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DIVISION III
STATE OF WASHINGTON
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NO. 350274

STATE OF WASHINGTON, COURT OF APPEALS
DIVISION III

DAVID WILLIAM JACKSON,

Respondent

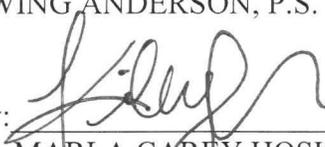
vs.

RHONDA LYN CLARK,

Appellant

AMENDED BRIEF OF RESPONDENT
DAVID WILLIAM JACKSON

EWING ANDERSON, P.S.

By: 

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I. INTRODUCTION

Regardless of whether the “rebuttable presumption” under RCW 26.09.430 was applied in Ms. Clark’s favor, the overall outcome of the case would have been the same. Given the trial court’s findings after extensive consideration of the evidence relating to the statutory factors under RCW 26.09.520, the court’s conclusion that the detriment of relocation outweighed the benefit of relocation to both the children and the relocating party, Ms. Clark, should not be disrupted.

II. STATEMENT OF THE CASE

Rhonda Clark and David Jackson are the parents of two children, L.J. (11) and H.J. (8). On April 21, 2015, the parties divorced and a Final Parenting Plan was entered in Lincoln County, Washington. CP 79. After the entry of the Final Parenting Plan, the parties did not follow the schedule detailed in that plan. RP Vol 2, 236. While the plan indicated Mr. Jackson had visitation every other weekend from Friday to Sunday and every Tuesday and Thursday from 2:30 p.m. to 8:00 p.m., the parties did not follow this schedule and instead Mr. Jackson had the children overnight on Tuesdays, Thursdays and every other weekend from Friday to Monday. RP Vol 2, 239. The parties’ intention to have a shared schedule

was further acknowledged in their order of child support. RP Vol 2, 224. There was no child support transfer payment given that the children were going to spend equal amounts of time with each parent. Id. The child support order indicates the children spend a significant amount of time with the parent who is obligated to make a support transfer payment. RP Vol 2, 224; P-50.

Contrary to Ms. Clark's contention, trial testimony from Ms. Clark, Mr. Jackson, and several witnesses indicated the parties had equal time with their minor children and in practice continued to follow a 50/50 schedule. RP Vol. 2, 248; Vol. 3 417, 466, 470; Ex. P-25. The parties agreed they were flexible with one another and Ms. Clark recognized when she travelled she would leave the children with Mr. Jackson: "when I was not there, he was able to be with [L.J.] and [H.J.]" RP Vol 1, 178.

In terms of parenting, Mr. Jackson was described as being actively involved in caring for the children as well as arranging and participating in many of their activities, including baseball, cross country, soccer and their musical lessons. RP Vol. 2, 229-230. He is described as being loving with

his children, places value on their social needs and is also involved in their schooling. RP* 120.¹

Testimony and evidence clearly demonstrated that other family members were regularly involved with these children and even participated in their day to day routines. RP* 64, 73; RP Vol. 2, 238; Vol 3 477, 510. Testimony showed the children had significant relationship with both of their grandmothers and that their relationship with Mr. Jackson's mother, Ms. Akerheim, was particularly special. RP Vol 3, 508. Both grandmothers participated in taking the children to school in the mornings if Mr. Jackson or Ms. Clark were unavailable. RP Vol 1, 135, Vol 2, 238; Vol 3, 477. Ms. Clark testified on more than one occasion that her mother assisted with transportation, stating "my mom came to my house every single morning to take the kids to school." RP Vol 1, 135, Vol 3, 477. After Ms. Clark relocated to Nevada, both grandmothers, including Ms. Clark's mother continued to live in Spokane and spent time with the children. RP Vol 1, 175.

Several other family members, including Ms. Clark's son and brother as well as Mr. Jacksons' older children, step-father, and brother also have

¹ RP* Refers to the transcript of the first day of trial, October 24, 2016 and was transcribed by Ken Beck.

relationships with the parties' children and continued to spend time with the children after Ms. Clark's relocation to Nevada. RP* 175-181; RP Vol 1, 51, 56. While the parties' children have a relationship with Ms. Clark's significant other, their relationships with family and friends in Spokane had been more extensive. RP* 158.

The parties' daughter, L.J., began seeing a counselor in February 2016 after she was having a difficult time adjusting to her parents' divorce. RP Vol 1, 7, 10. She was ultimately diagnosed with an adjustment disorder along with depressed mood and anxiety. RP Vol 1, 9. L.J. had an established relationship with a counselor, Ms. Bussard in Spokane was doing well in counseling. RP Vol 1, 10. However when the relocation process started, she began developing increased symptoms. RP Vol 1, 10. There were concerns about changing schools, leaving her school and friends in Spokane and moving to Nevada. RP Vol 1, 13. Ms. Clark attempted to minimize Mr. Jackson's level of involvement in their daughter's counseling, however she admits she did not obtain his permission nor did she discuss it with him prior to taking L.J. to counseling. RP Vol 1, 121; Vol 2, 221.

The parties' children both attend Montessori school in Spokane which was important to both parties, but especially to Ms. Clark. RP Vol 1, 73. There was testimony that one of the main benefits of Montessori schooling involves the children remaining with the same peer group for designated two to three-year blocks of time. Vol 3, 492.

Several witnesses testified to the unique nature of the West Central neighborhood the parties both lived in and where Mr. Jackson continues to reside. It is described as a nice, safe neighborhood where the parties' children and their friends freely float from home to home. RP* 113. There was significant testimony regarding the children's friendships both in their neighborhood, at school and with the children and grandchildren of family friends. RP* 113; RP Vol 2, 262, 265, 317, 324.

Less than a year after the original parenting plan was entered, in January 2016, Ms. Clark obtained an attorney and presented Mr. Jackson with a new parenting plan requesting to make changes to the original plan. RP Vol 2, 244-245. Mr. Jackson suggested changes to the visitation to reflect the schedule the parties implemented and followed. Id. The only change not made was the designation of Ms. Clark as custodian. RP Vol 2, 247. While Mr. Jackson had concerns about this, Ms. Clark indicated via

text message she had no intention of moving, including to Reno, Nevada. RP Vol 2, 253; CP 17. She stated: “I want [you] to know that I am not moving to Reno. I could easily get a principal job elsewhere but I know the kids are rooted here with school.” Id. Ms. Clark later encouraged Mr. Jackson to sign the proposed amended parenting plan, acknowledging via text message they had a shared visitation schedule: “you can always go through with the signing. We have 50/50.” RP Vol 2, 248; CP 19. Given these assurances that they had a shared schedule and Ms. Clark was not going to move, Mr. Jackson, Ms. Clark and Ms. Clark’s attorney all signed said parenting plan. Ex. P-25; RP Vol 2, 246, 254. The plan was presented to Lincoln County for entry but rejected. RP Vol 2, 251. Subsequently a change of venue was requested in Spokane County to enter the plan but this was not completed. Id.

On June 27, 2016 Ms. Clark filed a Notice of Intent to Move with the Children. CP 5. The Court heard evidence at a temporary orders hearing on July 26, 2016 and found the move was unlikely to be approved at trial based on the factors in RCW 26.09.520. CP 39. At the completion of the summer, the Court ordered the parties would follow the father’s proposed parenting plan, with the children residing with the father and the mother

having the children for one three day weekend per month. Id. The parties followed that arrangement until the trial court issued a decision in December 2016 after 2.5 days of trial in October 2016.

III. STANDARD OF REVIEW

A. Abuse of Discretion

An appellate court reviews the trial court's decision to grant or deny a petition for relocation for an abuse of discretion. In re Marriage of Horner, 151 Wash.2d 884, 893, 93 P.3d 124 (2004); Bay v. Jensen, 147 Wash.App. 641, 651, 196 P.3d 753 (2008). “A court abuses its discretion where the court applies an incorrect standard, the record does not support the court's findings, or the facts do not meet the requirements of the correct standard.” In re Marriage of Kim, 179 Wash.App. 232, 240, 317 P.3d 555 (2014) (citing Horner, 151 Wash.2d at 894, 93 P.3d 124; In re Marriage of Littlefield, 133 Wash.2d 39, 47, 940 P.2d 1362 (1997)). “We emphasize that trial court decisions in dissolution actions will be affirmed unless no reasonable judge would have reached the same conclusion.” Kim, 179 Wash.App. at 240 (citing In re Marriage of Landry, 103 Wash.2d 807, 809–10, 699 P.2d 214 (1985)).

Challenges to a trial court's factual findings are reviewed for substantial evidence and will be upheld if they are supported by such. In re Marriage of Fahey, 164 Wash. App. 42, 55, 262 P.3d at 128 (2011). "Substantial evidence exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." Id.

Conclusions of law are reviewed to determine whether factual findings that are supported by substantial evidence support the conclusions. "Within the confines of these standards, the trial court has discretion to grant or deny a relocation after considering the RCW 26.09.520 relocation factors and the interests of the children and their parents." Id. Appellate courts "defer to the trial court's ultimate relocation ruling unless it is manifestly unreasonable or based on untenable grounds or untenable reasons under the abuse of discretion standard." Id.

Appellate courts "review a decision to admit or exclude evidence for abuse of discretion." Kappelman v. Lutz, 141 Wash.App 580, 591, 170 P.3d 1189 (2007) (citing City of Kennewick v. Day, 142 Wash.2d 1, 11 P.3d 304 (2000)).

B. De Novo

Courts of appeal “review errors of law to determine the correct legal standard de novo.” Fahey, 164 Wash. App. at 55 (citing In re Marriage of Kinnan, 131 Wash.App. 738, 751, 129 P.3d 807 (2006)).

IV. ARGUMENT

A. Evidentiary Issues

1. The Letter Written by Mr. Jackson Regarding Settlement Negotiations and Mediation Was Properly Excluded

Mr. Jackson objected to the admission of a letter he wrote as a potential offer of settlement during negotiations under Evidence Rule (ER) 408. “Trial courts have broad discretion in ruling on evidentiary matters and will not be overturned on appeal absent a manifest abuse of discretion.” Duckworth v. Langland, 95 Wash.App. 1, 5-6, 988 P.2d 967 (1998) (citing Sintra, Inc. v. City of Seattle, 131 Wash.2d 640, 662–63, 935 P.2d 555 (1997); Industrial Indem. Co. v. Kallevig, 114 Wash.2d 907, 926, 792 P.2d 520 (1990), 7 A.L.R. 5th 1014 (1990)). ER 408 clearly indicates “[e]vidence of conduct or statements made in compromise negotiations is...not admissible.”

In attempting to admit said letter, Ms. Clark’s counsel presented to the Court the top of the letter specifically stated: “Jackson modification/

mediation.” RP* 60. Washington Courts have often excluded similar letters as offers of settlement under ER 408. See e.g. Duckworth, 95 Wash.App. at 5-6; State, Dept. of Ecology v. Tiger Oil Corp., 166 Wash.App. 720, 751, 271 P.3d 331 (2012). Given this information, the trial court did not abuse its discretion in ruling the letter was inadmissible.

2. The Parenting Plans Drafted by Ms. Clark or Her Counsel Were Properly Admitted

The trial court admitted a signed parenting plan presented to show the clear agreement of the parties to share equal residential time with their children and to settle the matter by reducing it to a formalized agreement. But for a judge’s signature, this document had all elements necessary to be considered a binding settlement agreement, not settlement negotiations pursuant to ER 408. “Settlement agreements are governed by general principles of contract law.” Morris v. Maks, 69 Wash.App. 865, 868-69, 850 P.2d 1357 (1993) citing Stottlemyre v. Reed, 35 Wn.App. 169, 171, 665 P.2d 1383, review denied, 100 Wash.2d 1015 (1983).

In determining whether informal writings...are sufficient to establish a contract...Washington courts consider whether (1) the subject matter has been agreed upon, (2) the terms are all stated in the informal writings, and (3) the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract.

Id., citing Loewi v. Long, 76 Wash. 480, 484, 136 P. 673 (1913). Both testimony and documentary evidence demonstrated the parenting plan was meant to memorialize the schedule the parties had been following, was drafted by Ms. Clark and her counsel to include the agreed terms and was signed by Mr. Jackson, Ms. Clark and Ms. Clark's counsel. Ex. P-25; RP Vol 2: 243-246.

To further determine whether agreements exist, courts look to CR2A. CR2A states: “[n]o agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless...the evidence thereof shall be in writing and subscribed by the attorneys denying the same.” “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 is to be encouraged.” In re Marriage of Ferree, 71 Wn.App. 35, 40-41, 856 P.2d 706 (1993) (citing Eddleman v. McGhan, 45 Wn.2d 430, 432, 275 P.2d 729 (1954); Bryant v. Palmer Coking Coal Co., 67 WnApp. 176, 179, 834 P.2d 662(1992) review denied, 120 Wash.2d 1027, 847 P.2d 480 (1993); Snyder v. Tompkins, 20 WnApp. 167, 173, 579 P.2d 994 review denied, 91 Wash.2d 1001 (1978)). The

parties working together to adjust their parenting plan by agreement is exactly the type of behavior CR2A seeks to promote. Not only did Ms. Clark and her counsel draft the parenting plan and present it to Mr. Jackson, but Ms. Clark, her counsel and Mr. Jackson all signed the parenting plan. This was more than sufficient to qualify as a settlement agreement pursuant to CR2A and not settlement negotiations. Ex. P-25; RP Vol 2: 243-246.

B. Child Relocation Act

Washington's Child Relocation Act (CRA) has been codified at RCW 26.09.405-.560. The act governs a trial court's ability to allow a parent to relocate their child. It lays out notice requirements and "sets standards for relocating children who are the subject of court orders regarding residential time." In re Marriage of Wehr, 165 Wn.App. 610, 612, 267 P.3d 1045 (2011). Washington Courts "recognize the significant interests at stake in child relocation cases. A parent's ability to relocate with their children is a significant interest that we do not take lightly." Wehr, 165 Wash.App. 610, 613 (citing In re Custody of A.C., 165 Wash.2d 568, 578-82, 200 P.3d 689 (2009) (J.M. Johnson, J. concurring); In re Parentage of R.F.R., 122 Wash.App. 324, 332-33, 93 P.3d 951

(2004). RCW 26.09.430 requires a person “with whom the child resides a majority of the time” to provide notice if he or she intends to relocate. If another interested party objects, the superior court must then conduct a fact-finding hearing. RCW 26.09.520. At the hearing there will be “a rebuttable presumption that the intended relocation of the child will be permitted.” *Id.* The objecting person may rebut the presumption if they can show that the detrimental effects of relocating will outweigh the benefits to the child and the relocating person. *Id.* After such hearing, the trial court has the authority “to allow or not allow a person to relocate the child” based on an overall consideration of the best interests of the child. RCW 26.09.420; *R.F.R.*, 122 Wash.App. at 324; *In re Marriage of Grigsby*, 112 Wash.App. 1, 7–8, 57 P.3d 1166 (2002).

1. **Based on the Parties Shared, 50/50 Parenting Schedule, Ms. Clark Was Not Entitled to the Presumption Under RCW 26.09.430**

Courts in Washington have indicated if there is no parenting plan, whether a party is “a person with whom the child resides a majority of the time” under RCW 26.09.430 is a question of fact. *R.F.R.*, 122 Wn.App. at 330. While there is a parenting plan in the situation at hand, the parties did not follow the language of the plan and instead followed a shared, 50/50

schedule. Trial testimony from Ms. Clark, Mr. Jackson, and several witnesses indicated the parties had equal time with their minor children and in practice followed a 50/50 schedule. RP Vol. 2, 248; Vol. 3 417, 466, 470; Ex. P-25. Both parties were flexible with one another and Ms. Clark recognized when she travelled she would leave the children with Mr. Jackson: “when I was not there, he was able to be with [L.J.] and [H.J.]” RP Vol 1, 178.

Ms. Clark mischaracterizes the record to in an attempt to support her position that the parties did not have a 50/50 schedule. She indicates “Mr. Jackson himself admits the parties did not have a 50/50 parenting plan” and cites the report of proceedings at page 417, lines 21-22. Brief of Respondent/Appellant, 16, 34. The testimony does not support this assertion. The question asked of Mr. Jackson was “did it come out to pretty much 50/50?” and Mr. Jackson responded “Uh-huh. It was probably within just a day or two of 50/50 that summer, just like the school year.” RP Vol 3, 417. Just prior to this, Mr. Jackson was asked “did you believe you and Rhonda had a 50/50 plan?” and he answered “yes.” RP Vol 2, 248. The issue was clarified again when he was asked “in practice, were you following a 50/50 plan?” and he answered “yes.” Id.

The parties' intention to have a shared schedule from the very beginning was further acknowledged in their order of child support. RP Vol 2, 224; P-50. There was no child support transfer payment given that the children were going to spend equal amounts of time with each parent. Id. The child support order indicates the children spend a significant amount of time with the parent who is obligated to make a support transfer payment. Id.

Not long after the divorce, the parties also signed a new parenting plan reflecting the schedule they had been following. RP Vol. 2, 236, 239, 244, 245, 246, 251, 254. That plan was presented to Lincoln County but not signed by the court. Id. It was clear based on the parties actions, both before and after signing the plan, that they intended for this plan to be a binding agreement. Id. Given the signed plan and shared schedule they followed, there was not a parent with whom the children reside a majority of the time. Division 2 of the Washington Court of Appeals noted "RCW 26.09.430 is silent as to the relevant time period for determining who is the parent "with whom the child resides a majority of the time." R.F.R., 122 Wn.App. at 330. The same Court acknowledged that the plain language of the statute "suggests that if neither parent qualifies as a parent

with whom a child resides a majority of the time, for example when residential time is split 50/50, that neither parent can invoke the child relocation statute and receive the rebuttable presumption in his/her favor.” Fahey, 164 Wash.App. at 58.

This case can be distinguished from Fahey in several ways as found by the trial court. In Fahey, “the original parenting plan envisioned *approximately* equal residential time” for the parents but granted the mother “more residential time and identified her as the primary residential parent.” 164 Wash.App. at 59 (emphasis added). The children spent three weekdays with the mother and two with the father. Id. In the case at hand, the evidence showed the parenting plan signed by Mr. Jackson, Ms. Clark and Ms. Clark’s counsel did not envision approximately equal residential time, but *actual* equal residential time, with each parent having two consistent weekday overnights and alternating Friday to Sunday overnights every other weekend during the school year. Ex. P-25; RP Vol 2, 239; RP Ruling 3: 10-25, 4: 1-8. There was testimony that this schedule was followed and the time was consistently exercised. Id.

While Ms. Clark testified the parties shared a 50/50 plan only occasionally, the Court found that using the example “of her mother

driving the children to school each morning...as a basis not to say they're 50/50 doesn't make a lot of sense because it's not Ms. Clark that is driving these children or parenting these children." RP Ruling 9: 5-20. Rather, the Court found "[t]here was other evidence within her deposition testimony, her testimony at trial and the exhibits and attachments to some of the exhibits which would indicate that the parties had a shared custodial arrangement." RP Ruling 9, 10. This evidence included "the parenting plan that was signed in January 2016 where they, in fact, outlined the 50/50 shared schedule. While it was not entered with the Court...the testimony was that Lincoln County rejected it for some reason." RP Ruling 10.

This situation can be further distinguished from Fahey given that the father in Fahey enjoyed a significant amount of his residential time during the summer months when the mother was unable to exercise her time. In contrast, the parties here agreed and followed a schedule that allowed the children to spend equal amounts of time with each parent year round. Ex. P-25; RP Vol 2, 239, 246. While the parties would trade days on occasion and offered to watch the children if the other was unavailable, in practice they followed a 50/50 plan. RP Vol 2, 248; RP Vol 3, 417; CP 19.

Division 2 of the Washington Court of Appeals has had the opportunity to delve into this issue further. In In Re Marriage of Ruff and Worthley, the Court found “[a] plain reading of the CRA's language supports the conclusion that the CRA does not apply to proposed relocations that would modify joint and equal residential time under a joint parenting plan to something other than joint and equal residential time.” 198 Wash.App. 419, 428, 393 P.3d 859 (2017).

[T]he rebuttable presumption is that a fit parent entrusted with the most time with a child will act in the child's best interest, and thus the relocation must also be in the child's best interest. But...where there is a joint parenting plan, both parents are equally entrusted to act in the child's best interests. Thus, the presumption that the relocation must be in the child's best interest is not appropriate to apply to a proposed relocation where a joint and equal residential designation exists because in those circumstances the court presumes both parents act in the child's best interests.

Id. at 431.

There was sufficient information to support the findings that “the parties really were working off of a shared parenting time that was across the boards. They lived in the same neighborhood. The children were freely going back and forth between the parties, and they had expanded by agreement the Lincoln County parenting plan to what became the parenting plan as outlined in their agreement in January 2016.” RP

Ruling 8. The Court found the signed parenting plan was a “formalization of what they had been practicing for quite some time, and it set forth the 50/50 parenting plan” that was referred to throughout the trial. Ruling, 4.

Washington courts are clear:

[a]n appellate court will uphold a finding of fact if substantial evidence exists in the record to support it. Evidence is substantial if it exists in a sufficient quantum to persuade a fair-minded person of the truth of the declared premise. So long as substantial evidence supports the finding, it does not matter that other evidence may contradict it. This is because credibility determinations are left to the trier of fact and are not subject to review.

Burrill v. Burrill, 113, Wash.App. 863, 868, 56 P.3d 993 (2002) (citing Holland v. Boeing Co., 90 Wash.2d 384, 390, 390-91, 583 P.2d 621 (1978); State v. Camarillo, 115 Wash.2d 60, 71, 794 P.2d 850 (1990)).

Given the significant evidence at trial regarding the parties’ shared residential schedule, the appellate court should not disturb the trial court’s findings with regard to the statutory presumption.

2. Benefits to Both the Children and the Relocating Parent, Ms. Clark, Were Appropriately Considered and Weighed

Ms. Clark asserts the trial court did not appropriately consider the benefits of the purported relocation to her and instead focused too heavily on the children’s interests. However, the very purpose of the eleven

statutory factors is to serve as a balancing test between the important and competing interests and circumstances that are involved in relocation matters. Horner, 151 Wash.2d at 894. The Washington Supreme Court emphasized the importance of the interests of the relocating person, noting that most of the 11 factors refer to the interests and/or circumstances of the relocating parent.” Kim, 179 Wash.App. at 243. Of the eleven factors, only four focus exclusively on the child's best interests. Horner, 151 Wash.2d at 894 n.9. Thus, by the nature of the factors themselves and the specific findings detailed by the court, Ms. Clark’s interests were properly considered.

3. **The Trial Court Considered and Made Findings Regarding Each Statutory Factor To Determine the Detriment of Relocation Outweighed The Benefits to Both the Children and Relocating Party.**

In 2010, the Division 3 Court of Appeals indicated, “the sole purpose of a presumption is establishing which party has the burden of going forward with the evidence on an issue.” Taufer v. Estate of Kirpes, 155 Wn.App. 598, 604, 230 P.3d 199 (2010). The only result of the court applying the presumption in favor of Ms. Clark is that Mr. Jackson would bear the burden of presenting evidence on the issue. Regardless of whether Ms. Clark received the presumption, Mr. Jackson provided ample

evidence to support the court's determination that the children should not be permitted to relocate. The court overtly acknowledged this in the oral ruling, indicating "even if I were to have found that the presumption existed for Ms. Clark based upon her being designated as the custodian...I cannot make the findings that it would be better for these children to go, and that that presumption was overcome by the evidence that I did receive at trial." RP, Ruling, 35: 14-23.

The decision about whether the detrimental effects of relocation outweigh the benefits to the children and the relocating parent is inherently subjective. Grigsby, 112 Wash.App. at 14. The task on review is limited to determining whether the court's findings are supported by the record and whether they, in turn, reflect consideration of the appropriate factors. Horner, 151 Wash.2d at 896, 93 P.3d 124. The appellate court *does not reweigh the evidence*. In re Marriage of Kovacs, 121 Wash.2d 795, 810, 854 P.2d 629 (1993) (emphasis added). An appellate court may not substitute its findings for those of the trial court where there is sufficient evidence in the record to support the trial court's determination. Id. While Ms. Clark may not agree with the overall outcome, it does not negate the

fact that the trial court relied on substantial evidence in weighing the factors and reaching its ultimate decision.

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.

Horner, 151 Wash.2d at 896.

Contrary to Ms. Clark's assertion, in the trial court's ruling on November 18, 2016, the Honorable Judge McKay, evaluated and made detailed findings of fact regarding each of the eleven factors listed in the CRA. The Court satisfied both methods of documenting its consideration of the child relocation factors. It entered specific findings of fact as to each factor. The court also met the second method given that the record reflects that substantial evidence was presented on each child relocation factor and the written findings and oral ruling reflect that it considered each factor. When considering each factor, none clearly weighed in favor of relocation. Based on these findings as well as other issues, the Court found: "based

upon these parents, these children, the issues involved here that 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 and the benefit to Ms. Clark to living in Nevada.” RP Ruling, 34. Accordingly, the Court applied the correct legal standard to the relocation issue. Ms. Clark is now asking the appellate court to reweigh the factors to reach a different conclusion.

The Court was asked to prohibit Ms. Clark from relocating with the children based on the fact that the 11 factors in the CRA weighed heavily in Mr. Jackson’s favor. Mr. Jackson was required and did show “that the detrimental effect of the relocation outweighs the benefit of the change to the children and [Ms. Clark]” based upon the following [child relocation] factors.” RCW 26.09.520. The factors consider:

- (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.

Id. Ms. Clark appears to assign error to the Court's findings regarding seven of the ten applicable factors. While it is not clear, it seems she takes issue specifically with the findings made in regard to factors one, two, three, six, seven, nine, and ten.

a. **The Vast Majority of the Children's Important Relationships with Family and Friends Are in Spokane**

The first relocation factor requires the court to consider “[t]he relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent, siblings, and other significant persons in the child's life.” RCW 26.09.520(1). Here, the court found both parents were good parents, but specifically noted Mr. Jackson is “attentive, caring, loving to his children and stepchildren. He parents his children. He does not pawn them off.” Ruling, 11: 16-17. There was also significant evidence regarding Mr. Jackson's relationship with his children, their interactions with one another and the types of activities they do together. Ruling, 11-12. It was clear in addition to arranging and supporting the children in their activities, Mr. Jackson also took pride in sharing his interests with them. The court noted: “[t]hey rode bikes. They went rafting

and tubing. There was music in the neighbor's yard. He has not been attending the adult trivia nights because he has his children. He takes them to Mariner games, to the zoo." Ruling, 12: 8-12.

At the time of trial, Mr. Jackson was 60 years old and planned to continue working until he was approximately 65. RP Vol 2, 301. At that time, the parties' children would be 12 and 15 years old. RP Vol 2, 303. Upon his retirement, he would be available to the children one hundred percent of the time. Id.

The Court found there was information regarding "the extent of Mr. Jackson's involvement with these children and what he does with them on a day-to day basis because that was testified to." RP Ruling 14. The court indicated however, "I don't really have a picture of what Ms. Clark's involvement on a day-to-day basis with the children was." Id. Ms. Clark points out the few activities that were mentioned at trial, but there was little to no testimony regarding Ms. Clark's involvement in the children's every day routine. Simply because this information was not adequately presented to the Court does not mean the Court abused its discretion in making these findings.

While the children have a strong relationship with Mr. Jackson, both parties also explained that their children have close attachments to and spend quality time with many different members of both parties' families in the Spokane area. RP Vol. 2, 238; Vol 3 477. Some family members even participated in the children's day to day routines. Id. There was testimony that the relationship between the children and Mr. Jackson's mother, Ms. Akerheim, was very loving and special. RP Vol 3, 508. Ms. Akerheim attended as many of the children's games and performances as she could, including soccer, piano, baseball and choir. RP Vol 3, 510. She and her husband, Mr. Akerheim, both testified that they saw the children on average a couple times per week. RP* 64; RP Vol 3, 510. Mr. Akerheim emphasized how close Ms. Akerheim was with the grandchildren, indicating "she loves those two kids probably better than she loved her own kids." RP* 73.

Both grandmothers participated in taking the children to school in the mornings if Mr. Jackson or Ms. Clark were unavailable. RP Vol 1, 135, Vol 2, 238; Vol 3, 477. Ms. Clark testified on more than one occasion that her mother assisted with transportation, specifically stating "my mom came to my house every single morning to take the kids to school." RP

Vol 1, 135, Vol 3, 477. After Ms. Clark relocated to Nevada, both grandmothers, including Ms. Clark's mother continued to live in Spokane and regularly spent time with the children. RP Vol 1, 175; RP Vol 2, 375. While Ms. Clark's mother did not testify, Ms. Clark indicated her mother was not currently living in Nevada and Mr. Jackson confirmed that Ms. Clark's mother was still in Spokane. RP Vol 1, 175; RP Vol 2, 375.

Contrary to Ms. Clark's contention, nearly all of the children's close relatives, including Ms. Clarks' brother and older son as well as Mr. Jacksons' older children, stepfather, and brother live in the Spokane area. Ms. Clark's brother, Mr. Rodrigues, who lives in a Spokane suburb, sees the children regularly at family gatherings and on other occasions when he spends time with the children and his mother. RP* 175-181. Ms. Clark's son lived with the parties while they were married and had a close relationship with his younger siblings. After Ms. Clark moved to Nevada, he remained in Spokane to finish high school. RP Vol 1, 51. While not living in the same home, he nonetheless continued to be involved with his younger siblings, particularly his younger sister. RP Vol 1, 56. Ms. Clark indicated he regularly made contact with L.J., especially if he knew she was feeling upset or needed something. Id. He would come to Mr.

Jackson's home to spend time with his siblings, would take them out for ice cream, and would spend time with them together with their grandmother, Ms. Clark's mother. Id.

Ms. Clark attempted to minimize the children's relationships with other members of their family, specifically Mr. Jackson's older son, Adam Jackson. Adam is 23 years older than L.J. and 26 years older than H.J. so he did not live in the same home with them. RP Vol 2, 331, 333. Adam explained that given the dynamic of his parent's marriage ending and Ms. Clark and Mr. Jackson's relationship beginning, at times he wanted to keep some distance between himself and Ms. Clark. RP Vol 2, 333-334. Despite this, Adam participated in a lot of activities with his father, L.J. and H.J. and enjoyed seeing his father share things with L.J. and H.J. that he and his father shared during his childhood. RP Vol 2, 335. Adam explained L.J. and H.J. have spent time at his home with his children, they all have gone sledding, spent time at Hoopfest, and attended Spokane Indians games together. RP Vol 2, 335. In the months leading up to trial, Adam saw the children a couple of times in the summer, a few times in the fall and the Friday immediately preceding trial. RP Vol 2, 337-338.

While the parties' children have a relationship with Ms. Clark's significant other, their relationships with family and friends in Spokane are more extensive. Prior to Ms. Clark's relocation, her children travelled to visit her significant other, Mr. Turnispseed, a few times per year. RP* 158. While Mr. Turnispseed's family saw the children when they visited Nevada those few times, the only relative in Nevada is Ms. Clark's godmother who lives two and a half hours away from Carson City. RP Vol 1, 173.

Trial testimony also highlighted that both children have their own significant relationships with close friends in Spokane. Ruling 13. While there was some indication the children have developed some relationships with children in Nevada, the Court found that "the main information that I got was those relationships have centered here in Spokane." Id. Given the strength, nature, quality and extent of involvement of the children's relationships with relatives and friends in Spokane, the Court appropriately determined that this factor weighed in Mr. Jackson's favor.

b. **The Parties Agreed It Was Important to Have Frequent Contact with Their Children and Reduced that Agreement to Writing**

The second factor requires the court to consider "prior agreements of the parties." RCW 26.09.520(2). The parties' parenting plan clearly

indicated they intended for the children to spend equal amounts of time and have regular contact with each parent. Ex. P-25. While Mr. Jackson testified he was not pleased with the designation of Ms. Clark as custodial parent, he agreed to sign the parenting plan given assurances she made regarding sharing the children 50/50 and not moving. RP Vol 2, 247-248; CP 19. Ms. Clark indicated via text message she had no intention of moving, to Reno, Nevada. RP Vol 2, 253; CP 17. She stated: “I want [you] to know that I am not moving to Reno. I could easily get a principal job elsewhere but I know the kids are rooted here with school.” Id. Mr. Jackson testified he felt reassured Ms. Clark was not going to move. RP Vol 2, 254. Ms. Clark later encouraged Mr. Jackson to sign the amended parenting plan, acknowledging their shared schedule via text message: “you can always go through with the signing. We have 50/50.” RP Vol 2, 248; CP 19. Thus, the Court’s finding that based on the evidence, including testimony, exhibits and text messages, there was an “agreement of the parties sharing these children on a 50/50 basis.” RP Ruling 15.

c. Evidence Indicated that Disrupting Contact Between the Children and Both Parents Would be Detrimental

Ms. Clark next challenges the court’s finding regarding the third relocation factor. This factor requires the court consider “[w]hether

disrupting the contact between the child and the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation.” RCW 26.09.520(3). Ms. Clark contends that because the court found that disrupting the contact between the children and either parent would be detrimental that this was not sufficient to satisfy the statutory requirements.

Trial courts must enter specific findings on each statutory child relocation factor, or parties must have presented substantial evidence on each factor with trial court making findings and oral articulations that reflect its consideration of each. In re Marriage of McNaught, 189 Wash.App. 545, 359 P.3d 811, review denied 185 Wash.2d 1005, 366 P.3d 1243 (2015). “A trial court abuses its discretion when it fails to *consider* each factor.” McNaught, 189 Wash.App. at 556 (emphasis added) (citing Horner, 151 Wash.2d at 894–95, 93 P.3d 124). The statute and case law do not require that the court make definitive findings that each factor weighs in favor of one parent or another. Rather, the court must consider all eleven factors to assist in its overall determination. Id.

The court's findings here can be compared to the findings made in McNaught. In McNaught, the trial court found the strength of the child's relationship to her mother and her family in Texas was at least as strong as her relationship with her father and his family. McNaught, 189 Wash.App at 557-58. Division 1 of the Court of Appeals indicated this "reflects the Court's consideration of this factor" and was sufficient to satisfy the statutory requirement. Id. at 558. Likewise, the trial court's specific findings here demonstrate the court's appropriate consideration of this factor in the overall determination.

d. There Was No Basis to Subject Either Parent's Time to Limitations Under RCW 26.09.191, Nor Were Restrictions Present in Previous Parenting Plans

The fourth factor under RCW 26.09.520 requires the court consider "whether either parent or a person entitled to residential time with the child is subject to limitations under RCW 26.09.191." RCW 26.09.520(4). Despite the fact that none of the signed parenting plans contained limitations under RCW 26.09.191, Ms. Clark requested restrictions on Mr. Jackson's time. There was not sufficient evidence to substantiate the need for limitations regarding alcohol or abusive use of conflict and the court had concern over Ms. Clark's allegation that the children have no

emotional ties with their father, referring to the allegation as “appalling.”

Ruling 17.

e. **Evidence Supported the Court’s Findings that Relocation Could Negatively Impact the Children’s Schooling and Their Daughter’s Emotional and Mental Well-Being**

The sixth relocation factor requires the court to consider “[t]he age, developmental stage, and needs of the child, and the likely impact the relocation or its prevention will have on the child’s physical, educational, and emotional development, taking into consideration any special needs of the child.” RCW 26.09.520(6).

The parties’ daughter, L.J., began seeing a counselor in February 2016 after having difficulties adjusting to her parents’ divorce. RP Vol 1, 7, 10. She was diagnosed with an adjustment disorder along with depressed mood and anxiety. RP Vol 1, 9. L.J. established a strong relationship with a counselor in Spokane and was doing well in counseling. RP Vol 1, 10. When the relocation process started, she developed increased symptoms. Id. There were concerns about changing schools, leaving her school and friends in Spokane and moving to Nevada. RP Vol 1, 13. Ms. Clark attempts to minimize Mr. Jackson’s level of involvement in their daughter’s counseling, however she admitted she did

not obtain his permission nor did she discuss it with him prior to taking her to a counselor. RP Vol 1, 121; Vol 2, 221. There were also concerns that Ms. Clark's behavior exacerbated L.J.'s symptoms given her admission at trial that she discussed the ongoing litigation with her, including telling her Mr. Jackson filed a motion to exclude certain testimony from her counselor at trial. RP Vol 1, 196.

The court also considered the impact relocation could have on the children's schooling. When enrolling their children in school, the parties selected the Montessori school system. Ms. Clark indicated she chose this school given her older children attended the same Montessori school and she recognized the benefits of the close-knit environment and type of learning Montessori programs offer. RP Vol 1, 73, 154. There was testimony from L.J.'s teacher, Ms. Feola, who described the principle behind the program is to build a community of peers the children will learn, teach and grow with over the years. RP Vol 3, 489. While Ms. Clark indicated the children would be able to attend another Montessori school in Carson City, they would be in a new class, with a new group of students and teachers. RP Vol 1, 73. They would be removed from the community

they have already built and have to develop a new sense of community, thus frustrating the purpose of the Montessori philosophy.

With regard to L.J. specifically, the court further found based upon her diagnosis that “granting the relocation would certainly have an effect on her short-term educational development.” Ruling 25. The court found the parties, specifically Ms. Clark, felt it was important to put the children into Montessori school where they have been enrolled since first grade. Ruling 22. The court found the Montessori philosophy benefited these children and they are thriving in this environment, therefore this factor weighs in favor of denying relocation. Id.

f. **There Was Sufficient Evidence That the Quality of Life, Resources, and Opportunities In Spokane at The Time of Trial Were More Beneficial to the Children**

The seventh relocation factor requires the court to consider “the quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations.” RCW 26.09.520(7). Ms. Clark focused on the opportunities available to her in Nevada, particularly with regard to her employment. The Court recognized her consideration of this information, finding “the school system she’s currently working in is what is referred to as a family first school...

allowing [teachers and administrators] to place their families first.” RP Ruling, 26.

With regard to resources and financial opportunity, testimony and documentary evidence indicated Ms. Clark’s year to date earnings in Spokane through August 31, 2016, were \$55,571, or an average gross income per month of \$6946. RP Vol 3, 472. Had Ms. Clark completed the full year in Spokane, her gross income would have been \$83,356. In Nevada, Ms. Clark signed a contract for \$77,088 or \$6424 per month. Ex. R-104; RP Vol 1, 36. Per her contract in Spokane, Ms. Clark was contracted to work a teacher schedule of 180 days per year. RP Vol 1, 41. As a vice principal, Ms. Clark is required to work 218 days per year. RP Vol 1, 98. Given this information, the court did not err in determining that Ms. Clark could be expected to work more hours as a vice principal and could glean that her new position did not result in an increase in income.

The Court recognized the West Central neighborhood in Spokane where the children resided with Mr. Jackson is a very tight knit community. Ruling 26. Both parents lived in this neighborhood prior to Ms. Clark moving given that Mr. Jackson purchased a house in this neighborhood after their divorce so the children could have access to both

parents on a daily basis. RP Vol. 2, 233, 293-94. Several witnesses made it clear that children freely roam the neighborhood, L.J. and H.J. have friends there who they see on a regular basis and that it is the only neighborhood the children have ever known. Ruling 26. Together, this information was sufficient to support the court's finding that the children's community is focused in Spokane.

g. **The Court Appropriately Determined It Was Not Feasible Or Desirable For Mr. Jackson to Relocate to Nevada Given That He Has Significant Ties to Spokane**

The ninth relocation factor requires the Court to consider the alternatives to relocation and whether it is feasible and *desirable* for the other party to relocate also.” RCW 26.09.520(9)(emphasis added). Ms. Clark ignores whether or not it would be desirable for Mr. Jackson to relocate to Nevada and instead focuses solely on whether or not it would be possible for him to move. In addition to having an established career, Mr. Jackson has deep roots in the Spokane area, including strong relationships with his immediate and extended family in Spokane as well as with close friends. Aside from Ms. Clark, Mr. Jackson has no relationships in Nevada nor does he know the area. RP Vol 2, 371.

h. Ms. Clark's Proposed Relocation and Corresponding Proposed Parenting Plan Would Have a Serious Financial Impact and Posed Logistical Difficulties in Facilitating Visitation

The tenth relocation factor requires the Court consider “the financial impact and logistics of the relocation or its prevention.” RCW 26.09.520. Ms. Clark attempts to indicate the court did not analyze this factor, however her real issue is that the court did not find this factor weighed in her favor.

Simply because Ms. Clark indicated she would be willing to pay for one additional plane ticket does not mean the relocation would not result in significant transportation costs given that these children have to fly to facilitate visitation. The Court acknowledged “the drive...one way was about 13 to 14 hours, not necessarily something that’s going to be very easy to accommodate around school schedules and these parents are both tied to a school schedule.” RP Ruling 27. The Court also found “there is nothing that can make up for face-to-face contact between a parent and child...to get the face to face contact that will be, frankly, necessary here...the children will have to fly.” Id.

Ms. Clark testified that each time the children travel between the parties’ homes, an adult will be required to travel with them, resulting in

the need to purchase at least three if not four round trip plane tickets. RP Vol 2, 361. Based on previously purchased tickets and Ms. Clark's testimony, on average the tickets cost approximately \$300 to \$400 per traveler. Ex. P-27; RP Vol 2, 212. Given that the parties need three to four tickets per trip, they have additional transportation costs of \$900 to \$1200 per visit.

Per Ms. Clark's proposed parenting plan, the parties would be required to purchase tickets two times per month, resulting in an additional \$1800 to \$2400 per month on transportation. CP 9. Under Mr. Jackson's proposed parenting plan, the children would have one visit per month in Reno and Ms. Clark would travel to Spokane for one monthly visit, given that she continues to have friends and family, including her mother and brother, whom she can stay with. CP 18; RP Vol 2, 213. Ms. Clark's school district in Nevada also has additional vacation days, including a week-long fall break as well as an additional week of winter break and spring break that would allow her to travel to Spokane to spend additional time with the children. RP Vol 1, 107; RP Vol 2, 214. This arrangement would cut down on at least three additional plane tickets per month, significantly reducing the monthly transportation costs.

When both parties lived in Spokane, the children could easily go between the parent's homes on bike or foot as they lived in the same neighborhood. RP* 113. The child support order indicates the children spend a significant amount of time with the parent who is obligated to make a support transfer payment, therefore there was no child support transfer payment. RP Vol 2, 224; Ex. P-50. Regardless of whether the children were permitted to relocate or not, the parties would no longer be sharing time equally, necessitating a child support transfer payment. This in itself would have a financial impact on the parties.

Given the necessary transportation costs, any purported increase in Ms. Clark's income and any child support transfer payment between parties would be consumed. As such, the trial court appropriately found that "there is a financial impact because these children will be flying." RP Ruling 29.

C. Attorney Fees on Appeal

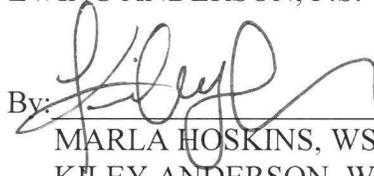
Given the financial resources of the parties and the lack of merit regarding Ms. Clark's issues presented on appeal, Mr. Jackson respectfully requests attorney fees incurred in responding to Ms. Clark's appeal pursuant to RAP 18.1 and RCW 26.09.140.

V. CONCLUSION

The trial court considered the evidence presented regarding each of the statutory factors under RCW 26.09.520 and properly found that none clearly weighed in favor of relocation and rather that a majority weighed in favor of denying the relocation. The appellate court is not in as good of a position as the trial court to consider the evidence and reweigh the factors. As such, the trial court did not abuse its discretion in determining that there was sufficient evidence to support the finding that the detriment of relocation outweighed the benefits to both the children and Ms. Clark, in favor of denying the relocation. Mr. Jackson respectfully requests this Court affirm the trial court's ruling.

DATED this 28th day of November, 2017.

EWING ANDERSON, P.S.

By: 

MARLA HOSKINS, WSBA 27253
KILEY ANDERSON, WSBA 48216
Attorney for Respondent Jackson

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of November, 2017, a true and correct copy of the foregoing document was served on the following in the manner set forth herein:

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