502:23-25] Furthermore, when L.J. was struggling, Ms. Clark sought support from a counselor at school. [RP 504:11-13] Ms. Clark and L.J.'s teacher email frequently. [RP 503:24] There is no testimony that Mr. Jackson has contacted L.J.'s teacher to discuss her education, counseling or how to improve her SBAC score. Mr. Jackson has only met his daughter's

counselor once. [RP 434:6] Ms. Clark takes action to help the children with education and emotional needs.

The children in this case participate in a large number of activities. Mr. Jackson described the children's activities as consisting of soccer, choir, piano, cross-country. L.J. has Soccer Mondays and Wednesday from 6:00 p.m. -7:30 p.m. [RP 385:10 and 18] H.J. also has soccer. Mr. Jackson says "I mean we're just busy" [RP 287:21] Mr. Jackson's stepfather states that it is better for the children to relocate with their mother because she has more time for them. [RP 74:24-75:7, 2016. He also stated that Mr. Jackson does a "tremendous amount of things." [RP 70:24-71:1] Mr. Jackson is involved with the children when it comes to athletic activities. He transports them to practice and games. However, this is not enough. Based on the children's schedule, they sometimes have multiple practices in one day and do not get home until 7:30 p.m. There is no time for bonding or spending quality time together. The kids, especially L.J., need more. L.J. has a difficult time sharing her feelings with her father and she will not be able to progress if she keeps her feelings bottled in. Further, L.J.'s issues have already worsened in the short time that Ms. Clark has been gone.

Additionally, in her ruling, the Judge found that Mr. Jackson

The record supports a finding that disrupting contact between Ms. Clark and the children would be more detrimental than disrupting contact between Mr. Jackson and the children.

7. THE TRIAL COURT ERRED WHEN IT ADMITTED EVIDENCE OF A PREVIOUSLY NEGOTIATED PARENTING PLAN IN VIOLATION OF ER 408

The standard of review for issues of trial procedure, including questions about admissibility of evidence, is abuse of discretion. Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 *Sea. L. Rev.* 11, 42 (1994).

The trial court admitted two different parenting plans in violation of Evidence Rule 408. (hereinafter ER 408). ER 408 limits admission of offers to compromise. ER 408. The rule is “based on the policy of promoting complete freedom of communication in compromise negotiations. Parties are encouraged to make whatever admissions may lead to a successful compromise without sacrificing portions of their case in the event such efforts fail.” Bulaich v. AT&T Inof. Sys., 113 Wn.2d 254, 263, 778 P.2d 1031 (1989). However, settlement negotiations are admissible if the evidence is offered by the same party who proposed the settlement or are probative of a relevant issue like the mental state of the party. Id. at 264.

Here, there are two parenting plans in question. Neither of which were filed with the court. The first one [Ex P26] was not signed by Mr. Jackson and included handwritten notes of his proposed changes. [RP 245:4-6] This parenting plan was signed the by Ms. Clark and mimicked the final Parenting plan in regards to visitation. This parenting plan stated that Mr. Jackson shall have visitation every other weekend and Tuesday

and Thursdays from 2:30p.m. to 8:00 p.m. and listed Ms. Clark as the Custodian [Ex P26] The major difference in this proposed parenting plan is contained in section VI Other Provisions. Ms. Clark listed six additional provisions, most of which dealt with communication between parties. [Ex P26] She sought an amended parenting plan because Mr. Jackson's harassing behavior escalated and he attempted to manipulate her time with the children and she felt that there needed to be restrictions regarding communication. [RP 139:3-10, 139: 20-25] Mr. Jackson went so far as to withhold the children and tried to control where Ms. Clark could take them. [RP 141:4-14] The purpose of the amended parenting plan in Exhibit 26 was to add other restrictions. Mr. Jackson made handwritten notes that sought to change the visitation and the custodial parent. This parenting plan was not signed by him.

The second parenting plan [Ex P25] was signed by Mr. Jackson. However, he states that he does not agree with the custodial designation because it lists Ms. Clark as the custodian. This was clearly an ongoing negotiation between the parties. Mr. Jackson was presented with the parenting plan again a second time and does not recall signing it. [RP 251:4-5] He did not agree to the custodian determination because it listed Ms. Clark as the designated custodian. Therefore, the parties were going back and forth with changes to the parenting plan and negotiating.

Further, no exception applies in this case. Neither parenting plan was offered by the party who proposed the settlement initially nor did Mr.

Jackson argue that the evidence was presented for some other relevant reason like to show the other parties mental state. Permitting the admittance and extreme reliance on evidence that was part of settlement negotiations hinders the legislative intent behind ER 408. It will limit open communication between parents out of fear that those communication will be used at a later date.

Exhibit 25 and 26 should not have been admitted as evidence because they were part of ongoing negotiation between the parties, therefore violate ER 408. Admitting these two exhibits works against the policy behind ER 408. The decision to admit these two parenting plans is based on an incorrect standard; therefore it is based on untenable grounds. In re Marriage of McNaught, 189 Wn. App. at 552.

8. THE TRIAL COURT ERRED WHEN IT FAILED TO CONSIDER THE FACT THAT MS. CLARK WOULD BE PAYING FOR A COMPANION TICKET FOR THE CHILDREN'S TRAVEL

A trial court's parenting plan decision is reviewed for an abuse of discretion. In re Marriage of McNaught, 189 Wn. App. at 552. The trial court committed reversible error when it failed to fully analyze the factor concerning financial impact of the relocation because it failed to consider that Respondent would be paying for companion airfare.

Here, the trial court failed to fully analyze this factor. In its ruling, the trial court stated that this will be a long-distance parenting plan and there will be a financial impact because of travel. [RP Ruling 29:4-6] Further, the trial court states that three plane tickets will need to be

purchased for the kids and a companion. [RP Ruling 29:9-10] However, the trial court fails to state any findings of fact. Ms. Clark has stated numerous times that if the relocation were granted, she would agree to be solely responsible for the airfare of the companion and would pay for her mother to travel from Nevada to Spokane with the children. [RP 157:1-4,9-10, RP 213:708] Again, the court in Horner, found that because none of the relocation factors are weighted, it is vital for the court to analyze each factor thoroughly. Here, the trial court failed to do so. Furthermore, substantial evidence submitted to the court shows that the financial impact to the Mr. Jackson would be less if the children were to relocate because the mother would pay for the companion airfare and the children's health insurance. [CP 9]

Had the court analyzed this factor, it would weigh in favor of relocation because Ms. Clark would take on the burden of health insurance for the children and would be solely responsible for companion airfare when the children travel to visit Mr. Jackson.

9. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO ADMIT A LETTER FROM MR. JACKSON

The trial court committed reversible error when it failed to admit a letter written by Mr. Jackson. During the trial Mr. Jackson testified that he never suggested separating the children and having H.J. stay with him in Spokane and L.J. relocating to Nevada with Ms. Clark. [RP* 59:1-2] Mr. Jackson wrote a letter to Ms. Clark that was not received by her or her

counsel until after mediation. [RP* 59:10-12] This letter stated that the children should be separated and Ms. Clark attempted to use it for impeachment purposes at trial. However, the trial court denied its admittance on the basis that it was prepared for mediation. [RP* 60:6] This conclusion was drawn because on top of the letter Mr. Jackson wrote, “Jackson Modification/Mediation” [RP* 60:2] Mr. Jackson used to practice law. [RP 99:13] There was never any evidence by Mr. Jackson that this was prepared for mediation or refuting the fact that it was not received by Ms. Clark or her counsel until AFTER mediation. This letter was not prepared for mediation. It should have been permitted for impeachment purposes. Additionally, this same letter was discussed during Mr. Jackson’s deposition with no objection. [RP* 59:13-14]

10. THE TRIAL COURT COMMITTED REVERSAL ERROR WHEN IT FAILED TO FULLY CONSIDER THE ALTERNATIVES TO RELOCATION, SPECIFICALLY WHETHER MR. JACKSON HAS THE ABILITY TO RELOCATE

A trial court’s parenting plan decision is reviewed for an abuse of discretion. In re Marriage of McNaught, 189 Wn. App. at 552.

The court was required to analyze the alternatives to relocation and whether it is feasible and desirable for the other party to relocate. In analyzing this factor the court found that it is possible that Ms. Clark could find a vice principal jobs in Spokane [RP Ruling 28:9-10. However, Ms. Clark provided proof that she applied to numerous jobs and never received any offers. Further, Mr. Jackson stated that the positions he was aware of in the Spokane School District only became available last minute. [RP

352:6-7] He also stated that he did not know of any other positions that have opened up in Spokane. [RP 352:6-7] The record does not support a finding that Ms. Clark could have obtained a vice principal job in Spokane and therefore the trial court abused its discretion in entering this finding.

The court also found that it is not feasible for Ms. Clark to move or return to Spokane. [RP Ruling 28:14-16] Further, the court stated it is not particularly feasible for Mr. Jackson to relocate to Nevada. However, in his testimony, Mr. Jackson stated he would not relocate without his family. [RP 374:5] He also testified that he would be retiring soon. Based on the record, Mr. Jackson has two older children living in Spokane, Adam and Arianne. He has no relationship with Arianne and sees Adam once every few months. Other than that, Mr. Jackson has a mother who lives in Spokane. Based on the information presented and based on his own admission that he would not relocate without his family, the record supports a finding that it is feasible for Mr. Jackson to relocate.

11. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO ANALYZE HOW, IF THE RESPONDENT WAS GIVEN THE REBUTTABLE PRESUMPTION, THE MR. JACKSON OVERCAME IT.

The trial court committed reversible error when it failed to analyze how, if Ms. Clark were given the rebuttable presumption, Mr. Jackson overcame the presumption. The trial court simply states that even if Respondent was given the rebuttable presumption, the Mr. Jackson overcame it. Horner made it clear, a trial court must analyze each factor and must enter findings, which are supported by significant facts. Here

that is not the case. Again, the trial court makes a conclusory statement without finding any facts that support that. Looking at the record Mr. Jackson did not show that the detrimental effect of relocation to the children outweighs the benefit of the relocation to the children. As stated above, Ms. Clark and her family are in Reno, she has reserved a spot at Carson Montessori school for the children, Carson Montessori is a 4 star school, the children would still keep the relationship with their friends in Spokane because they would spend significant time here, and the children have no relationship with Mr. Jackson's older two children. Mr. Jackson failed to show any detriment to relocation and has absolutely failed to show that if there is any detriment, it outweighed the benefit to both the children and Ms. Clark.

12. THE COURT ERRED WHEN IT FAILED TO ANALYZE THE QUALITY OF LIFE, RESOURCES AND OPPORTUNITIES AVAILABLE TO THE CHILDREN OR THE RELOCATING PERSON IN THE CURRENT AND PROPOSED GEOGRAPHIC LOCATION.

The Appellate court is determining a question of law and is in as good of a position as the trial court to determine the issue by analyzing the parties final parenting plan. Therefore, the standard of review is de novo.

The court in Horner it clear, a trial court must analyze each factor and must enter findings, which are supported by significant facts. Here that is not the case. The court further stated, "...**Particularly important in this regard are the interests and circumstances of the relocating person..**"

Horner, 151 Wn.2d at 894 (emphasis added).

Here, when analyzing this factor, the Judge focused on the best interest of the children. She stated, Ms. Clark has her fiancé in NV, they have horses, a puppy, a mule, do arhery and the school system is a family first school. [RP Ruling 25:22-25] The Judge states that these are all “excellent opportunities and would be a good home base for H.J. and L.J.” [RP Ruling 26:2-4] The Judge further stated that she did not receive evidence regarding resources and opportunities that would be available to the kids in Carson City versus Spokane or that there were resources and opportunities that were better for H.J. and L.J in Spokane versus Carson City. [RP Ruling 26: 5-9] She also found that the West Central neighborhood the children live in is a tight knit community. [RP Ruling 26:13] Ms. Clark testified that Carson City will also be the children’s home and the Judge found that “their community right now is primarily focused in Spokane.” [RP Ruling 26:22] The Judge stated she cannot make a finding that Carson City is better than Spokane [RP Ruling 26:24] or that the children would do better in either Spokane or Carson City. *Id.* However, she focused on the neighborhood the kids lived in in Spokane.

The Judge completely failed to analyze whether the quality, resources and opportunities available to Ms. Clark in Reno, NV are better than those available in Spokane. This is required by the factor listed in RCW 26.09.520. Ms. Clark got a better paying job, will likely be a principal in two years, her fiancé lives in Nevada, her mother lives in Nevada, Carson city is a 4 star school, and Ms. Clark’s current employer is a family first

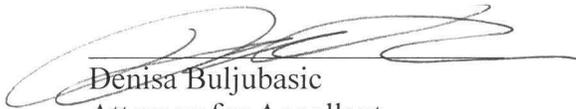
school. Ms. Clark would be able to transport the kids to school every morning. If Ms. Clark remained in Spokane, she would be working as a teacher on special assignment and making significantly less money.

The court clearly violated Horner, by failing to analyze how the resources and opportunities in Reno are better than those in Spokane for the Relocating party. The interests of the relocating person are particularly important. Horner. Instead the court conducted a best interest of the child analysis which violates the CRA.

VII. CONCLUSION

In all due respect, the ruling of Honorable Julie McKay should be reversed and Ms. Clarks Petition to relocate should be granted.

Respectfully submitted this
25th day of October, 2017.



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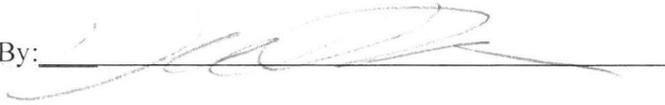
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CERTIFICATE OF SERVICE

I certify that on the 25th day of October 2017, I caused a true and correct copy of this Brief of Respondent to be served on the following in the manner indicated below:

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 Hand Delivery

By:  _____