

No. 85591-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 63438-1-I

LYNETTE KATARE,

Respondent,

v.

BRAJESH KATARE,

Petitioner.

PETITION FOR REVIEW
(Amended)

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A IDENTITY OF PETITIONER.

Petitioner Brajesh Katare asks this Court to accept review of the decision designated in Part B (“Slip Op”), a copy of which is Appendix A.

B. DECISION BELOW.

The Court of Appeals decision follows appeal from a second remand after the trial court had been reversed twice because its factual findings did not support the parenting plan international travel restrictions and passport controls it imposed after the 2003 divorce and relocation trial.¹ In January, 2011, the Court of Appeals ruled that, this time the same trial judge did not abuse its discretion and affirmed the international travel restrictions and passport controls it had originally imposed and which have been in effect since the conclusion of the 2003 divorce. The provisions still prevent Brajesh, a U.S. citizen and Microsoft employee for over 12 years (and now a manager) from traveling internationally with his two, now nearly teen-age children until they are 18, and that he relinquish his U.S. passport before each visitation.

The bases for the restrictions are the fears of the mother, Lynette Katare, and the trial court’s speculation that Brajesh “could” abduct the children which was based on evidence from the 2003 trial and new evidence at the 2009 remand hearing: racial profiling, inadmissible double hearsay accepted by the trial court only through an expert witness to

¹ The case has been before this Court on petitions for review after each reversal of the trial court. *In re the Marriage of Katare*, 125 Wn. App. 813, 105 P.3d 44 (2004), *rev. den.*, 155 Wn.2d 1005 (2005) (“*Katare I*”); *In re the Marriage of Katare*, 2007 WL 2823311 (2007), *rev. den.*, 163 Wn.2d 1051 (2008) (*Katare II*”). Copies of the prior two decisions are attached as Appendices E and F.

“corroborate” alleged threats in 2002, and emails showing “resentment” of Lynette. The decision raises the following issues.

C. ISSUES PRESENTED FOR REVIEW.

1. The trial court re-imposed a permanent ban on foreign travel of the children with the father under RCW 26.09.191(3)(g) based on evidence that the father “still harbors resentment” against the mother and this “could” manifest itself in abduction. CP 154. Is this “it could happen” standard in conflict with the statutory standard recognized in *In re Marriage of Watson*, 132 Wn. App. 222, 233-34, 130 P.3d 915 (Div. II, 2006), which required proof by “substantial evidence establishing a nexus between [the parent’s] ‘involvement or conduct’” and the claimed harm to the child; and in *In re Marriage of Wicklund*, 84 Wn. App. 763, 777-71, 932 P.2d 652 (Div. I, 1996), *i.e.*, that requires the complaining parent to prove “the parent’s [actual] conduct was adverse to the best interests of the child?” RAP 13.4(b)(2), (3), (4).
2. Does “concern” over child abduction justify a court order which permanently bans a father from taking his child to a foreign country simply because that country is not a signatory to the Hague Convention on child abduction? RAP 13.4(b)(2), (3), (4).
3. Can a trial court place permanent restrictions on one parent’s fundamental right to travel abroad with his child solely on the basis that the other parent is afraid the first parent “might” not return the child to the United States, without any evidence or determination that this is likely to occur? RAP 13.4(b)(2), (3), (4).
4. A trial court resolving a dispute over a parenting plan improperly admitted and considered profiling testimony from an “expert” on Indian culture and abduction. Did the Court of Appeals err in holding that this type of error could be harmless where the trial court was assessing the likelihood that an Indian parent (and U.S. citizen and resident) would engage in future parental misconduct? RAP 13.4(b)(3),(4).

D. STATEMENT OF THE CASE.²

This appeal is a continuation of the earlier two appeals stemming from the restrictions in the initial 2003 parenting plan. Brajesh's and Lynette's daughter, AK, is now 10½ and their son, RK, is almost 9½. The children live with their mother in Clearwater, Florida and, since September 2006, have been able to have some monthly visits and vacation time with Brajesh in Redmond. The divorce was finalized in 2003. Brajesh is now into his 12th year at Microsoft, X RP, pp. 71-78; CP 23, 28-30. Once the divorce was final and the relocation permitted, Brajesh accepted a two-year position in Hyderabad, India to help establish that facility, which now has over 3,000 employees. *Id.* Despite the fact that he was for that period of time based in India, he nevertheless made his regular monthly visitations to see the children in Florida, visiting them in Florida over 29 times from 2003 through 2008 (including 19 from India), and having them visit him in Redmond 13 times since fall of 2006. CP 24. Brajesh has advanced in his career and is now a general manager in charge of several hundred people. *Id.* He is based in Redmond and his responsibilities continue to require him to travel around the world, though he spends most of his time here.

² References to transcripts are chronological following the convention from the two prior appeals, beginning with the trial transcripts: I RP: June 16, 2003 (Trial); II RP: June 17, 2003 (Trial); III RP: June 18, 2003 (Trial); IV RP: June 19, 2003 (Trial); V RP: June 23, 2003 (Trial); VI RP July 7, 2003 (Oral Decision); VII RP: July 30, 2003 (Post-trial hearing). These transcripts have been transferred to this record.

The four volumes of transcripts from the second remand hearing are referenced as VIII RP: Jan. 14, 2009 #1; IX RP: Jan 14, 2009 #2; X RP: Jan. 15, 2009 #1; and XI RP: Jan. 15, 2009 #2.

The Slip Opinion has an abbreviated recitation of the case background and the Court is respectfully directed to the *Katare I* decision and Brajesh's opening briefs for a full picture of the case.³

1. The 2003 Divorce and Imposition of Travel Restrictions and Passport Controls, and Brajesh's Two Prior Appeals Which Reversed For Abuse of Discretion.

a. The 2003 trial and original ruling.

A five-day trial was held in June, 2003 on property division, the requested relocation by Lynette to Florida with the infant children, and the terms of the parenting plan. Lynette sought a draconian, highly restrictive parenting plan including findings restricting visitation under RCW 26.09.191. See App. H, *Katare I* Opening Brief pp. 14-17, App H, pp. 25-28. Although she did not get supervised visitation, Lynette got a highly restrictive parenting plan that forbade any international travel by Brajesh with the children until they are adults and required he surrender his passport on each visitation.

While Lynette argued Brajesh would abduct the children, perhaps because of the fact there was no live testimony other than Lynette's that Brajesh threatened to abduct the children, in 2003 the trial court roundly rejected those allegations in no uncertain terms: "I'm not persuaded, based on all the evidence presented, including that of the expert witnesses who were called to testify, that Mr. Katare presents a serious threat of

³ The prior appellate briefing is part of this appellate record as App. H to the Opening Brief in this case in PDF form on a CD-Rom supplied to the Court of Appeals. A courtesy copy of the CD will be sent to the Court separately for its convenience and additional copies as helps the Court.

abducting the children.” VI RP 10; App. B-3. However, after stating this conclusion that Brajesh was not a serious threat to abduct, which was formalized into a finding, Judge Roberts went on to say:

Nonetheless, *if I'm wrong on this* the consequences are incredibly serious and I'm mindful about that. I'm going to impose some restrictions in the parenting plan that will be designed to address this issue, and I hope that everything that has been brought to this Court, which I think indicates that there is not a serious risk of abduction, turns out to be the truth.

VI RP 10-11 (emphasis added). Judge Roberts then proceeded to impose the permanent restrictions that have remained at issue.

b. First appeal: reversal based on Brajesh's challenge to the travel restrictions, denial of Lynette's cross-appeal that §191 findings were required.

Division One reversed in the first appeal and remanded because,

Although the trial court stated Brajesh “appears to present no serious threat of abducting the children,” it addressed concerns about the risk of abduction and imposed limitations to prevent abduction. Whether the court found there was a risk of abduction that justified the imposition of limitations is at least ambiguous. Indeed, such a finding is implicit in the trial court's discussion of the risk of abduction, the findings it made and the limitations it imposed. Except for the inconsistent entry that states the RCW 26.09.191 basis for restrictions does not apply, the court's findings support restrictions under RCW 26.09.191(3)(g). Rather than speculate, we remand for the trial court to clarify the legal basis for its decision to impose restrictions to prevent Brajesh from taking the children to India and if appropriate to make the necessary findings.

Katara I, 125 Wn. App. at 831.

c. **Second appeal: reversal based on Brajesh's challenge to the first remand order which still "failed to explain the reasons for the limitations under RCW 26.09.191(3)(g)."**

The first remand resulted in a hearing on the papers in which Judge Roberts refused to consider new evidence and ultimately made no material changes to the parenting plan's findings, consistent with her statement in 2003 she would not change her mind in the future. *See* VII RP, p. 31:18-23. Division One again reversed and remanded in *Katare II* as follows:

By basically restating its earlier findings as the justification for imposing limitations on Brajesh's residential time with the children under RCW 26.09.191(3)(g), the trial court does not resolve the ambiguity and does not expressly address whether the evidence supports the limitations under RCW 26.09.191(3). The amended parenting plan still states that "the husband appears to present no serious threat of abducting the children," and again, without express findings to justify the limitations, the court imposed restrictions, apparently based on an implicit risk of abduction. In addition, the court also does not expressly address the best interests of the children. Because these findings do not comply with the mandate to explain the reasons for the limitations under RCW 26.09.191(3), we remand. [Citations omitted] **Given the passage of time, the trial court should also examine current relevant information concerning any limitations under RCW 26.09.191(3).**

Katare II, 2007 WL 282331 at *3 (emphasis added).

On remand from the Court of Appeals, which directed Judge Roberts to clarify the factual basis for the restrictions, all she added to the parenting plan was, in fact, a legal conclusion: that the risk of abduction justifies the ban. But nowhere in the orders entered on the first remand – or in 2003 after the trial – was there an express finding that a genuine, serious risk of abduction by Brajesh existed. Much less was there a

finding of what Brajesh contends is the minimum under the statute and the Constitution: an express finding that Brajesh presents a genuine, serious risk of abducting the children. Nevertheless, Judge Roberts refused to lift the restrictions.

2. The 2009 Remand Hearing and the Third Court of Appeals Decision in January, 2011.

A two-day hearing was held January 14 – 15, 2009. RP VIII – XI. Both parties testified, but the main event was Lynette’s so-called expert on Indian culture and abduction, Michael Berry, an attorney from Florida, who was proposed to testify on the difficulty and expense of obtaining return of abducted children and also “the profile of persons who are likely to abduct.” CP 88.⁴ Brajesh moved *in limine* to exclude “any and all testimony, references to testimony, or argument based upon the testimony of Michael C. Berry, . . .” CP 87-94. Judge Roberts allowed the testimony after extensive voir dire related to the foundation for Berry’s testimony and argument. IX RP (1/14/09. v. II) at 77-83. Included in what was admitted through Mr. Berry were “risk factor” exhibits composed of “Profiles” and “red flags” that Judge Roberts ultimately relied on. For instance, Judge Roberts ruled:

The respondent’s [Brajesh’s] behavior, . . . his bitterness towards Petitioner [Lynette] and the lack of resolution of difficulties of the parties ***show that he meets the criteria for several Profiles and “red flags” which indicate a risk of abduction by the father, which is against the best interests of the children.***

⁴ Mr. Berry was Lynette’s “main event”. Of the 383 pages in the four volumes of transcripts for the 2009 hearing, argument about or testimony from or reference of Berry was on 141 pages. His impact was all over the case.

CP 156, bullet #4 (emphasis added).

Judge Roberts also explicitly relied on inadmissible double hearsay brought in by a new “expert” (Mr. Berry) relating his review of a report of another expert, the parenting evaluator (Ms. Waldroup), to provide what the judge determined was substantive, corroborating evidence that, six years after trial, supposedly transformed Lynette’s accusation in the 2003 trial that Brajesh threatened in 2002 to abduct the children into evidence of a credible threat of abduction, even though it had not been before:

In the months leading up to the mother filing a petition for dissolution of their marriage, the father threatened to take the children to India without the mother. Third parties *interviewed by the parenting evaluator stated* that they heard the father make similar threats. *The trial court finds that the mother’s testimony that the father made the threats credible, when viewed in conjunction with the testimony of others.*

CP 153, bullet #3 (emphasis added).⁵ As related in the various Court of Appeals decisions, the parenting evaluator could not herself say whether Brajesh had made the threats, even though they were supposedly “corroborated” by the two witnesses sent to her by Lynette and who she interviewed over the telephone taking their unsworn comments. Brajesh argued that any reliance for substantive purposes on that evidence received through Waldroup was improper. *See Brajesh’s Opening Brief*, pp. 16 – 18; *Reply Brief* pp. 9-12.

The Court of Appeals’ decision skipped over the manner in which

⁵ The flaw is fatal because, under long-settled law, such hearsay statements relied on by experts are *per se* inadmissible to establish the facts related (here that Brajesh threatened abduction, which he denied) and can *only* be used to support the *expert’s* opinion. *Group Health Co-Op. v. Dep’t. of Revenue*, 106 Wn.2d 391, 399-400, 722 P.2d 787 (1986).

the evidence was received and used by Judge Roberts, and instead found that the fact signed declarations by those witnesses were admitted as evidence in 2003 allowed their use to avoid the rule of *Group Health*, even though Judge Roberts never relied on those declarations when submitted but, quite apparently, ignored them for the reasons argued by Brajesh's trial counsel in 2003. In 2009, she relied on the parenting evaluator's hearsay interviews with those witnesses, not the affidavits. Slip Op., p. 12 bullet 3; pp. 16-17. See Opening Brief pp 16-18; Reply Brief, pp. 9-11.

The decision held that admission of Mr. Berry's testimony was error, but that it was harmless, ostensibly because it was not ultimately relied on by Judge Roberts; all she relied on was the materials he presented and testified to, not his opinions, and Brajesh did not continually object to the materials when they were proffered during Mr. Berry's foundation and later testimony. Slip Op., 22-25. ⁶

The opinion quickly dismisses the arguments of the *amici* that the trial court misconstrued Indian law, overstated the seriousness of the consequences of abduction in India, and placed unjustified reliance on the

⁶ However, this was error for, among other reasons, Brajesh's objection *in limine* to Mr. Berry included objecting to all his supporting materials. A party losing a motion to exclude evidence ***has a standing objection to the admission of that evidence at trial*** where the trial court makes a final ruling on the motion in limine. *State v. Kelly*, 102 Wn.2d 188, 192-93, 685 P.2d 564 (1984). In *Kelly*, the defense moved in limine to exclude the testimony of rebuttal witnesses. The trial court denied the motion at the close of the defense case. The rebuttal witnesses testified without further defense objection. The State argued that the issue was not preserved for appeal because the defense failed to object to the testimony at trial. The Washington Supreme Court held that "defense counsel was not required to lodge a subsequent objection to the rebuttal evidence at the time of its admission" because it had a standing objection as the party losing the motion in limine. *Kelly*, 102 Wn.2d at 192.

fact that India did not sign the Hague Convention. While the decision's primary point is that foreign law is a fact and that the evidence presented to the court was uncontroverted SO that the record supports the trial court's findings regarding the consequences and seriousness of abduction to India, that is not in fact the case, even assuming application of the principle that proof of foreign law was a fact. For instance, all facts must be supported by substantial evidence and the facts that a trial court may make from the evidence submitted, even if that evidence was "uncontroverted", may not be contrary to the evidence before it.

In this case, footnote 14 of the decision refers to two cases cited by *amici*, one of which it is true was not brought to the attention of the trial court. However, the other decision was, in fact, referred to and discussed in the materials considered by the trial court and part of the point of the *amicus* brief was to highlight the erroneous reading of the case and even of one of the treatises that refers to that case. In other words, the treatise that was admitted in the 2009 hearing included information that stated that India *does* have summary proceedings; and the treatise that was admitted had a long quote from a case which itself admits to the existence of summary proceedings but that the emphasis of the expert, who underlined a phrase that highlighted that, on those facts, summary proceedings were not appropriate, but who did not recognize or underline an earlier phrase that admits that there are summary proceedings. That case cited by *amici* was before the trial court in the materials it admitted and the excerpt itself demonstrates that the trial court's reading of the case was incorrect. That

incorrect reading cannot be a proper basis for supporting the trial court's decision keeping restrictions in place, nor for the appellate court's decision affirming the trial court.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

The Court should accept review to explain and enforce the legal requirements under RCW 26.09.191(3)(g) for imposing a permanent childhood ban on international travel. Included is the amount of weight, if any, to give to the fact the country to be visited is not a signatory to the Hague Convention on International Child Abduction, as more than half the countries in the world are not signatories. *See* Opening Brief in *Katara II*, pp. 22-24 and App. E thereto, setting out those countries which have and have not signed the Hague Convention. This issue is important not just to Brajesh and the two children who are not permitted to see half their extended family in this time of increasing global travel, but for the thousands of others born abroad who are now U.S. Citizens and parents in Washington State. How will our state law treat our naturalized Citizens – Citizens who are told on taking their oath that they are thereby on exactly the same legal status with all other American Citizens? *See* Opening Brief in *Katara II*, pp. 13-27 esp. 22-24; 43-45; and 48-49.

1. **This Court Should Accept Review to Resolve the Conflict Between the Decision Below and the Court of Appeals Decisions in *Watson* and *Wicklund* and Confirm that Trial Courts Must Find a Nexus Between Parental Conduct and the Actual or Likely Adverse Impact of that Established Conduct on the Children Before Imposing Parenting Plan Limitations under RCW 26.09.191(3).**

This Court should grant review under RAP 13.4(b)(2) to resolve a conflict with two decisions of the Court of Appeals. The decision below fails to meet the required legal standard under RCW 26.09.191(3) that, before a trial court may impose parenting plan restrictions on a fit parent's activities with his children, it must find a nexus between the proven parental conduct and an actual or likely adverse impact of that conduct on the children which justify the restrictions. In this case, that means a determination that it is likely Brajesh would abduct the children, as other states have concluded must be shown when applying the best interest of the child standard, and as the Court of Appeals recognized in *Katare I*.⁷

The statute sets out the requirements that have been followed by the Court of Appeals in *Watson* and *Wicklund*. It provides in part:

A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist:

(g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

⁷ See, e.g., *In re the Marriage of Long v. Ardestani*, 241 Wis.2d 498, 624 N.W.2d 405 (2001), cited at footnote 22 of *Katare I*, 125 Wn. App at 831 (App. E-11) and page 12 of Brajesh's Opening Brief below. In *Long* the Wisconsin Court of Appeals held that the parent seeking to impose the restriction on the otherwise fit parent had to demonstrate evidence that the traveling parent was not likely to return the children to the home from the international traveling, in that case, taking teen-age boys to Iran. Because the mother "had not proven there was a likelihood [the father] Ardestani would not return the children," her requested restrictions were denied. 624 N.W.2d at 410-11. As Ardestani was characterized by Division I in *Katare I*, because "abduction was unlikely", preventive measures were not imposed. *Id.*, 125 Wn. App. at 831, n. 22. *Long* helps demonstrate that it is this burden on the objecting parent to prove that the abduction would be likely that needs to be explicitly adopted to comport with both the statute and the best interest standard.

RCW 26.09.191(3)(g). The statute sets out a two-part analysis. *First*, the predicate for any restriction is that the parent's involvement or conduct "may have an adverse effect on the child's best interests." *Id.* *Second*, if such adverse parental conduct or involvement is proven, then the court has the discretion to "preclude or limit" any part of the parenting plan; but then *only if* any of the enumerated factors exist. Those listed in subsection (g) require a second determination of factors harmful to the child. Thus, the court does not even examine into the "other harmful factors or conduct" in subsection (g) if the threshold finding of parental conduct harmful to the child cannot be made. The *Watson* and *Wicklund* cases that the Slip Op conflicts with illustrate this nicely, as detailed *infra*.

In banning Brajesh from foreign travel with the children, the trial court and Court of Appeals relied on RCW 26.09.191(3). Although subsection 191(3) authorizes limitations in a parenting plan where any of several factors applies, the court may not impose such limitations absent 1) adverse parental conduct that is adverse to the child's best interest; *and* 2) substantial evidence that establishes a nexus between the parent's conduct -- the actual conduct that occurred that purportedly gives rise to the need for restrictions -- and an actual or likely adverse impact on the children. *In re Marriage of Watson*, 132 Wn. App. 222, 234, 130 P.3d 915 (2006). Here, the trial court relied on subsection 191(3)(g), the "catch all" provision of subsection 191(3) that authorizes limitations in a parenting plan based on "[s]uch other factors or conduct as the court expressly finds adverse to the best interests of the child."

The Slip Opinion relied on the fact the trial court found that Brajesh “still harbors resentment” against Lynette, and that this “*could* manifest itself by an abduction of the children” on the basis of emails directed toward the mother, Lynette. CP 154, bullet 7 (App. B-3). (emphasis added).

But the emails were directed at *Lynette*; they did not engage or affect the children.⁸ Nothing in the emails even demonstrates a mere

⁸ The closest the trial court comes to identifying any interest of the children in the emails the court did not like in 2009 was one from November 1, 2005, Ex. 37 (App. G hereto), which it considers at length in its order at CP 154-155, App. B 2-3. Judge Roberts described the tone as “condescending and sarcastic” toward Lynette and stated it showed his willingness to “punish” the children because Lynette had forced him to visit them in Florida by virtue of the divorce and relocation and the vacation visitations to Seattle had not yet begun because the youngest was not yet five. *Id.*

However, the email itself, attached as App. G, does not by its bare words lend itself to the interpretation given by Judge Roberts. All the short email does is request delivery of verbal messages of love and future celebration of a holiday Lynette does not follow, to which Lynette responds: “I will pass this on to them. Thanks for sharing. Happy Diwali by the way!!! Lyn.” Ex. 37. Nothing in her response indicates she took offense or umbrage to it. But Ex. 38 shows she was fully capable of taking offense and responding nastily to emails, in spades when so moved. If this was supposed to be an effort by Brajesh to be belittling or controlling, it failed completely.

There also was no testimony about Ex. 37 at the 2009 hearing to give a basis for Judge Robert’s interpretation. It was admitted and addressed very briefly by Brajesh on direct, but Lynette’s attorney chose not to cross-examine him on it and Lynette did not address it when she testified on rebuttal. *See* X RP (Jan. 15, 2009 #1) at pp. 111-112 (Ex. 37 admitted & Brajesh direct) and XI RP (Jan. 15, 2009 #2) at 18-35 (Brajesh cross) and 66 – 66-71 (Lynette direct and cross). No one else testified about it. There thus was no testimony by Lynette or anyone else about the supposed hidden messages in this email which Judge Roberts found in it, and thus there is no evidentiary basis for Judge Roberts’ novel interpretation.

Moreover, Diwali is a five-day holiday celebrated in the home with traditional activities and special foods and clothes. *See* <http://en.wikipedia.org/wiki/Diwali>. It thus was not easily transported to a motel room in the far corner of the country. Rather, it makes sense that Brajesh would store presents for that holiday at his home in the Seattle area and the coming time (then less than a year) when they would come to the Northwest for visits, especially since Lynette would be unable to explain the unique elements of the presents to the children if he sent them to Florida, particularly as she had made clear she did not support the Indian cultural heritage in her house.

possibility that Brajesh could abduct (if it reflects even that), much less that abduction was likely, the real test. There simply is no correlation or nexus between Brajesh's negative feelings and "resentment" toward Lynette exhibited in his emails and the possibility of abduction, much less that they demonstrated abduction was *likely*.

According to Lynette's testimony, Brajesh has always had negative feelings toward Lynette. Yet despite his feelings, Brajesh has never attempted to interfere with Lynette's custody of the children and has never failed to return the children timely under the parenting plan or as otherwise agreed. He has never been held in contempt in the long history of this case that began in summer, 2002, even when he came home from a business trip to India to find his home emptied of his wife, children, and even the financial papers with an ex parte restraining and divorce papers on the counter. *Katara I* Opening Brief pp. 12-13; *Katara II* Opening Brief, p. 8.⁹ If "resentment" alone was a sufficient basis to impose permanent limitations under subsection (3)(g), foreign travel could be banned in virtually every dissolution, particularly contested cases where one spouse was born in or has family in another country, and irrespective of the total lack of any evidence which establishes that the restrained parent is likely to fail to return the children at the end of the visitation.

Brajesh argued the nexus requirement below in his opening brief at pp. 22 – 26 where he argues the statutory provision is meeting an

⁹ Despite the email communication while on the trip seeming to indicate that everything was normal, Lynette took the children and vacated the house. Brajesh did not see his children for over six weeks, and then only under very close supervision. *Id.*

underlying constitutional requirement in order to restrict a fit parent in exercise of their fundamental right to raise their children.¹⁰ The underlying constitutional issue is reached, even if indirectly, by a proper construction of the statute to require the proof required under the constitutions, as seen in the federal cases, which require proof “that some harm threatens the child’s welfare before the state may constitutionally interfere with a parent’s right to rear his or her child.” *Smith*, 137 Wn.2d at 18. Brajesh argues that here, this means a genuine, actual, present threat, not a speculative accusation based on an irrational belief that the accused ex-spouse wants to “get back” at the accuser; and, moreover, that this threat must be current. The fact that Brajesh’s emails show he “harbors resentment” against Lynette does not mean he is likely to abduct. No evidence demonstrates a nexus between the emails and a likely abduction. It is all speculation.

2. Requiring Proof of Both the Claimed Conduct of the Individual Parent and the Nexus is Necessary to Insure That Children’s Best Interests are not Sacrificed to the Fears of One Parent, Even Though the Fears May Be Sincere.

Both *Watson* and *Wicklund*, but especially *Watson*, illustrate why the proof of actual conduct and the nexus to actual harm to the children is essential to insure the children’s best interests are not actually sacrificed

¹⁰ This argument relies heavily on *In re Custody of Smith*, 137 Wn.2d 1, 15, 969 P.2d 21 (1998), *aff’d sub nom Troxel v. Granville*, 530 U.S. 57 (2000) (“*Smith*”) and *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 109 P.3d 405 (2005), among other state and federal cases. It was a re-iteration of the argument made in *Katara II* in the Opening Brief at pp. 13-14 & 15 - 22; Reply Brief at pp. 10-17, which the Court of Appeals felt it need not address since it reversed on statutory grounds.

and they are harmed in the false name of trying to keep them safe.

In *Watson* the parent who wanted restrictions was the mother who claimed the father was sexually abusing their daughter. She had what were, to her, legitimate fears that her ex-husband was sexually abusing their daughter and of course wanted protection. But there was no proof of any such abuse and the trial court could not find that allegation had been established. Nevertheless, the trial court greatly reduced the father's visitation with the daughter. Division II reversed and vacated the restrictions on the father's visitation because "the unproven allegation of sexual abuse does not provide substantial evidence in support of the visitation restrictions. Moreover, . . . [the father's] failure to disprove the sexual abuse allegation is not substantial evidence that his involvement or conduct will adversely affect" his daughter. *Watson*, 132 Wn. App. at 233-34. *Wicklund* was similar: the conduct complained of was not deemed harmful; there was no nexus between the father's homosexuality and a likely harm to the child, so no basis for restrictions.

In this case too, the restrictions imposed by the trial court are not merely contrary to the children's best interest, but the undisputed record shows they are harmful to the children by denying them half their cultural heritage during the formative years while they are forming their identities. The parenting evaluator testified in 2003 that it "is pretty vital to their knowledge of themselves" to know at a deep level the Indian side of their extended family as their personal awareness and sense of self develops

after age five.¹¹

3. The Failure to Establish the Requirements of Proving 1) Harmful Conduct by the Father and 2) the Nexus of That Proven Conduct to a Likely Harm to the Children Yields An Appearance That the Proceeding Was Not Really Conducted Under the Law and the Facts and Thus Was Not Fair, But Was Conducted by Whim.

Our system of law is predicated on the belief that the law is equally applicable to all people. In a bench trial such as this one, when a judge makes major changes to her prior rulings six years after the fact, especially findings made six years earlier which were affirmed on appeal without changing the ultimate result, it can give the appearance that the court is improperly “result-oriented”. In several contexts, the Washington courts have routinely condemned “result-oriented” judging at both the appellate and trial court level. This Court has made that point abundantly clear in many cases.¹² The Court of Appeals has also recognized this well-

¹¹ See Opening Brief, p. 21 & n. 11; II RP 153-154 and *Katara I* Opening Brief, p. 16, App. H, p. 27; *Katara II*, Opening Brief, pp. 39-41, App. H, pp. 254-256, quoting parenting evaluator Waldroup.

¹² See, e.g., *Stuart v. Caldwell Banker*, 109 Wn.2d 406, 422, 745 P.2d 1284 (1987) (reversing insupportable ruling imposing liability for construction defects against building vendor and asserting that “This court will not sanction such result-oriented jurisprudence, particularly in an area of law so vitally enmeshed in our economy and dependent on settled expectations as is the construction business.”); *State v. Gunwall*, 106 Wn.2d 54, 62-63, 720 P.2d 808 (1986) (*Gunwall* criteria for state constitutional analysis exist so that judges’ decisions will be made for “well founded legal reasons and not by merely substituting [their] notion of justice for that of duly elected legislative bodies or the United States Supreme Court; *In re Detention of Martin*, 163 Wn.2d 501, 511, 182 P.2d 951 (2008) (majority criticizes dissent for “taking a results oriented approach to statutory interpretation”); *Anderson v. King County*, 158 Wn.2d 1, 138 P.3d 963 (2006) (J. Johnson, J., concurring) (“Both decisions below were transparently result-oriented”); *State v. Norman*, 145 Wn.2d 578, 607, 40 P.3d 1-161 (2002) (Sanders, J., dissenting) (“I fear the majority begins with the result it seeks to impose rather than reasoning from sound legal principles, known facts, and precise mathematical formulae to find a result.”).

established principle.¹³

In this case that claim could be leveled that the trial judge engaged in blatant “result oriented” judging with the parenting plan restrictions unless this Court gives a clear statement of the correct legal standard to be applied while observing that such was not applied by the trial judge in this case through lack of guidance with a definitive ruling in a specific abduction case at the time of the initial 2003 ruling.

4. This Court Should Establish Whether Admission of Profile Evidence Can be Harmless in Disputed Family Law Bench Trials Focused on A Parent’s Character and Conduct.

The Court of Appeals ruled that racial and cultural profiling had no place in this parenting plan dispute in part because it did not address the assessment of Brajesh as an individual, but attempted to permit assessments of him because of his immutable membership in his ethnic and cultural origins. Nevertheless, it also concluded that despite the fact this bench trial focused on assessing Brajesh’s character and past and future conduct, its admission was “harmless” because the trial court stated it relied on other materials, even though it admitted and considered the evidence. Brajesh had moved to exclude all of the Berry evidence *in limine* under ER 403 because its unfair prejudice outweighed any probative value it might have. CP 90.

¹³ See, e.g., *State v. Silva*, 107 Wn. App. 605, 614, 27 P.3d 663 (2001) (applying neutral criteria of *Gunwall* “helps to achieve a balanced and complete development of the issue and avoid baseless, result-oriented jurisprudence.”).

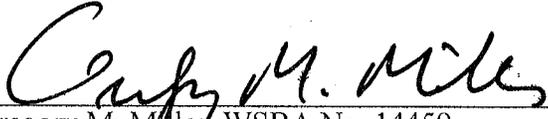
This case raises the question of whether a Washington appellate court should be permitted to affirm on grounds of harmless error a parenting plan decision of a trial court expressly based on inadmissible racial profiling evidence, or whether this Court should instead declare that, whenever a Washington trial court relies on racial profiling evidence to impose restrictions, the usual deference to the trial court's decisions will be subjected to the strictest scrutiny to insure they are not discriminatory, and do not appear to a disinterested person given all the facts, to be irredeemably tainted by racial stereotyping, which would require vacating the restriction at issue and remanding for further proceedings before a new judge.

F. CONCLUSION.

Petitioner Brajesh Katare respectfully asks this Court to accept review and schedule argument at the earliest opportunity.

Respectfully submitted this 17 day of February, 2011.

CARNEY BADLEY SPELLMAN, P.S.

By 
Gregory M. Miller, WSBA No. 14459
Attorneys for Petitioner

CERTIFICATE OF SERVICE

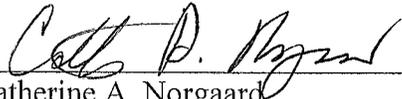
I hereby certify under penalty of perjury under the laws of the State of Washington that I had the original of the foregoing amended Petition for Review delivered to the Washington Supreme Court on or before February 18, 2011.

I also caused a true and correct copy of the foregoing document to be served on the following counsel of record on February 18, 2011:

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Dated this 17 day of February, 2011 at Seattle, Washington.



Catherine A. Norgaard
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APPENDIX A

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

LYNETTE KATARE,)	
)	No. 63438-1-I
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
BRAJESH KATARE,)	
)	
Appellant.)	
_____)	FILED: January 10, 2011

Schindler, J. — In the first appeal in this case, we held the trial court has the authority under RCW 26.09.191(3)(g) to impose foreign travel restrictions on residential time if the court expressly finds the parent’s conduct is adverse to the best interests of the child and the restrictions are reasonably calculated to address the harm. In re Marriage of Katare, 125 Wn. App. 813, 105 P.3d 44 (2004). Because the trial court found that the father did not appear to present a serious threat of abduction, yet imposed foreign travel restrictions on his residential time with the children to prevent abduction, we remanded to the trial court to clarify whether the court found there was a risk of abduction that justified the imposition of the restrictions. On remand, the court

expressly found that the father made credible threats to take the children to India without the mother, “[t]he risk of abduction has not abated,” the father’s conduct was adverse to the best interests of the children, and the passport and travel restrictions are “reasonably calculated to address this identified harm.” The father’s primary argument in this appeal is that the trial court erred in relying on inadmissible evidence in finding credible threats to abduct and imposing the foreign travel restrictions. The father also contends that the trial court erred in denying his motion in limine to exclude profile evidence on the grounds that the witness was not qualified to testify, the evidence does not meet the Frye¹ standard, and the prejudice of such testimony outweighs any probative value. We agree the trial court abused its discretion in admitting the profile evidence. However, without regard to the impermissible profile evidence, because substantial evidence supports the trial court’s imposition of the foreign travel restrictions, we affirm.

FACTS²

Background

Brajesh Katare was born and raised in India. Brajesh is very close to his family. All of his family members live in India.³ After obtaining a computer science degree in India, Brajesh enrolled in school in Florida to pursue a postgraduate degree. Brajesh obtained his master’s degree in 1991, and then worked in the computer industry in Florida. In 1995, Brajesh and Lynette Katare were married in Clearwater, Florida.

¹ Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923).

² The facts are more fully set forth in In re Marriage of Katare, 125 Wn. App. 813, 105 P.3d 44 (2004) and will be repeated only as necessary.

³ We refer to the parties by their first names to avoid confusion and intend no disrespect by doing so.

Lynette is from the Clearwater area and has a close relationship with her extensive family in Florida.

In 1999, Microsoft offered Brajesh a job. Lynette did not want to leave her family and move to Washington state, but eventually agreed to do so. The couple's daughter, A.K., was born on May 27, 2000, and their son, R.K., was born on September 20, 2001. Brajesh became a U.S. citizen in the summer of 2000.

In 2002, Brajesh sought a position at Microsoft that did not require as much travel. In April 2002, Microsoft offered Brajesh a job in Florida, but he did not accept the offer. In May, Microsoft offered Brajesh a two-year position in India to begin in the summer or fall of 2002. Brajesh accepted the offer. Lynette did not want to move to India with the children. Despite her objections, Brajesh stopped looking for another position. As the deadline to move approached, Brajesh and Lynette frequently argued about moving to India.

In July 2002, Brajesh went on a two-week trip to India to make arrangements for the move. While Brajesh was gone, Lynette filed for dissolution of the marriage. In her request for a restraining order, Lynette states that Brajesh threatened to take the children to India without her.

Brajesh and Lynette agreed to appoint Margo Waldroup to conduct a parenting assessment and make recommendations regarding the parenting plan. In October 2002, Lynette filed a notice of her intent to relocate with the children to Florida.

Waldroup completed her parenting assessment and report in fall 2002. The report includes an extensive discussion of threats to abduct and the risks of abduction.

Waldroup states that while Brajesh denied making any threats, Lynette's fear was credible and her allegation was corroborated by two witnesses. According to the two witnesses, during the summer of 2002, Brajesh said he would take the children to India without Lynette if she did not agree to go. Waldroup concluded Brajesh made the threats, and regarding the imposition of permanent travel restrictions, states:

There is no way to know if the father is at risk of taking the children to India and therefore I cannot recommend restrictions, or lack of them, based on the allegations. I do believe the father made the threats to take the children to India without Lyn, and had likely done so in an effort to coerce Lyn into moving to India. Whether he would take the children at this time to "punish" Lyn remains unknown.

Waldroup recommended that the supervised visitation restrictions that were in place at the time should "certainly not be lifted until the children's passports have been secured." She also suggested that the court consider placing the passport numbers on a watch list or requiring Brajesh to post a bond.

Waldroup states in her report that because Brajesh denied making any threats, she could not predict whether the father would abduct the children.

No evaluation of this type can tell whether the father will abduct the children. I am not aware of any criteria that can predict if such would occur. The Katare's situation is somewhat unusual in that there is not only the allegation of abduction but corroboration of two witnesses hearing the threat that Brajesh would take the children to India "with our [sic] without" their mother. As Brajesh denies these statements it is impossible to evaluate whether the statements were said in crisis to pressure the mother to move to India, rather than being his literal intent or whether Brajesh truly intended to remove the children from the country without the mother's consent. Because Brajesh is not willing to acknowledge his anger over the mother's lack of agreement to move, I cannot assess whether his anger has decreased over time and if he has gained any perspective on his actions of last summer. His assurances that he has surrendered his Indian passport and citizenship are of no comfort given that he can easily be reinstated as an Indian citizen and obtain a passport.

The five-day dissolution trial took place in July 2003. Lynette testified about the threats Brajesh made to take the children to India. She said Brajesh told her: "I've taken this position [w]hether it results in divorce or not," and that "we're all going" and she had "no choice." As corroborated by other witnesses, Lynette testified that Brajesh was extremely angry and frustrated because of her opposition. Lynette said that Brajesh initially tried to force her to agree to move with him to India but then eventually said he did not want her to go. Lynette said Brajesh told her that he was "going to take [the children] to India without [her]," and she would have "no recourse to get the children back." Lynette also said that Brajesh told her he could "hire a nanny to replace [Lynette] as mother" and his family would help raise the children. Lynette testified that Brajesh told her that he would take the children to India without her at least eight different times.

Lynette testified that Brajesh told her the job in India was not just for two years but would be "as long as he wanted it to be." Lynette said that Brajesh also told her "it would be very easy for him to regain Indian citizenship," and he would be able to get a job with an Indian company and "live there forever."⁴ Lynette testified that she found an application for an India PIO card (similar to a United States "green card") on Brajesh's computer.

Brajesh's account was very different. Brajesh testified that Lynette was "excited" and "[v]ery supportive" of him accepting the position in India. Brajesh testified that there was no conflict over the move, but rather, they both had an "equal amount of

⁴ Lynette also said that during the arguments, Brajesh routinely swore at her and at one point threatened murdering the family and suicide.

concerns" that they were "working constructively to figure out." Brajesh said that he did not "press Lynn very hard, but [he] did talk to her about moving to India." However, Brajesh admitted that the "India job precipitated" all the difficulties in the marriage.

Although Brajesh testified that he had been to India six to eight times since July 2002, he said he did not intend to move to India after the dissolution was finalized. When asked about his plans to move to India if Lynette and the children moved to Florida, Brajesh testified, "I cannot move to India because there is no position for me in India." Brajesh said he was supervising employees based in India but his role there would soon "diminish."

During cross examination, Lynette's attorney sought to impeach Brajesh with his 1997 application to IBM in India in which he asserted that he was "planning to settle in India." Lynette also presented evidence that Brajesh sold the family car in preparation for the move and that during discovery, Brajesh requested copies of various documents that he would need to take the children to India, such as applications for the children's passports, Indian tourist visas, and immunization records.

Waldroup believed Brajesh made the threats reported by Lynette: "I do believe the father made the threats to take the children to India." She testified that two witnesses heard Brajesh tell Lynette he would take the children to India with or without her on two separate occasions. Waldroup also testified that Lynette's concerns about Brajesh taking the children to India were "justified" and "not out of proportion to the situation." Waldroup believed Brajesh "used threats of kidnaping [sic] the children or killing the family in an effort to force Lynette's agreement to move to India."

However, because he denied making the threats, Waldroup said it was very difficult to predict whether Brajesh would abduct the children. Waldroup told the court it would have to decide whether the risk was significant enough to impose the restrictions.

During his cross examination of Lynette, Brajesh introduced into evidence the declarations of the two witnesses identified by Waldroup as corroborating the threats made by Brajesh. One witness said she talked to Brajesh in the summer of 2002 at Lynette's grandfather's memorial service, and Brajesh said Lynette was being "stupid" and "stubborn" about the move and he would take the children to India "with or without" her. The other witness said that during the same time period, she heard Brajesh tell Lynette over the telephone that he did not need her and was taking the children to India where his family would help raise them.

The court granted Lynette's motion to relocate to Florida. The parenting plan gave Brajesh three-day visits each month within a two-county area in Florida until R.K. reached age five. The court found that Brajesh did not appear to present a serious threat to abduct and the statutory basis for imposition of restrictions based on parental conduct did not apply. Nonetheless, the trial court imposed foreign travel restrictions based on the following findings:

2.20.1 India is not a signator to the Hague Convention on International Child Abduction.

2.20.2 Based on the evidence, including the testimony of expert witnesses, the husband appears to present no serious threat of abducting the children. Nonetheless, under the circumstances of this case, given the ages of the children, the parties' backgrounds, ties to their families and communities, and history of parenting, the consequences of such an abduction are so irreversible as to warrant limitations on the husband's

residential time with the children, including: location of exercise of residential time, surrender of his passport, notification of any change of his citizenship status, and prohibition of his holding or obtaining certain documents (i.e. passports, birth certificates) for the children. The mother shall retain the children's passports.

First Appeal

In the first appeal, Brajesh challenged the foreign travel restrictions and the two-county restriction while with the children in Florida. Brajesh argued that because the court did not find a basis for limitations under RCW 26.09.191 and determined there was “no serious threat” that he would abduct the children, the findings did not support the imposition of restrictions.

We held that a court has the authority under RCW 26.09.191(3)(g) to impose restrictions in a parenting plan if the court expressly finds “factors or conduct . . . adverse to the best interests of the child,” and the restrictions are “reasonably calculated to address the identified harm.” Katare, 125 Wn. App. at 826 (quoting RCW 26.09.191(3)(g)). Because the court found there was no basis to impose restrictions but also found that the imposition of foreign travel restrictions was justified based on an implicit finding of the risk of abduction, we remanded.⁵ Katare, 125 Wn. App. at 830-31.

Although the trial court stated Brajesh “appears to present no serious threat of abducting the children,” it addressed concerns about the risk of abduction and imposed limitations to prevent abduction. Whether the court found there was a risk of abduction that justified the imposition of limitations is at least ambiguous. Indeed, such a finding is implicit in the trial court's discussion of the risk of abduction, the findings it made, and the limitations it imposed. Except for the inconsistent entry that states the RCW 26.09.191 basis for restrictions does not apply, the

⁵ As to the two-county geographical limitation in Florida, we held that the restriction was not “logically related to the risk of abduction” and the court's stated reason that the children were too young to travel any further was not supported by the evidence in the record. Katare, 125 Wn. App. at 832.

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court's findings support restrictions under RCW 26.09.191(3)(g). Rather than speculate, we remand for the trial court to clarify the legal basis for its decision to impose restrictions to prevent Brajesh from taking the children to India and if appropriate to make the necessary findings.

Katare, 125 Wn. App. at 831 (footnotes omitted).

On remand, the trial court amended the parenting plan by restating the previous findings related to foreign travel restrictions, including the finding that Brajesh presents “no serious threat of abducting the children,” but added a finding that “[t]he risk of

abduction is a factor justifying limitations under RCW 26.09.191(3)(g)."⁶

Second Appeal

In the second appeal, Brajesh argued that the trial court failed to comply with this court's mandate. We agreed and held:

By basically restating its earlier findings as the justification for imposing limitations on Brajesh's residential time with the children under RCW 26.09.191(3)(g), the trial court does not resolve the ambiguity and does not expressly address whether the evidence supports the limitations under RCW 26.09.191(3). The amended parenting plan still states that "the husband appears to present no serious threat of abducting the children," and again, without express findings to justify the limitations, the court imposed restrictions, apparently based on an implicit risk of abduction. In addition, the court also does not expressly address the best interests of the children.

In re Marriage of Katare, 140 Wn. App. 1041, *3, 2007 WL 2823311. Because the findings did not expressly address the justification for foreign travel restrictions under RCW 26.09.191(3), we held that the court did not comply with the mandate and remanded. Given the passage of time, we directed the trial court to also examine current relevant information to determine whether any restrictions under RCW 26.09.191(3) were justified. Katare, 2007 WL 2823311, at *3.

Hearing on Remand

On remand, the trial court scheduled a two-day hearing to address whether the evidence supports foreign travel restrictions under RCW 26.09.191(3) and to examine the current information to determine whether restrictions were justified.

Lynette identified Michael C. Berry, an attorney with experience in legal proceedings involving the return of abducted children, as an expert witness in her

⁶ In re Marriage of Katare, 140 Wn. App. 1041, *2, 2007 WL 2823311.

disclosure of possible primary witnesses. Lynette stated that Berry would testify about the difficulties and expense of obtaining the return of an abducted child and “the profile of persons who . . . are likely to abduct.” Brajesh filed a motion in limine to exclude profile testimony. Brajesh argued profile evidence was inadmissible, that Berry was not qualified to testify about the profile of a potential child abductor, and such testimony was not supported by generally accepted scientific principles under Frye. The court reserved ruling on the admissibility of Berry’s testimony.

The court heard testimony from Brajesh and Lynette and also from Brajesh’s girlfriend and his coworker at Microsoft.⁷ The court also considered extensive e-mail correspondence between Brajesh and Lynette from after the 2003 trial until the beginning of 2009. The court allowed Berry to testify. The court ruled that the testimony would assist it in understanding the literature on international child abduction submitted as exhibits and observed that the court was ultimately responsible for making the determination of risk of abduction.

On April 6, 2009, the court entered detailed “Findings of Fact and Conclusions of Law on Second Remand.” The court found that Brajesh made credible threats to take the children to India without the mother in 2002 and the risk of abduction “[had] not abated.” The court concluded Brajesh’s conduct and testimony “alone” put the children at risk of abduction justifying the imposition of passport and foreign travel restrictions on his residential time with the children under RCW 26.09.191(3)(g).

Based on the evidence presented at the 2003 trial, the court expressly found

⁷ Brajesh has been based in Redmond since October 2005. He has received two significant promotions since completing the assignment in India and purchased a residence in 2008.

that “there is a sufficient risk of abduction to warrant a geographical limitation on the father’s residential time,” and deleted its earlier finding that Brajesh presents “no serious risk” of abduction. The court found that the credible evidence of threats was corroborated by evidence of Brajesh’s actions around the time of the dissolution. Consistent with an intent to unilaterally move to India with the children, an application for a PIO card was found on Brajesh’s computer, and he sought to obtain copies of documents in discovery which would assist him in taking the children to India. The court further found that the “consequences of abduction to India are incredibly serious and irreversible.” The court’s findings, based on the evidence at the 2003 trial, state:

- The father was born and raised in India, where his immediate family still remain. Other than the parties’ children, the father has no family ties to the United States. (He is now engaged to marry an Indian woman who lives and works in the Seattle area and has applied for a green card).
- Even after the mother expressed her disagreement in moving the family to India, the father nevertheless pursued the family’s relocation to India.
- In the months leading up to the mother filing a petition for dissolution of their marriage, the father threatened to take the children to India without the mother. Third parties interviewed by the parenting evaluator stated that they heard the father make similar threats. The trial court finds that the mother’s testimony that the father made threats was credible, when viewed in conjunction with the testimony of others.
- The father sought information for the children in discovery, which would have allowed him to obtain documents (Indian PIO cards) which would assist in removing the children from the country. The information requested included: copies of the applications for the children’s passports and Indian tourist visas, copies of passport pages and Indian tourist visas from their passports, and copies of the children’s immunization records.
- The mother found an application for an Indian PIO card (similar to a

U.S. "green card") on the father's computer.

- The father has the means and potential to relocate to India for employment.
- The children were too young to seek help if the father improperly retained them in India.^{8]}
- The consequences of abduction to India are incredibly serious and irreversible.
- The risk of abduction was sufficient to warrant limitations on the father's time with the children.
- It was in the best interests of the children to have their residential time with their father in the United States given the above findings; it was in their best interest to limit their travel outside the United States as well, given the risks.

The court also addressed current circumstances and found that the evidence presented on remand "shed light on some of the court's earlier findings." The court found:

The risk of abduction has not abated, and based on evidence presented at the hearing on remand, is seen more clearly to have been strong at the time of the original trial, and perhaps to have now increased. From the emails between the parties after the first trial, it is evident that the father still harbors resentment against the mother, which could manifest itself by an abduction of the children. The father's emails demonstrate extreme anger, abuse, unreasonableness, and poor judgment. This is of particular concern given that he knew that the emails would likely be presented in court. He addressed the mother in a condescending and humiliating manner, indicating utter disdain for the mother. This continuing conduct, especially when the father is aware of the court's involvement, heightens the risk to the children.

Pointing to Brajesh's "extreme anger," "bitterness towards [Lynette]," and his "demonstrated . . . willingness to punish the children in response to the parenting plan,"

⁸ Although the court found that the children were too young to effectively seek assistance if retained in India, it declined to base this finding on Lynette's testimony which it characterized as "overly dramatic."

the court found that his “pattern of abusive, controlling, punishing behavior puts the children at risk of being used as the tools to continue this conduct.” The court also found that “[c]ontrary to his representations at the previous trial, the father has spent significant time in India since that trial. He lived and worked there for at least two years.”

In addition to the court's earlier finding that India is a non-signatory to the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention), the court made findings about the legal impediments to effectuating return of children abducted to India by a parent. Based on exhibits admitted during Berry's testimony, the court found that abduction by a parent is not a crime in India, there is “no guarantee of enforcing a U.S. parenting order in India,” such proceedings can take from six months to a year, and that the “custody order of a foreign state is only one of the factors which will be taken into consideration by a court of law in India.” With respect to the profile testimony, the trial court found that the literature identified “profiles” or risk factors for abduction and that according to the literature, “[t]o the extent that families meet the criteria for more than one profile, the risk for abduction is probably increased.” The court further found:

Respondent's behavior, including his behavior in 2002 as shown in Exhibits 39 and 40 and his emails in Exhibit 15, his bitterness towards Petitioner and the lack of resolution of difficulties between the parties show that he meets the criteria for several Profiles and “red flags” which indicate a risk of abduction by the father, which is against the best interests of the children.⁹

⁹ Exhibits 39 and 40 were documents showing that in the summer of 2002, Brajesh designated the children in place of Lynette as insurance beneficiaries and designated his father in India as his emergency contact person.

Based on Brajesh's conduct and testimony, the court concluded it was not in the best interests of the children to remove the foreign travel restrictions and the restrictions were reasonably calculated to address the harm. Brajesh appeals.

ANALYSIS

The primary argument Brajesh makes on appeal is that the trial court erred in finding credible threats of abduction and imposing foreign travel restrictions under RCW 26.09.191(3). Brajesh also contends substantial evidence does not support the court's characterization of the e-mails. Brajesh argues that absent a finding of a substantial risk of abduction, there is no actual harm and the foreign travel restrictions are not warranted. In addition, Brajesh argues the court erred in denying his motion to exclude profile testimony.

A trial court's parenting plan decisions are reviewed for abuse of discretion. In re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). This court will not reverse its decision unless it was manifestly unreasonable or based on untenable grounds or reasons. Littlefield, 133 Wn.2d at 46-47. An appellate court will not retry the facts on appeal, and will accept findings of fact as verities if they are supported by substantial evidence in the record. In re Marriage of Thomas, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991). Evidence is substantial when there is a sufficient quantum of evidence "to persuade a fair-minded person of the truth of the declared premise." In re Marriage of Burrill, 113 Wn. App. 863, 868, 56 P.3d 993 (2002). "So long as substantial evidence supports the finding, it does not matter that other evidence may

contradict it.” Burrill, 113 Wn. App. at 868. This court does not review the trial court's credibility determinations, nor can it weigh conflicting evidence. In re Marriage of Rich, 80 Wn. App. 252, 259, 907 P.2d 1234 (1996).

Foreign Travel Restrictions

A trial court has the authority to impose limitations on visitation in a parenting plan under RCW 26.09.191(3) based on “factors or conduct as the court expressly finds adverse to the best interests of the child.” RCW 26.09.191(3)(g). In Katare, we held that under RCW 26.09.191(3), the trial court has the discretion to impose foreign travel restrictions if the court expressly finds the parent's conduct justifies the imposition of the restrictions under RCW 26.09.191(3). Katare, 125 Wn. App. at 830-31.

Brajesh challenges the trial court's finding that Lynette's testimony that Brajesh threatened to take the children to India without her was “credible” when “viewed in conjunction with the testimony of others.”¹⁰ Citing Group Health Cooperative of Puget Sound, Inc. v. The Department of Revenue, 106 Wn.2d 391, 399-400, 722 P.2d 787 (1986), Brajesh asserts that as a matter of law, the court erred in relying on hearsay statements of the corroborating witnesses cited by Waldroup in concluding that Lynette's testimony was credible. In Group Health, the court held that an expert can rely on otherwise inadmissible hearsay evidence for the limited purpose of establishing

¹⁰ Moreover, while Brajesh asserts he is challenging only the evidence admitted in the 2009 evidentiary hearing, not the 2003 trial, the corroborating evidence was mentioned only in passing during the 2009 hearing. The court also explicitly states that its finding that the threats were credible was based solely on the evidence presented at the 2003 trial.

the basis of the expert's opinion. Group Health, 106 Wn.2d at 399; see also ER 703.

But here, unlike in Group Health, the evidence Brajesh objects to was introduced by him and admitted into evidence at his request during the cross examination of Lynette.¹¹ Brajesh relied on the declarations to elicit the fact that both witnesses were close family friends who gave earlier statements which failed to specifically mention his alleged statements about taking the children to India without Lynette.¹² Brajesh also used the exhibits to cross examine Waldroup, suggesting the possibility that the witnesses were coached by Lynette.

An error is waived if the party asserting such error materially contributed to the error. In re Dep. of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). We conclude that here, any error in relying on the corroboration of the sworn affidavits was waived.

Brajesh also contends substantial evidence does not support the trial court's characterization of the voluminous e-mail correspondence and its conclusion that the risk of abduction "has not abated." The court found that the e-mails demonstrate Brajesh's "extreme anger, abuse, unreasonableness, . . . poor judgment," and "utter disdain" for Lynette, and that "it is evident" he still "harbors resentment against the mother, which could manifest itself by an abduction of the children." Brajesh claims that the e-mails merely show continued "[b]ickering" between the parties and argues that the animosity is not one-sided.

The e-mails, including the specific examples cited by the court, are replete with

¹¹ Although Brajesh refers to the statements of the corroborating witnesses as "unsworn," both declarations were made under penalty of perjury.

¹² In arguing against the imposition of restrictions, Brajesh also brought these issues regarding the corroborating evidence to the court's attention.

examples that support the trial court's finding. The e-mails reveal Brajesh's unrelenting verbal abuse and anger. He calls Lynette "vindictive," "sick," a coward, an unfit parent, and refers to her family as a "bunch of losers." Brajesh tells her that "[the children] need to know in [the] future who eliminated their daddy from their lives," and "[h]opefully one day [Lynette and family] will answer to [the children] for depriving them of their heritage, culture and the fantastic life they could have enjoyed." Brajesh further states, "[A]ll signs point that they will know who robbed them as they grow older." Brajesh also constantly accuses Lynette of not acting "in the best interest of the children." Brajesh continually accuses Lynette of lying, referring to her as a "born liar [sic]," a "pathological liar," and a "compulsive" liar. The e-mail evidence also reveals Brajesh bringing the children into the parties' hostilities, for example, by threatening to show written exchanges to them. The court's characterization of the e-mail correspondence is amply supported by the evidence. The record also supports the trial court's conclusion that Brajesh's "pattern of abusive, controlling, punishing behavior puts the children at risk of being used as the tools to continue this conduct."

Substantial evidence supports the trial court's finding that Brajesh made credible threats to abduct the children and that "the father's testimony and conduct alone" supports the conclusion that the risk of abduction had not abated. The evidence also supports the trial court's finding that "it is not in the best interest of the children to allow them to travel with their father outside the United States such that they might be put in a position of being kept from returning to the United States."

Brajesh and the amici curiae¹³ argue the court misconstrued Indian law,

¹³ The Fred T. Korematsu Center for Law and Equality, Asian Bar Association, and Vietnamese

overstated the seriousness of the consequences of abduction in India, and placed unjustified reliance on the fact that India is not a signatory to the Hague Convention.

Foreign law is a fact which may be proved in Washington courts like any other fact. State v. Rivera, 95 Wn. App. 961, 966, 977 P.2d 1247 (1999) ("Foreign law is a fact issue that must be pleaded and proved like any other fact by the party relying on the foreign law."). Here, because the only evidence presented to the court on Indian law and the enforcement of foreign custody orders in Indian courts was uncontroverted, the record supports the court's findings regarding the consequences and seriousness of abduction to India.¹⁴

Brajesh next contends that the court was not authorized to impose foreign travel restrictions under RCW 26.09.191(3) absent a finding of actual, rather than potential, harm. He claims that the court's order therefore fails to comply with the statutory requirements of the Parenting Act, chapter 26.09 RCW. However, RCW 26.09.191 authorizes limitations based on conduct or factors that may adversely affect the children's best interests. See Burrill, 113 Wn. App. at 871-72 (restrictions upheld under RCW 29.09.191(3)(e) based on abusive use of conflict despite evidence of only potential, not actual harm).

Brajesh relies heavily on In re Marriage of Wicklund, 84 Wn. App. 763, 932 P.2d 652 (1996). In Wicklund, the court held that the restrictions on a parent's behavior were not justified because there was no evidence that the prohibited conduct would be

American Bar Association.

¹⁴ To the extent that the two cases cited by the amici curiae contradict the court's findings regarding Indian courts' treatment of foreign custody orders, neither was brought to the attention of the trial court. See RAP 2.5(a) (a party waives its right to appeal issues not brought to the attention of the trial court).

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adverse to the best interests of the children. Wicklund, 84 Wn. App. at 770. By contrast, here, the court expressly found that the father's threats to abduct were credible and that the evidence showed the risk had not abated. These findings justified the trial court's decision to impose foreign travel restrictions as reasonably calculated limitations in the best interests of the children.

In sum, the court's findings are supported by substantial evidence and meet the requirements of the statute. The trial court, therefore, was within its discretion in

imposing the travel restrictions.¹⁵

Profile Evidence

Brajesh contends the court erred in denying his motion to exclude profile evidence as an indicator of likelihood of child abduction. Below, Brajesh argued the evidence was inadmissible and prejudicial, that Berry was not qualified to testify about psychological profiles, and the profile literature Berry relied on did not meet the Frye standard and was not accepted by the scientific community.

In allowing Berry to testify, the court stated that the testimony would assist it in understanding the “status of the literature.” The court observed that it would, however, be responsible for making the “ultimate determination” on the risk of abduction and that the court was capable of giving “appropriate weight” to the evidence. The court also noted that it did not want to “hear much detail in the way of actual application” of the risk factors because the court was familiar with all the facts.

A trial court has broad discretion in admitting expert evidence and a party may introduce expert testimony if the expert is properly qualified, relies on generally accepted theories, and is helpful to the trier of fact. ER 702; Philippides v. Bernard, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). However, an expert may not testify outside the area of his expertise and must have a sufficient factual foundation for his opinion. Queen City Farms, Inc. v. Cent. Nat’l Ins. Co. of Omaha, 126 Wn.2d 50, 104, 882 P.2d 703 (1994). Conclusory or speculative expert opinions that lack an adequate

¹⁵ Brajesh also reasserts the constitutional arguments he raised in the earlier appeals. The premise of his constitutional claims is that the foreign travel restrictions in the parenting plan do not comply with the statutory requirements under RCW 26.09.191(3). Because the court’s imposition of the restrictions complies with the statute, we disagree with the premise and need not address these arguments again. We also previously considered and rejected the argument that the court had to quantify the level of risk.

foundation should not be admitted. Davidson v. Mun. of Metro. Seattle, 43 Wn. App. 569, 571-72, 719 P.2d 569 (1986). “A trial judge is presumed to be able to disregard inadmissible evidence.” State v. Melton, 63 Wn. App. 63, 68, 817 P.2d 413 (1991).

In support of Lynette’s position at the hearing that if the foreign travel restrictions were modified, the court should impose a substantial bond and other safeguards, Berry testified about the legal impediments, difficulty, and expense involved in retrieving children unlawfully retained in foreign jurisdictions. Berry had some expertise in this area based on his work on child abduction litigation in foreign jurisdictions, although not specifically in India. During Berry’s testimony, Lynette admitted into evidence several publications pertaining to international parental abduction and Indian law. Brajesh did not object to this evidence. Four of the publications contained lists of “risk factors” or “profiles” for identifying a risk of abduction.¹⁶

Berry then proceeded to testify about Indian law and about various “risk factors” or psychological “profiles” for identifying a risk of abduction as described in the publications. The risk factors Berry testified about included such factors as existence of “strong emotional or cultural ties to the country of origin,” “[f]riends or family living in another country,” a “history of marital instability,” and “[n]o strong ties to the child’s home state.” Berry briefly testified about whether particular risk factors identified in the literature were present in this case. On cross examination, Brajesh elicited testimony in support of his position that he did not match any of the profiles and none of the

¹⁶ These publications consisted of the following: Patricia M. Hoff, Am. Bar Ass’n, Ctr. on Children & the Law, Parental Kidnapping: Prevention and Remedies (2000); Janet R. Johnson et al., Early Identification of Risk Factors for Parental Abduction, Juvenile Justice Bulletin, March 2001, at 1; J. Robert Flores, Office of Juvenile Justice & Delinquency Prevention, Family Resource Guide on International Parental Kidnapping (2007); and Hoff, Nat’l Ctr. for Missing & Exploited Children, Family Abduction-Prevention and Response (2002).

identified risk factors were present.

We hold the court abused its discretion in admitting the testimony about risk factors and profiles. There was no foundation for Berry's profile testimony, nor did Lynette establish that the testimony met the Frye standard because there was no showing that it was based on established scientific methodology.¹⁷ Because the evidence was inherently speculative and unhelpful, it was inadmissible under ER 702.¹⁸ The evidence was essentially akin to profile evidence, inadmissible in criminal proceedings, and was more prejudicial than probative.

Lynette failed to establish that Berry had any expertise in predicting abduction, or that the risk factors had a valid, scientific basis. For this reason, the expert testimony lacked adequate foundation. "It is apparent that where opinion testimony is given by a witness who is not qualified to testify to such an opinion, the testimony given is, by definition, not helpful to the finder of fact." In re Det. of Pouncy, 144 Wn. App. 609, 624, 184 P.3d 651 (2008). Thus, the evidence was also not relevant, nor helpful to the trier of fact. See ER 401; see also ER 702.

And most significantly, as Brajesh pointed out below, the evidence about risk factors was analogous to inadmissible profile evidence. Profile evidence identifies a group of people as more likely to commit a crime, and is inadmissible if it is used to

¹⁷In re Det. of Thorell, 149 Wn. 2d 724, 756-58, 72 P.3d 708 (2003), where in the context of sexually violent predator commitment proceedings, the court upheld the use of actuarial assessments to predict future dangerousness, is not analogous. Unlike the challenged evidence in Thorell, the evidence here did not amount to an individualized assessment of risk.

¹⁸ ER 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, expertise, training, or education, may testify thereto in the form of an opinion or otherwise.

lead to the conclusion that a defendant must have committed the charged crime because he shared the characteristics of known offenders. State v. Braham, 67 Wn. App. 930, 936-37, 841 P.2d 785 (1992) (“[P]rofile testimony that does nothing more than identify a person as a member of a group more likely to commit the charged crime is inadmissible owing to its relative lack of probative value compared to the danger of its unfair prejudice.”). Profile evidence is inadmissible because it is essentially unhelpful in determining whether a particular individual committed the charged crime. Likewise, here, the evidence about “profiles” of abductors was not probative because it did not assist the trier of fact to determine whether, and to what extent, Brajesh presented a risk of abduction. We hold that the testimony was inadmissible and the trial court abused its discretion in admitting and considering the testimony.

Brajesh asserts that even assuming validity of the factors, the “central issue is the application of these factors to [him],” and challenges Berry’s testimony that certain factors applied to him. The trial court did not, however, adopt Berry’s risk factor analysis. Berry testified that numerous risk factors applied, including the existence of strong ties to country of origin, lack of ties to children’s home state, lack of a financial reason to stay in the area, and suspicions or concerns about abuse, which the trial court did not rely upon as existing risk factors. The trial court did not identify any of these factors as creating a risk of abduction and, it appears, largely disregarded Berry’s opinion about which risk factors applied.

And without regard to any reliance on the impermissible profile testimony, the court found that Brajesh’s “testimony and conduct alone” supported the foreign travel

restrictions. The court found that a risk of abduction still exists based on Brajesh's conduct and behavior, his apparent anger, and demonstrated "willingness to punish," independent of any risk factor analysis. Those findings are supported by the evidence, and the court's findings support the imposition of the RCW 29.09.191 restrictions.¹⁹

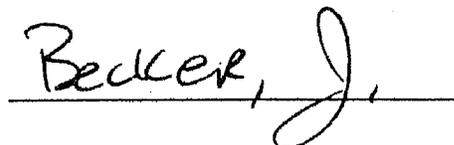
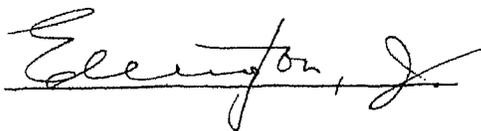
Attorney Fees

Lynette requests fees, citing In re Marriage of Greenlee, 65 Wn. App. 703, 829 P.2d 1120 (1992); RCW 26.26.140; and RAP 18.9. She argues that fees are justified because this is Brajesh's third appeal and asserts that he has raised variations of the same arguments in each appeal. The appeal is not frivolous and Lynette has not shown intransigence. Under RCW 26.09.140, this court may award attorney fees in its discretion, balancing the needs of one party against the other's ability to pay. We have considered the financial affidavits submitted by the parties, and also decline to award fees under RCW 26.09.140.

We affirm.



WE CONCUR:



¹⁹ Because we affirm, it is unnecessary to consider arguments about remanding to a different trial court judge. Also, although Brajesh assigns error to the trial court's failure to timely rule on Lynette's fee application, because he does not include any argument or authority supporting the claim of error in his brief, we do not address the claim of error. See RAP 10.3(a)(6).

APPENDIX B

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JUDGE MARY E. ROBERTS

FILED
KING COUNTY, WASHINGTON
APR 06 2009
SUPERIOR COURT CLERK
KIM C. PHIPPS
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In re the Marriage of:
LYNETTE KATARE,
Petitioner,
and
BRAJESH KATARE,
Respondent.

NO. 02-3-05316-9 SEA
FINDINGS OF FACT AND
CONCLUSIONS OF LAW
ON SECOND REMAND

I. BASIS FOR FINDINGS

This matter came before the court upon the parties' requests for a hearing to address the issues presented upon (the second) remand from the court of appeals. The court held a hearing on January 14 and 15, 2009. Both the petitioner and the respondent attended the hearing, along with their attorneys, Gordon Wilcox for the petitioner, and Katy Banahan and Christopher Rao for the respondent. The court then heard argument from counsel on February 5, 2009.

The court of appeals directed this court on remand to (1) expressly address whether the evidence supports limitations under RCW 26.09.191(3), and (2) expressly address the best interest of the children. The court of appeals also directed this court to examine current

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 1

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1 relevant information concerning any limitations under RCW 26.09.191(3), given the passage of
2 time since the original trial in 2003. The specific limitations at issue in this case are the
3 passport and foreign travel restrictions in the parenting plan. The new evidence presented at
4 the hearing allowed the court to make new findings based on the current circumstances. It also
5 shed light on some of the court's earlier findings.
6

7 II. FINDINGS

8 Upon the basis of the court record, the court FINDS:

9
10 The risk of abduction by the father and the best interests of the children justify
11 limitations under RCW 26.09.191(3)(g). In finding that there is a sufficient risk of abduction
12 to warrant a geographical limitation on the father's residential time with the children, the Court
13 considered the following evidence, which was brought forth during the June 2003 dissolution
14 trial:

- 15 • The father was born and raised in India, where his immediate family still remain.
16 Other than the parties' children, the father has no family ties to the United States.
17 (He is now engaged to marry an Indian woman who lives and works in the Seattle
18 area and has applied for a green card).
- 19 • Even after the mother expressed her disagreement in moving the family to India,
20 the father nevertheless pursued the family's relocation to India.
- 21 • In the months leading up to the mother filing a petition for dissolution of their
22 marriage, the father threatened to take the children to India without the mother.
23 Third parties interviewed by the parenting evaluator stated that they heard the
24 father make similar threats. The trial court finds that the mother's testimony that
25 the father made threats was credible, when viewed in conjunction with the
testimony of others.
- The father sought information for the children in discovery, which would have
allowed him to obtain documents (Indian PIO cards) which would assist in

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 2

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removing the children from the country. The information requested included: copies of the applications for the children's passports and Indian tourist visas, copies of passport pages and Indian tourist visas from their passports, and copies of the children's immunization records.

- The mother found an application for an Indian PIO card (similar to a U.S. "green card") on the father's computer.
- The father has the means and potential to relocate to India for employment.
- The children were too young to seek help if the father improperly retained them in India.
- The consequences of abduction to India are incredibly serious and irreversible.
- The risk of abduction was sufficient to warrant limitations on the father's time with the children.
- It was in the best interests of the children to have their residential time with their father in the United States given the above findings; it was in their best interest to limit their travel outside the United States as well, given the risks.

In addition to the above findings based on the 2003 trial, the trial court makes the following additional findings based on the evidence presented on remand, some of which are new, and some of which serve to bolster the findings based on evidence from the original trial:

- The risk of abduction has not abated, and based on evidence presented at the hearing on remand, is seen more clearly to have been strong at the time of the original trial, and perhaps to have now increased. From the emails between the parties after the first trial, it is evident that the father still harbors resentment against the mother, which could manifest itself by an abduction of the children. The father's emails demonstrate extreme anger, abuse, unreasonableness, and poor judgment. This is of particular concern given that he knew that the e-mails would likely be presented in court. He addressed the mother in a condescending and humiliating manner, indicating utter disdain for the mother. This continuing conduct, especially when the father is aware of the court's involvement, heightens the risk to the children.
- The father demonstrated his willingness to punish the children in response to the parenting plan, and to continue to taunt the mother. Exhibit 37 is an email from November 1, 2005, in which the father wrote:

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Convey my love and wishes to A and R as today is Diwali. Tell them I love them and they will have their diwali gifts whenever they visit their daddy's home. They are stored in their play room. Tell them that I will explain what diwali and its significance is when they grow up.

This e-mail was described by the father as an example of his "civil," approach to dealing with the mother. He does not see that the tone is condescending and sarcastic, and that he has chosen to punish the children by storing their gifts and delaying his teaching to them about an important celebration. He implies that the mother and the court have made it impossible for him to provide the gifts and to explain the significance of the celebration, simply because he was required to visit the children in Florida rather than bring them to his home in Washington state while they were young.

- The father, in his correspondence, expressed his contempt for the legal system, e.g., referring to the court's order allowing the mother to relocate to Florida with the children as, "legal abduction."
- Contrary to his representations at the previous trial, the father has spent significant time in India since that trial. He lived and worked there for at least two years. The court recognizes that the father nonetheless kept to the visitation schedule with his children while he worked in India.
- The children, now ages 8 and 7, are too young to seek assistance in the event that they are improperly retained by their father or otherwise unable to return to their mother. This is especially true if the children are taken to a foreign country such as India. The court did not consider the mother's testimony about the conditions in India, which testimony was without foundation. Nor did the court place weight on the mother's attempts to paint her children, who are in gifted programs at school, as incapable of making phone calls or dealing with money. Her portrayal of the vulnerability of the children was unconvincing to the court, and reminiscent of her testimony in the 2003 trial, which was also often overly dramatic and not credible. Nonetheless, it is not in the best interest of the children to allow them to travel with their father outside the United States such that they might be put in a position of being kept from returning to the United States. The father's testimony and conduct alone leads the court to this conclusion, regardless of the mother's testimony.
- Exhibit 11, at 6.11(3) and Exhibit 25 at p. 113 show the legal impediments to obtaining the return of an improperly retained child through the court in India. Exhibit 32, p. 8, shows that child abduction is not a crime in India. This information was persuasive and helpful to the court, but not necessary to its other findings and conclusions.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 4

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- It is in the best interests of the children to have their residential time with their father in the United States. The father's time with the children is not now limited to Florida, and his concerns about not being able to expose the children to his culture have been ameliorated by the elimination of other restrictions on his time with the children.
- Exhibit 11 shows that India is not a signator to the Hague Convention on International Child Abduction. Exhibit 11, 6.11(4), *Foreign Orders*, shows that India has its own laws giving it broad authority to rewrite parenting orders of other states. Exhibit 11, 6.11(1), shows that there is no guarantee of enforcing a U.S. parenting order in India. Exhibit 25, p. 113, shows that proceedings in India do not include summary proceedings. Exhibit 11, 6.11(3), shows that such proceedings can take from six months to a year.
- Exhibit 25, p. 114, shows that the custody order of a foreign state is only one of the factors which will be taken into consideration by a court of law in India. Exhibit 28 sets out early identifications of risk factors for parental abduction. Exhibit 33 identifies profiles (factors) for family abductors: descriptive profiles and preventive interventions. There is a different set of "common red flags" in Exhibit 26, some of which are not included in the factors above. Exhibits 30 and 31 show research regarding risk factors for abduction and refer to "red flags." The Patricia Huff article at Exhibit 26 refers to the same or similar "red flags." Exhibit 28, pp. 2-3, shows risks based on the profiles described in the gray boxes. Exhibit 28 at p. 6, shows that the literature suggests that to the extent that families meet the criteria for more than one profile, the risk for abduction is probably increased.
- Respondent's behavior, including his behavior in 2002 as shown in Exhibits 39 and 40 and his emails in Exhibit 15, his bitterness towards Petitioner and the lack of resolution of difficulties between the parties show that he meets the criteria for several Profiles and "red flags" which indicate a risk of abduction by the father, which is against the best interests of the children.
- The respondent's conduct as described above is adverse to the best interests of the children. His pattern of abusive, controlling, punishing behavior puts the children at risk of being used as the tools to continue this conduct. The passport and travel restrictions set forth in the parenting plan are reasonably calculated to address this identified harm.

III. CONCLUSIONS

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 5

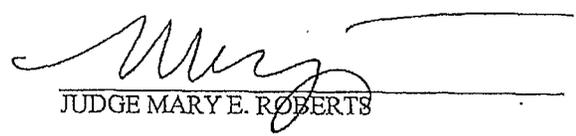
JUDGE MARY E. ROBERTS
King County Superior Court
Courtroom 4D
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, WA 98032-4429
(206) 296-9240

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Based on the above findings of fact, the court concludes that the restrictions in the parenting plan are appropriate.

At argument, counsel requested the opportunity to address any award of attorneys fees following the issuance of this decision. The court will consider any such request.

DATED this 4th day of April, 2009.



JUDGE MARY E. ROBERTS

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 6

JUDGE MARY E. ROBERTS
King County Superior Court
Courtroom 4D
Norm Maleng Regional Justice Center
401 Fourth Avenue North
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APPENDIX C

FILED

KING COUNTY WASHINGTON

JUL 30 2003

SUPERIOR COURT CLERK

BY LAMEANIA M. BRIDGES

DEPUTY

HON. MARY ROBERTS

SUPERIOR COURT OF WASHINGTON COUNTY OF KING

In re the Marriage of:

LYNETTE KATARE

Petitioner,

and

BRAJESH KATARE

Respondent.

NO. 02-3-05316-9 SEA

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
(FNFL)

I. BASIS FOR FINDINGS

The findings are based on trial held on June 16 – 20 and June 23rd, 2003. The following people attended: Petitioner, Petitioner's Lawyer, Respondent, and Respondent's Lawyer.

II. FINDINGS OF FACT

Upon the basis of the court record, the court FINDS:

2.1 RESIDENCY OF PETITIONER. The petitioner is a resident of the state of Washington.

2.2 NOTICE TO THE RESPONDENT. The respondent appeared and responded to the petition.

2.3 BASIS OF PERSONAL JURISDICTION OVER THE RESPONDENT. The court has jurisdiction over the Respondent because the following facts establish personal jurisdiction: The respondent is presently residing in Washington; the parties lived in Washington during their marriage and the petitioner continues to reside in this state; and, the parties have conceived children while within Washington.

2.4 DATE AND PLACE OF MARRIAGE. The parties were married on November 25, 1995 at Clearwater, Pinellas County, Florida.

FINDINGS OF FACT AND CONCL OF LAW (FNFL) –
WPF DR 04.0300 (9/2001) - CR 52; RCW 26.09.030;
.070 (3)– Page 1

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ORIGINAL page 165

- 1
- 2 2.5 STATUS OF THE PARTIES. Husband and wife separated on July 12, 2002.
- 3 2.6 STATUS OF THE MARRIAGE. The marriage is irretrievably broken and at least 90 days have
4 elapsed since the date the petition was filed and since the date the summons was served or the
respondent joined.
- 5 2.7 SEPARATION CONTRACT OR PRENUPTIAL AGREEMENT. There is no written
6 separation contract or prenuptial agreement.
- 7 2.8 COMMUNITY PROPERTY. The parties have the following real or personal community
8 property:
- 9 (a) Residence located at 24027 SE 12th Place, Sammamish, Washington;
- 10 (b) Fidelity IRA in wife's name;
- 11 (c) Fidelity IRA in husband's name;
- 12 (d) Microsoft 401(k);
- 13 (e) Microsoft Employee Stock Purchase Plan
- 14 (f) Microsoft stock options;
- 15 (g) Fidelity Acct. No. -899;
- 16 (h) Fidelity Acct. No. -351
- 17 (i) First Tech Credit Union Acct. No. -854;
- 18 (j) American Express IDS life insurance policy covering wife's life;
- 19 (k) American Express IDS life insurance policy covering husband's life;
- 20 (l) Indian jewelry;
- (m) Nissan Quest;
- (n) Honda Civic;
- (o) Air miles;
- (p) Household furnishings; and
- (q) Personal property.
- 21 2.9 SEPARATE PROPERTY. The husband has the following real or personal separate property:
22 All personal property acquired after the date of separation with earnings. The wife has the following
23 real or personal separate property: Her interest in the DeGuzman Family Partnership and all personal
24 property acquired after the date of separation.

21 2.10 COMMUNITY LIABILITIES. The parties have incurred the following community liabilities:

<u>Creditor</u>	<u>Amount</u>
Mortgage on Sammamish house	Approx. \$260,000
Valenti Loan for house down payment	\$25,320
Unpaid property taxes (incl. interest, penalties)	\$4,736
Loan 1 on Microsoft 401(k)	Approx. \$18,000
First USA credit card	Approx. \$5,000
United Airlines credit card	Approx. \$5,000

*FINDINGS OF FACT AND CONCLUSION OF LAW (FNFL) -
WPF DR 04.0300 (9/2001) - CR 52; RCW 26.09.030;
.070 (3) - Page 2*

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2.11 SEPARATE LIABILITIES. The husband has incurred the following separate liabilities: Any and all debt incurred after the date of separation, including, but not limited to "Loan 2" on Microsoft 401(k), credit cards, and attorneys fees and costs. The wife has incurred the following separate liabilities: Any and all debt incurred after the date of separation, including, but not limited to personal loans from her parents.

2.12 MAINTENANCE. Maintenance should be ordered because: The wife has been a stay-at-home mom and has not worked in four years by agreement of the parties. The wife is in need of maintenance until the wife relocates to Florida and the husband has the ability to pay. Maintenance should cease upon the wife's relocation.

2.13 CONTINUING RESTRAINING ORDER. Does not apply.

2.14 FEES AND COSTS. There is no award of fees or costs because neither party has the ability to pay the other's fees.

2.15 PREGNANCY. The wife is not pregnant.

2.16 DEPENDENT CHILDREN. The children listed below are dependent upon either or both spouses.

Name of Child	Age	Mother's Name	Father's Name
Annika Katare	3 years	Lynette Katare	Brajesh Katare
Rohan Katare	22 months	Lynette Katare	Brajesh Katare

2.17 JURISDICTION OVER THE CHILDREN. This court has jurisdiction over the children for the following reasons: This court has exclusive continuing jurisdiction. The court has previously made a child custody, parenting plan, residential schedule or visitation determination in this matter and retains jurisdiction under RCW 26.27.211; This state is the home state of the children because the children lived in Washington with a parent or a person acting as a parent for at least six consecutive months immediately preceding the commencement of this proceeding.

2.18 PARENTING PLAN. The parenting plan signed by the court on this date is approved and incorporated as part of these findings.

2.19 CHILD SUPPORT. There are children in need of support and child support should be set pursuant to the Washington State Child Support Schedule. The Order of Child Support signed by the court on this date and the child support worksheet, which has been approved by the court, are incorporated by reference in these findings.

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FNFL) -
WPF DR 04.0300 (9/2001) - CR 52; RCW 26.09.030;
.070 (3) - Page 3

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2.20 OTHER.

2.20.1 India is not a signator to the Hague Convention on International Child Abduction.

2.20.2 Based on the evidence, including the testimony of expert witnesses, the husband appears to present no serious threat of abducting the children. Nonetheless, under the circumstances of this case, given the ages of the children, the parties' backgrounds, ties to their families and communities, and history of parenting, the consequences of such an abduction are so irreversible as to warrant limitations on the husband's residential time with the children, including: location of exercise of residential time, surrender of his passport, notification of any change of his citizenship status, and prohibition of his holding or obtaining certain documents (i.e. passports, birth certificates) for the children. The mother shall retain the children's passports.

2.20.3 The husband's agreement to the Temporary Parenting Plan of August 13, 2002, does not constitute an admission that he engaged in the conduct alleged therein under RCW 26.09.191.

2.20.4 The husband has not engaged in a pattern of emotional abuse of a child or the abusive use of conflict which creates the danger of serious damage to the children's psychological development under RCW 26.09.191.

2.20.5 Based on the evidence, the husband has no long-term emotional impairment that interferes with his performance of parenting functions.

2.20.6 Limitations on the parents' residential time with the children to a particular location is also justified by the age of the children.

2.20.7 The children each have a Fidelity UTMA account. The husband shall be the sole custodian of each of these accounts.

2.20.8 While relying on RCW 26.09.184 and RCW 26.09.187 in making residential provisions for the children as set forth in the Parenting Plan, the court also relies upon and incorporates the findings contained in the Order on Objection to Relocation entered at the same time as these findings.

2.20.9 Nicolas Valenti, maternal grandfather of the children, was accused of engaging in sexual misconduct with ^{adult} patients in his medical practice and surrendered permanently his right to practice as a physician as part of resolving the administrative process arising from these actions. Nicolas Valenti is to be with the children only if there is a third party adult also present. *man*

2.20.10 Regarding property held by the parties at the time of marriage, there was such a degree of commingling and there was a failure to trace such funds that the separate identity of those funds was lost and all of the property is community property. There was also a lack of

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proof in some instances that assets held prior to marriage were ever transferred to the community or were utilized for community purposes.

2.20.11 Regarding gifts from the parents, there was no proof that such gifts were not made to the community.

2.20.12 Regarding community funds sent to India to the family of the husband prior to the date of separation, these funds were community funds gifted or transferred by both parties and it is specifically found that the wife acquiesced in such gifts or transfer of funds and that Mr. Katare did not waste those community funds by making those transfers or gifts, and reimbursements to the community regarding those funds is not warranted.

III. CONCLUSIONS OF LAW

The court makes the following conclusions of law from the foregoing findings of fact:

3.1 JURISDICTION. The court has jurisdiction to enter a decree in this matter.

3.2 GRANTING OF A DECREE. The parties should be granted a decree.

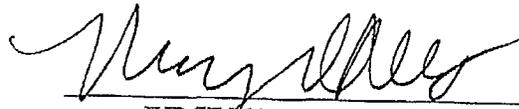
3.3 DISPOSITION. The court should determine the marital status of the parties, make provision for a parenting plan for any minor children of the marriage, make provision for the support of any minor child of the marriage entitled to support, consider or approve provision for the maintenance of either spouse, make provision for the disposition of property and liabilities of the parties, make provision for the allocation of the children as federal tax exemptions, make provision for any necessary continuing restraining orders, and make provision for the change of name of any party. The distribution of property and liabilities as set forth in the decree is fair and equitable.

3.4 CONTINUING RESTRAINING ORDER. Does not apply.

3.5 ATTORNEY'S FEES AND COSTS. Each party should pay their own attorney's fees and costs.

3.6 OTHER. Does not apply.

Dated: July 30, 2003



JUDGE MARY E. ROBERTS

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Presented by:
GORDON W. WILCOX, INC. P.S.

Approved for entry:
HARRIS, MERICLE & WAKAYAMA, PLLC

By _____
Gordon W. Wilcox
Attorney for Petitioner
WSBA No. 75

By _____
George W. Schoonmaker
Attorney for Respondent
WSBA No. 624

*FINDINGS OF FACT AND CONCL OF LAW (FNFL) –
WPF DR 04.0300 (9/2001) - CR 52; RCW 26.09.030;
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APPENDIX D

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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

HON. MARY ROBERTS
SUPERIOR COURT OF WASHINGTON COUNTY OF KING

In re the Marriage of:		
LYNETTE KATARE	Petitioner,	NO. 02-3-05316-9 SEA
And		PARENTING PLAN
BRAJESH KATARE	Respondent.	FINAL ORDER (PP)

This parenting plan is the final parenting plan signed by the court pursuant to a decree of dissolution entered on this date.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

I. GENERAL INFORMATION

This parenting plan applies to the following children:

<u>Name</u>	<u>Age</u>
Annika Katare	3 years
Rohan Katare	23 months

II. BASIS FOR RESTRICTIONS

Under certain circumstances, as outlined below, the court may limit or prohibit a parent's contact with the children and the right to make decisions for the children.

2.1 PARENTAL CONDUCT (RCW 26.09.191(1), (2)). Does not apply.

2.2 OTHER FACTORS (RCW 26.09.191(3)). Does not apply.

III. RESIDENTIAL SCHEDULE

The residential schedule must set forth where the children shall reside each day of the year, including provisions for holidays, birthdays of family members, vacations, and other

PARENTING PLAN (PPP, PPT, PP) - WPF DR 01.0400
(9/2001) - RCW 26.09.181; .187; .194 - Page 1

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2 *special occasions, and what contact the children shall have with each parent. Parents are*
3 *encouraged to create a residential schedule that meets the developmental needs of the children*
4 *and individual needs of their family. Paragraphs 3.1 through 3.9 are one way to write your*
5 *residential schedule. If you do not use these paragraphs, write in your own schedule in*
6 *Paragraph 3.13.*

7
8 3.1 SCHEDULE FOR CHILDREN UNDER SCHOOL AGE. Prior to enrollment in school,
9 the children shall reside with the mother, except for the following days and times when the
10 children will reside with or be with the other parent: Three consecutive days each month,
11 including overnights, from 10:00 a.m. to 8:00 p.m., in Florida only, and subject to the provisions
12 in ¶ VI. Three-day holiday weekends will be used whenever possible so that travel causes the
13 least disruption to the parents' work schedule. The Hindu holidays (Diwali, Holi, Dushera, Rakhi
14 and Ganesh Chaturhi) shall be considered when scheduling the weekend time. The father shall
15 give the mother written notice of his intended monthly visitation dates by the 15th of the
16 preceding month.

17
18 3.2 SCHOOL SCHEDULE. Upon enrollment in school, the children shall reside with the
19 mother, except for the following days and times when the children will reside with or be with the
20 other parent: Same as schedule in ¶ 3.1, except that the residential time may be outside of
21 Florida when Rohan is five. The school schedule for both children will start when Annika enters
22 kindergarten.

23
24 3.3 SCHEDULE FOR WINTER VACATION. The children shall reside with the mother
25 during winter vacation, except for the following days and times when the children will reside
with or be with the other parent: During odd-numbered years, from 2:00 p.m. December 25 to
8:00 p.m. December 31st; during even-numbered years, from 2:00 p.m. December 26 to 8:00 p.m.
January 1. The father shall give the mother written notice of his intent to exercise his residential
time by November 15th of each year. The father's residential time with the children shall be in
Florida until Rohan reaches age five. Thereafter the children may travel to visit the father, but
only if that is within the United States. The winter vacation schedule is in lieu of the monthly
weekend time per ¶ 3.2 for December.

3.4 SCHEDULE FOR SPRING VACATION. The children shall reside with the mother
during spring vacation, except for the following days and times when the children will reside
with or be with the other parent: For seven consecutive days of spring vacation, beginning at
10:00 a.m. and ending at 8:00 p.m., excluding Easter Sunday. The father shall give the mother
written notice of his intent to exercise his residential time by February 15th of each year. The
father's residential time with the children shall be in Florida until Rohan is five. Thereafter the
children may travel to visit the father, but only if that is within the United States. The spring
vacation schedule is in lieu of the monthly weekend time per ¶ 3.2 for the month in which the
spring vacation occurs.

3.5 SUMMER SCHEDULE. Upon completion of the school year, the children shall reside
with the mother, except for the following days and times when the children will reside with or be

1 with the other parent: Three nonconsecutive weeks each summer, beginning at 10:00 a.m. and
 2 ending at 8:00 p.m. When Rohan reaches age 8, the three weeks may be consecutive. The father
 3 shall give the mother written notice of his intended summer visit dates by April 1st each year.
 4 The father's residential time with the children shall be in Florida until Rohan reaches age five.
 5 Thereafter the children may travel to visit the father, but only if that is within the United States.
 6 The summer schedule is in lieu of the monthly weekend time per ¶ 3.2 for June and July.

7 3.6 VACATION WITH PARENTS. The mother shall have two weeks vacation with the
 8 children each year and shall notify the father of those weeks by May 1st each year. The father's
 9 vacation time with the children shall occur as per ¶¶ 3.3 – 3.5.

10 3.7 SCHEDULE FOR HOLIDAYS. The residential schedule for the children for the holidays
 11 listed below is as follows:

	<u>With Mother</u>	<u>With Father</u>
New Year's Eve/Day	Even	Odd
Martin Luther King Day	Every*	In Florida w/notice until Rohan is 5
Presidents' Day	Every*	In Florida w/notice until Rohan is 5
Easter	Every	
Memorial Day	Every*	In Florida w/notice until Rohan is 5
July 4th	Every	
Labor Day	Every*	In Florida w/notice until Rohan is 5
Diwali**	Every	
Veterans' Day	Every*	In Florida w/notice until Rohan is 5
Thanksgiving Day	Thursday and Friday	Saturday and Sunday
Christmas Eve	Every	
Christmas Day	Until 2:00 p.m.	Beginning at 2:00 p.m.

12 * The father shall have priority to visit the children on these holidays per ¶¶ 3.1 and 3.2 provided
 13 he gives written notice of his intent to do so by the 15th of the month preceding the holiday.

14 ** Diwali is not set. It takes place anytime between mid-October through mid-November. The
 15 father shall give written notice of his intent to visit the children by the 15th of the month
 16 preceding the holiday.

17 The father's holiday time with the children shall be (in Florida only until Rohan is five) from
 18 10:00 a.m. to 8:00 p.m., unless included as part of a monthly weekend visit per ¶ 3.2.

19 3.8 SCHEDULE FOR SPECIAL OCCASIONS. The residential schedule for the children for
 20 the following special occasions (for example, birthdays) is as follows:

<u>Special Occasion</u>	<u>With Mother</u>	<u>With Father</u>
Mother's Day/Birthday	Every	
Father's Day/Birthday		Every
Annika's Birthday	Even	Odd
Rohan's Birthday	Odd	Even

1 The father's special occasion time with the children shall be (in Florida only until Rohan is 5)
2 from 10:00 a.m. to 8:00 p.m., unless included as part of a monthly weekend visit per ¶ 3.2. The
3 father shall give the mother written notice of his intent to visit the children on special occasions
by the 15th of the month preceding the occasion.

4 3.9 PRIORITIES UNDER THE RESIDENTIAL SCHEDULE. If the residential schedule,
5 paragraphs 3.1 - 3.8, results in a conflict where the children are scheduled to be with both parents
6 at the same time, the conflict shall be resolved by priority being given as follows: Rank the order
7 of priority, with 1 being given the highest priority: 1. Vacation with parents (3.6); 2. Holidays
(3.7); 3. Special occasions (3.8); 4. Winter vacation (3.3); 5. Spring vacation (3.4); 6. Summer
8 schedule (3.5); 7. School schedule (3.1, 3.2).

8 3.10 RESTRICTIONS. Does not apply because there are no limiting factors in ¶¶ 2.1 or 2.2.

9 3.11 TRANSPORTATION ARRANGEMENTS. Transportation costs are included in the
10 Child Support Worksheets and/or the Order of Child Support and should not be included here.
11 Transportation arrangements for the children, between parents shall be as follows: The mother or
her designee shall transport the children to and from their visits with the father. The parties shall
12 exchange the children at the sheriff/police department closest to the mother's home.

12 3.12 DESIGNATION OF CUSTODIAN. The children named in this parenting plan are
13 scheduled to reside the majority of the time with the mother. This parent is designated the
14 custodian of the children solely for purposes of all other state and federal statutes which require a
15 designation or determination of custody. This designation shall not affect either parent's rights
and responsibilities under this parenting plan.

15 The mother is designated as legal custodian of the children for purposes of the Hague Convention
16 and the Jay Treaty, and any other convention, treaty or law affecting the custody of children.

17 3.13 OTHER. Does not apply.

18 3.14 SUMMARY OF RCW 26.09.430 - .480, REGARDING RELOCATION OF A CHILD.

19 This is a summary only. For the full text, please see RCW 26.09.430 through 26.09.480.

20 If the person with whom the child resides a majority of the time plans to move, that person shall
give notice to every person entitled to court ordered time with the child.

21 If the move is outside the child's school district, the relocating person must give notice by
22 personal service or by mail requiring a return receipt. This notice must be at least 60 days before the
intended move. If the relocating person could not have known about the move in time to give 60 days'
23 notice, that person must give notice within 5 days after learning of the move. The notice must contain
the information required in RCW 26.09.440. See also form DRPSCU 07.0500, (Notice of Intended
24 Relocation of A Child).

24 If the move is within the same school district, the relocating person must provide actual notice by
25 any reasonable means. A person entitled to time with the child may not object to the move but may ask

1 for modification under RCW 26.09.260.

2 Notice may be delayed for 21 days if the relocating person is entering a domestic violence shelter
3 or is moving to avoid a clear, immediate and unreasonable risk to health and safety.

4 If information is protected under a court order or the address confidentiality program, it may be
5 withheld from the notice.

6 A relocating person may ask the court to waive any notice requirements that may put the health
7 and safety of a person or a child at risk.

8 Failure to give the required notice may be grounds for sanctions, including contempt.

9 **If no objection is filed within 30 days after service of the notice of intended relocation, the
10 relocation will be permitted and the proposed revised residential schedule may be confirmed.**

11 A person entitled to time with a child under a court order can file an objection to the child's
12 relocation whether or not he or she received proper notice.

13 An objection may be filed by using the mandatory pattern form WPF DRPSCU 07.0700,
14 (Objection to Relocation/Petition for Modification of Custody Decree/Parenting Plan/Residential
15 Schedule). The objection must be served on all persons entitled to time with the child.

16 The relocating person shall not move the child during the time for objection unless: (a) the
17 delayed notice provisions apply; or (b) a court order allows the move.

18 If the objecting person schedules a hearing for a date within 15 days of timely service of the
19 objection, the relocating person shall not move the child before the hearing unless there is a clear,
20 immediate and unreasonable risk to the health or safety of a person or a child.

21 **IV. DECISION MAKING**

22 4.1 DAY-TO-DAY DECISIONS. Each parent shall make decisions regarding the day-to-day
23 care and control of each child while the child is residing with that parent. Regardless of the
24 allocation of decision-making in this parenting plan, either parent may make emergency
25 decisions affecting the health or safety of the children.

4.2 MAJOR DECISIONS. Major decisions regarding each child shall be made as follows:
Education, non-emergency health care and religious upbringing, mental health care, and
children's activities: joint.

4.3 RESTRICTIONS IN DECISION MAKING. Does not apply because there are no
limiting factors in paragraphs 2.1 and 2.2 above.

V. DISPUTE RESOLUTION

*The purpose of this dispute resolution process is to resolve disagreements about carrying
out this parenting plan. This dispute resolution process may, and under some local court rules
or the provisions of this plan must, be used before filing a petition to modify the plan or a motion
for contempt for failing to follow the plan.*

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2 No dispute resolution process, except court action is ordered, unless the parties agree in
3 writing to mediation or arbitration. The mediator/arbitrator shall determine the allocation of
4 costs of the mediation or arbitration.

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VI. OTHER PROVISIONS

There are the following other provisions:

(a) Location. The father's residential time with the children is restricted to Pinellas and Hillsborough Counties, Florida, until Rohan reaches age five. Thereafter the children may travel to visit the father, but only if that is within the United States.

(b) Contact Information. The father shall give the mother good contact information: the address and local telephone number where he is staying during visits in Florida. The father shall give the mother a cell phone number where he may be reached when he is with the children and shall keep the phone on at all times while he has the children.

(c) Surrender of Passport. The father shall surrender his passport to a mutually-agreed party or one selected by the Court in the Pinellas/Hillsborough County area before he has any contact with the children per ¶¶ 3.1 – 3.8, which shall be returned to him after he has delivered the children back to their mother. The individual holding the passport shall notify the mother by e-mail or fax within five minutes of receiving or returning it.

(d) Removal of the Children. Prior to Rohan's 5th birthday, the father or anyone acting under his direction or control or as his designee shall not remove the children from Pinellas and Hillsborough Counties, Florida. After Rohan reaches age 5, the children may travel to visit their father, provided that is within the United States. The father or anyone acting under his direction or control or as his designee shall not remove the children from the United States.

(e) Children's Passports/Birth Certificates. The father or anyone acting under his direction or control or as his designee is not authorized to have or request new passports, visas, Indian PIO cards or birth certificates for the children (U.S. or any other country's). The mother shall retain the children's passports.

(f) Father's Citizenship. The father shall notify the mother and the court having jurisdiction over the children of any changes to his citizenship status, including regaining Indian citizenship, getting dual citizenship, or renouncing U.S. citizenship.

(g) Telephone contact. The father may contact the children by telephone three times each week on Mondays, Thursdays and Sundays between the hours of 7:30 p.m. to 8:30 p.m. Eastern Time. The mother may contact the children by telephone three times each week on Mondays, Thursdays and Sundays between the hours of 7:30 p.m. to 8:30 p.m. Eastern Time when the children are with the father. The calls may be up to ten minutes in duration until each child is four, and thereafter may be up to 20 minutes. The children shall have complete access to make phone calls to either parent if they so desire.

PARENTING PLAN (PPP, PPT, PP) - WPF DR 01.0400
(9/2001) - RCW 26.09.181; .187; .194 - Page 6

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(h) Contact with Maternal Grandfather. The mother shall not allow the children to be with Nicolas Valenti unless a third party adult is present.

VII. DECLARATION FOR PROPOSED PARENTING PLAN

Does not apply.

VIII. ORDER BY THE COURT

It is ordered, adjudged and decreed that the parenting plan set forth above is adopted and approved as an order of this court.

WARNING: Violation of residential provisions of this order with actual knowledge of its terms is punishable by contempt of court and may be a criminal offense under RCW 9A.040.060(2) or 9A.40.070(2). Violation of this order may subject a violator to arrest.

When mutual decision making is designated but cannot be achieved, the parties shall make a good faith effort to resolve the issue through the dispute resolution process.

If a parent fails to comply with a provision of this plan, the other parent's obligations under the plan are not affected.

Dated: September ²¹ 5, 2003


JUDGE MARY ROBERTS

Presented by:
GORDON W. WILCOX, INC. P.S.

Approved for entry:
HARRIS, MERICLE & WAKAYAMA, PLLC

By _____
Gordon W. Wilcox
Attorney for Petitioner
WSBA No. 75

By _____
George W. Schoonmaker
Attorney for Respondent
WSBA No. 624

APPENDIX E

▷

Court of Appeals of Washington,
Division 1.
In re the Marriage of Lynette KATARE, Respondent,
v.
Brajesh KATARE, Appellant.
No. 53231-6-I.

Dec. 20, 2004.
Publication Ordered Jan. 20, 2005.

Background: In child custody dispute, the Superior Court, King County, Mary E. Roberts, J., adopted restrictions designed to prevent father from taking his children out of the United States, and to limit his visits to a two-county area in the state where mother and children would relocate. Father appealed.

Holdings: The Court of Appeals, Schindler, J., held that:

- (1) trial court's ambiguous and contradictory findings regarding risk of abduction required remand to trial court to clarify its intent regarding foreign travel restrictions;
- (2) evidence failed to support prohibition on father's removing children from two-county area in state where mother and children were to relocate; and
- (3) evidence supported denial of father's request to allow him to make up visitation time when he was unable to travel to visit children.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Child Custody 76D ↪924

76D Child Custody
76DXIII Appeal or Judicial Review
76Dk924 k. Determination and Disposition of Cause. Most Cited Cases
Trial court's ambiguous order in child custody dispute, with regard to risk that father would abduct his two children and take them to his native country of India, required Court of Appeals to remand case to trial court to clarify the legal basis for its decision to impose restrictions to prevent father from taking children to

India, and, if appropriate, to make necessary findings; although trial court stated that father appeared to present no serious threat of abducting the children, trial court's findings addressed concerns about the risk of abduction, and trial court imposed limitations to prevent abduction which were supported by the court's findings. West's RCWA 26.09.191.

[2] Child Custody 76D ↪921(3)

76D Child Custody
76DXIII Appeal or Judicial Review
76Dk913 Review
76Dk921 Discretion
76Dk921(3) k. Visitation. Most Cited

Cases

The Court of Appeals reviews a trial courts decision on the provisions of a parenting plan for abuse of discretion.

[3] Child Custody 76D ↪921(3)

76D Child Custody
76DXIII Appeal or Judicial Review
76Dk913 Review
76Dk921 Discretion
76Dk921(3) k. Visitation. Most Cited

Cases

A trial court abuses its discretion if its decision on the provisions of a parenting plan is manifestly unreasonable or based on untenable grounds or untenable reasons.

[4] Child Custody 76D ↪921(3)

76D Child Custody
76DXIII Appeal or Judicial Review
76Dk913 Review
76Dk921 Discretion
76Dk921(3) k. Visitation. Most Cited

Cases

A trial court's decision on the provisions of a parenting plan is "manifestly unreasonable," so as to constitute an abuse of discretion, if it is outside the range of acceptable choices, given the facts and the applicable legal standard.

[5] Child Custody 76D ↪921(3)

76D Child Custody

76DXIII Appeal or Judicial Review

76Dk913 Review

76Dk921 Discretion

76Dk921(3) k. Visitation. Most Cited

Cases

Child Custody 76D ↪922(4)

76D Child Custody

76DXIII Appeal or Judicial Review

76Dk913 Review

76Dk922 Questions of Fact and Findings of

Court

76Dk922(4) k. Visitation. Most Cited

Cases

A trial court's decision on the provisions of a parenting plan is based on untenable grounds, so as to constitute an abuse of discretion, if the factual findings are unsupported by the record, and it is based on untenable reasons, likewise constituting such an abuse, if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

[6] Appeal and Error 30 ↪893(1)

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate

Court

30k893(1) k. In General. Most Cited

Cases

Statutory interpretation is a question of law that the Court of Appeals reviews de novo.

[7] Child Custody 76D ↪216

76D Child Custody

76DV Visitation

76Dk215 Visitation Conditions

76Dk216 k. In General. Most Cited Cases

Child Custody 76D ↪511

76D Child Custody

76DVIII Proceedings

76DVIII(C) Hearing

76Dk511 k. Decision and Findings by

Court. Most Cited Cases

The trial court may not impose limitations or restrictions in a parenting plan in the absence of express findings under statute authorizing such limitations, and any limitations or restrictions imposed must be reasonably calculated to address the identified harm. West's RCWA 26.09.191.

[8] Child Custody 76D ↪922(2)

76D Child Custody

76DXIII Appeal or Judicial Review

76Dk913 Review

76Dk922 Questions of Fact and Findings of

Court

76Dk922(2) k. Credibility of Witnesses.

Most Cited Cases

Credibility determinations in a child custody dispute are the province of the trier of fact and will not be disturbed on appeal.

[9] Child Custody 76D ↪474

76D Child Custody

76DVIII Proceedings

76DVIII(B) Evidence

76Dk466 Weight and Sufficiency

76Dk474 k. Geographical Limitations.

Most Cited Cases

Evidence in child custody dispute failed to support trial court's prohibition on the father's removing the children from a two-county area in the state where the mother and children were to relocate until the youngest child turned five; trial court's stated reason for the two-county restriction, that the children were too young to travel any farther during a three-day visit with the father, was not supported by any evidence in the record and was based on untenable grounds.

[10] Child Custody 76D ↪210

76D Child Custody

76DV Visitation

76Dk209 Physical Custody Arrangements

76Dk210 k. In General. Most Cited Cases

Evidence supported the trial court's denial, in child custody dispute, of father's request to add a provision to the parenting plan to allow him to make up visita-

tion time when he was unable to travel to the state where mother and children planned to relocate; father sought five-day visits following months in which he was unable to visit the children for his normal three-day visit, but undisputed evidence in the record indicated that five-day periods away from their mother, as the primary caretaker, would not be in the children's best interests, given their young age.

[11] Child Custody 76D ↪216

76D Child Custody
76DV Visitation
76Dk215 Visitation Conditions
76Dk216 k. In General. Most Cited Cases

Child Support 76E ↪559

76E Child Support
76EXII Appeal or Judicial Review
76Ek559 k. Determination and Disposition of Cause. Most Cited Cases
Trial court's order in child custody dispute that father pay all costs for his long-distance travel to visit children in another state, rather than allocating costs in the same proportion as the basic child support calculation, was justified by trial court's awarding father all of the community property air miles; however, since trial court did not make specific findings to deviate from basic support obligation in the child support order, it was necessary to remand to trial court to clarify whether it intended to deviate from the requirement that each parent pay a proportionate share of the travel expenses. West's RCWA 26.19.080.

[12] Child Custody 76D ↪100

76D Child Custody
76DIII Incidents and Extent of Custody Award
76Dk100 k. In General. Most Cited Cases

Child Support 76E ↪149

76E Child Support
76EIV Amount and Incidents of Award
76Ek149 k. Extraordinary Expenses in General. Most Cited Cases
The statutory language is mandatory that long distance travel expenses are extraordinary expenses that are to be shared by the parents in the same proportion as the

basic child support obligation. West's RCWA 26.19.080.

[13] Child Custody 76D ↪100

76D Child Custody
76DIII Incidents and Extent of Custody Award
76Dk100 k. In General. Most Cited Cases

Child Support 76E ↪149

76E Child Support
76EIV Amount and Incidents of Award
76Ek149 k. Extraordinary Expenses in General. Most Cited Cases

Once the trial court in a child custody dispute determines that extraordinary expenses are reasonable and necessary, it is required to allocate them in proportion with the parents' income.
****45 *815 Gregory Mann Miller, Seattle, WA, for Appellant.**

***816 Catherine Wright Smith, Edwards Sieh Smith & Goodfriend, Gordon Wilson Wilcox, Seattle, WA, for Respondent.**

SCHINDLER, J.

Under RCW 26.09.191, a trial court has authority to impose limitations in a parenting plan. Brajesh Katare contends the trial court erred in adopting restrictions designed to prevent him from taking his children out of the United States and limiting his visits to a two-county area in Florida until the youngest child turns five despite its finding that the factors in RCW 26.09.191 did not apply. Brajesh also contends the court abused its discretion when it refused to order additional time with his children if he is unable to travel to Florida and the trial court erred when it required him to pay all the transportation expenses. Lynette Katare cross-appeals and argues the trial court abused its discretion in not finding Brajesh engaged in an abusive use of conflict under RCW 26.09.191(3)(e) and the trial court's findings support imposing the challenged conditions under RCW 26.09.191(3)(g).

The trial court entered inconsistent and contradictory findings regarding its concerns about the risk of abduction. Although the court concluded there was no basis for finding that the factors in RCW 26.09.191

justified imposing restrictions in the parenting **46 plan and Brajesh did not present a serious risk, the court imposed restrictions on Brajesh's visitation because of his threats to take the children to India and the irreversible consequences of abduction. We remand to the trial court to clarify its intent in imposing the passport and foreign-travel restrictions and if appropriate to enter findings to justify limitations it imposed. We conclude the provision in the parenting plan that prohibits Brajesh from removing the children from a two-county area in Florida was an abuse of discretion. We reverse that *817 restriction and remand to amend the parenting plan to allow Brajesh to take the children to Orlando. We affirm the trial court's decision to deny Brajesh's request for make up time. We remand for the trial court to clarify its intent and if appropriate amend the child support order to include findings that support a deviation requiring Brajesh to pay the travel expenses.

FACTS

Lynette and Brajesh Katare were married on November 25, 1995, in Clearwater, Florida, and have two children, Annika, born May 27, 2000, and Rohan, born September 20, 2001.^{FN1} On July 22, 2002, after approximately seven years of marriage, Lynette filed a petition for dissolution.

^{FN1}. We refer to the Katares by their first names to ensure clarity. No disrespect is intended.

Brajesh Katare was born and raised in India. He moved to Florida in 1989 to obtain a master's degree. All of his family members live in India. Lynette Katare was born and raised in Florida, and most of her family lives in Florida. Lynette and Brajesh met in Florida in 1992. Lynette was a student and Brajesh was employed in the computer industry. After Lynette and Brajesh married, they continued to live in Florida and in 1996, Lynette earned a master's in business administration. Both Lynette and Brajesh are very close to their families and maintained close contact with them during their marriage, including visits with Lynette's family in Florida, Brajesh's family visiting from India, and Lynette and Brajesh visiting Brajesh's family in India.

Lynette and Brajesh relocated to Washington State in 1999 when Microsoft hired Brajesh. Lynette did not

want to move to Washington and leave her family and friends. Brajesh insisted they move and Lynette eventually agreed. Lynette also worked for Microsoft in Washington until she became pregnant with Annika.

*818 Brajesh's job with Microsoft required a great deal of travel.^{FN2} IN 2002, HE SOUGHT a different position within microsoft because a back injury made traveling difficult. In April 2002, Microsoft offered Brajesh a position in Florida. Brajesh did not accept the job offer. In May 2002, when Microsoft offered Brajesh a two year position in India to supervise local operations, he accepted.

^{FN2}. According to testimony at trial, Brajesh traveled approximately 102 out of 365 days in 2002.

Brajesh and Lynette gave different accounts about the decision to accept the position and move to India. Lynette said Brajesh accepted the job before discussing it with her. She said she expressed concerns about security in India, being isolated and the children's health. According to Lynette, when she expressed her objections and concerns, Brajesh became very angry and threatened her. Lynette said Brajesh told her he would go to India and take the children with or without her and he would relocate even if it meant divorce. At one point, Brajesh told Lynette she could stay and he would take the children to India.

According to Brajesh, he was excited about the job in India because it was the best option for him in terms of professional advancement and avoiding extensive travel. He said he was frustrated with Lynette's unwillingness to go because he thought some of her concerns were not valid. He denied threatening to take the children to India without her.

As the deadline to move to India in September 2002 got closer, Lynette and Brajesh fought more about the move. In July 2002, Brajesh went on a two-week business trip to India to prepare for the family's move. While Brajesh was gone, Lynette filed for dissolution and obtained an ex parte restraining order. In support of the restraining**47 order, Lynette told the court Brajesh threatened to take the children to India. After Brajesh returned, he and Lynette agreed to a temporary parenting plan that required Lynette and a court-approved supervisor to attend the twice-weekly

*819 visits with the children and Brajesh at specific locations.^{FN3} Lynette and Brajesh also agreed to appoint Margo Waldroup to conduct a parenting assessment and make recommendations regarding a parenting plan.

FN3. The week after the temporary parenting plan was entered, Brajesh moved to amend the temporary parenting plan to allow his visits to occur anywhere in King County, including at his apartment, to exclude Lynette from the visits, and to order her to facilitate the scheduled phone conversations with the children. The court granted the motion to expand the location for Brajesh's visits to a portion of King County and set a schedule to reduce the number of visits Lynette could attend.

In October 2002, Lynette filed a notice of her intent to relocate with the children to Florida. After Brajesh objected, the relocation decision was postponed to the dissolution trial in June 2003.

In fall 2002, Waldroup completed her parenting assessment and submitted a report with her recommendations. In Waldroup's opinion, the children were close to both parents but they were closer to Lynette as the primary caregiver. Waldroup's report included an extensive discussion of the threats to abduct the children and the risk of abduction. While Brajesh denied making threats, Waldroup stated Lynette's allegation that Brajesh threatened to abduct the children was corroborated by two witnesses. But in Waldroup's opinion, no evaluation could predict whether Brajesh would abduct the children.

Waldroup recommended that the twice-weekly visitation schedule established in the temporary parenting plan continue for a few months before adding overnight visits, and that Lynette no longer attend the visits. If Lynette was allowed to relocate to Florida with the children, Waldroup recommended Brajesh have three consecutive days with the children each month, adding staying overnight during the three day periods after Rohan turned two. Waldroup recommended Brajesh's vacation time coincide with school vacations when Annika reaches school age. While the monthly visits would occur in Florida, the vacation time with the children could occur in Florida or Seattle. Waldroup also recommended that the current

requirement *820 of supervised visitation not be lifted until the children's passports were secured, and suggested that perhaps Brajesh's and the children's passports could be added to a watchlist.

Brajesh moved to modify the temporary parenting plan to eliminate supervision based on Waldroup's report. His motion was granted subject to the requirement that his attorney hold his passport during his visitation.

A five day long trial was held in June 2003. The primary issues at trial were Lynette's intent to relocate with the children to Florida and Lynette's request that the court impose restrictions in the parenting plan. Several people testified, including the parties, Margo Waldroup, the parenting evaluator, and Marya Barey,^{FN4} the Director of Family Court Services.

FN4. Barey testified by deposition.

Lynette testified Brajesh repeatedly threatened to take the children to India without her and Brajesh was still planning on moving to India. Lynette also testified that during discovery, Brajesh requested copies of the applications for the children's passports and Indian tourist visas, copies of passport pages and Indian tourist visas from their passports, and copies of the children's immunization records. Lynette also said she found an application for an Indian PIO card (similar to a U.S. "green card") on Brajesh's computer. Lynette argued this evidence showed Brajesh was planning to take the children to India. Lynette also said she was concerned about the possibility that Brajesh might abduct the children to India because India is not bound by the Hague Convention on International Child Abduction, so it would be difficult if not impossible for her to get the children back to the United States. Brajesh denied making threats. Brajesh said the job in India was no longer a possibility **48 because the role he would have played there was no longer necessary, but he acknowledged that he was supervising employees there and traveling back and forth several times a year. Waldroup testified consistent with her *821 report about Brajesh's threats to abduct the children and her opinions and recommendations.

The trial court carefully analyzed the statutory factors for relocation and decided Lynette should be allowed to relocate to Florida with the children.^{FN5} The court followed Waldroup's recommendations and adopted a

parenting plan that established a residential schedule allowing Brajesh three consecutive days, including overnights, each month for residential time with the children in Florida. The court imposed limitations on Brajesh's residential time with the children designed to prevent Brajesh from taking the children to India, including: (1) prohibiting Brajesh from taking the children out of a two-county area in Florida until Rohan turns five, and prohibiting him from taking the children out of the country until they turn 18; (2) prohibiting Brajesh from holding or obtaining certain documents, including passports and birth certificates, for the children; (3) requiring Brajesh to surrender his passport to a neutral third party for the duration of each visit; and (4) requiring Brajesh to notify Lynette and the court of any change in his citizenship status.

FN5. The court entered an order setting forth detailed findings to support the statutory factors for relocation.

In the decree, the court awarded all of the community's 625,000 air miles to Brajesh taking into account that he may use some of the miles to travel to Florida for visitation time with the children. In the child support order, the court allocated the basic support obligation 65 percent to Brajesh and 35 percent to Lynette, but required Brajesh to pay for all the travel expenses until Rohan turns five.

In his motion to reconsider, Brajesh challenged the limitations on the location of his residential time and the passport controls. Brajesh also asked the court to add a provision to the parenting plan that would allow him to make up missed visits and to apportion the transportation expenses for visitation in Florida in the same proportion as the standard support. The court denied Brajesh's motion for *822 reconsideration and his request to order make up visitation time and to apportion travel expenses.

Brajesh appeals the provisions in the parenting plan that impose conditions on visitation with his children in Florida, the child support order requiring him to be solely responsible for transportation expenses until Rohan turns five, and denial of his request for make up visitation time if he is unable to travel to Florida for a scheduled visit.

Lynette files a conditional cross-appeal and argues the court erred when it found no RCW 26.09.191 factors

were present.^{FN6}

FN6. Lynette also argues that the trial court's findings support imposing the restrictions under RCW 26.09.191(3)(g).

ANALYSIS

Parenting Plan Provisions

[1] Brajesh argues the trial court erred when it imposed limitations on his residential time with Annika and Rohan. He contends there was no legal basis to impose the limitations because the court expressly found the factors to justify imposing restrictions under RCW 26.09.191 did not apply. He also contends that because the court found there was "no serious threat" that he would abduct the children, the court's findings do not support limitations or restrictions under RCW 26.09.191.^{FN7}

FN7. CP at 168.

[2][3][4][5] We review a trial court's decision on the provisions of a parenting plan for abuse of discretion. In re the Marriage of Littlefield, 133 Wash.2d 39, 46, 940 P.2d 1362 (1997). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. Littlefield, 133 Wash.2d at 46-47, 940 P.2d 1362. 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**49 grounds if the factual findings are unsupported by the record; it is based *823 on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. Id. at 47, 940 P.2d 1362.

Relying on Troxel v. Granville, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), In re Custody of Smith, 137 Wash.2d 1, 15, 969 P.2d 21 (1998), and State v. Ancira, 107 Wash.App. 650, 654, 27 P.3d 1246 (2001), Brajesh argues the limitations in the parenting plan violate his fundamental liberty interest in the care, custody and control of his children because no compelling interest for restricting his fundamental rights is supported by the record. But the cases Brajesh relies on do not support his argument that a parenting plan that complies with the statutory requirements to

promote the best interests of the children raises an issue of constitutional magnitude or violates a parent's constitutional rights.^{FN8}

FN8. Similarly, Brajesh has failed to cite any authority that supports his contention that the clear and convincing standard of proof should be met before a trial court can impose any limitations on a parent's exercise of residential time. (He cites only Santosky v. Kramer, 455 U.S. 745, 756, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (clear and convincing evidence was required for termination of parental rights), Nguyen v. State Dep't of Health Medical Quality Assurance Comm'n, 144 Wash.2d 516, 523-27, 29 P.3d 689 (2001) (clear and convincing evidence required when loss of medical license is at stake), and In re Parentage of C.A.M.A., 120 Wash.App. 199, 84 P.3d 1253 (2004) (clear and convincing evidence standard applies in third-party visitation context).) Here, Brajesh's parental rights were not terminated and his residential time with his children was not limited; the limitations imposed were intended to protect the best interests of the children and do not raise constitutional issues.

Brajesh argues the limitations imposed on his residential time violate the requirements of the Parenting Act. He contends the limitations were imposed without regard to the factors in RCW 26.09.187(3) and the best interests of the children under RCW 26.09.002, and they are not justified under RCW 26.09.191.

The trial court must consider a number of provisions in the Parenting Act in adopting a parenting plan, including the guidelines set forth in RCW 26.09.187(3), which must be read in conjunction with RCW 26.09.184 (setting forth the objectives and required contents of a *824 permanent parenting plan), RCW 26.09.002 (stating the policy of the Parenting Act), and RCW 26.09.191 (setting forth limiting factors which require or permit restrictions upon a parent's actions or involvement with a child). Littlefield, 133 Wash.2d at 50, 940 P.2d 1362.

Brajesh contends that under RCW 26.09.002, the existing pattern of interaction between a parent and child may only be altered when specific findings es-

tablish that the changes are necessary to protect the child. He claims the limitations in the parenting plan are unjustified departures from the previous patterns of his interaction with his children.

RCW 26.09.002 provides, in part:

[T]he best interests of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.

The Court in In re the Marriage of Kovacs, 121 Wash.2d 795, 854 P.2d 629 (1993), rejected the argument that the existing pattern of interaction may be changed only when it is harmful to the child. Instead, the Court held that when setting a residential schedule under RCW 26.09, the best interests of the child is to be determined with reference to the seven factors in RCW 26.09.187(3)(a).^{FN9} **50 There is no requirement in RCW 26.09.002 for specific findings. The limitations do not violate RCW 26.09.002.

FN9. The seven factors are:

- (i) The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
- (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
- (iii) Each parent's past and potential for future performance of parenting functions;
- (iv) The emotional needs and developmental level of the child;
- (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;

(vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and

(vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

RCW 26.09.187(3)(a).

*825 Brajesh contends a court may impose restrictions or limitations on a parent's residential time only if the court expressly finds there are factors or conduct that is adverse to the best interest of the child. He argues that because the trial court concluded no RCW 26.09.191 factors were present, there was no legal basis to impose limitations on his residential time.

[6] Whether RCW 26.09.191 factors must be present before limitations may be imposed on residential provisions of a parenting plan is a question of statutory interpretation. Statutory interpretation is a question of law this court reviews de novo. Berger v. Sommeland, 144 Wash.2d 91, 104-05, 26 P.3d 257 (2001).

RCW 26.09.191(1) and (2) are mandatory provisions that require the trial court to restrict a parent's conduct or involvement with the child, while RCW 26.09.191(3) is a discretionary provision that permits a trial court to restrict a parent's actions. RCW 26.09.191(1) prohibits a court from requiring mutual decision-making or dispute resolution other than court action if certain factors are present. RCW 26.09.191(2) requires a court to limit a parent's residential time with a child if any factors listed under that section are present. RCW 26.09.191(3) allows a court to limit any provision of a parenting plan if the court finds a parent's involvement or conduct may have an adverse affect on the child's best interest and any of the factors in RCW 26.09.191(3) are present.^{FN10} Under RCW 26.09.191(3):

FN10. While under the mandatory provisions of RCW 26.09.191(1) and (2) the court cannot allow dispute resolution and decision making provisions, the same result is not required for the discretionary factors in RCW 26.09.191(3). See, e.g., RCW 26.09.187(1) (limiting dispute resolution procedures

where any .191 factor applies), RCW 26.09.187(2) (requiring consideration of the presence of any .191 factor in determining what type of decision-making authority to provide). For factors under RCW 26.09.191(3), the trial court has the discretion to impose dispute resolution and decision-making provisions that are in the best interests of the child.

*826 A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist:

- (a) A parent's neglect or substantial nonperformance of parenting functions;
- (b) A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in RCW 26.09.004;
- (c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;
- (d) The absence or substantial impairment of emotional ties between the parent and the child;
- (e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;
- (f) A parent has withheld from the other parent access to the child for a protracted period without good cause; or
- (g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

[7] We conclude the court may not impose limitations or restrictions in a parenting plan in the absence of express findings under RCW 26.09.191.^{FN11} We also conclude that any limitations or restrictions imposed must be reasonably calculated to address the identified harm.

FN11. In her cross-appeal, Lynette contends the trial court was not required to enter RCW

26.09.191 findings because the limitations it imposed are not .191 restrictions. She relies on the boilerplate language from the parenting plan form to argue RCW 26.09.191 applies only where a court limits or prohibits a parent's contact with the children and the right to make decisions for the children. But RCW 26.09.191 is not so limited.

Lynette argues the evidence established Brajesh was planning to remove the children **51 from the country. Lynette testified Brajesh repeatedly threatened to take the children to India without her and Brajesh was still planning*827 on moving to India. Lynette also testified that while their dissolution was pending, Brajesh requested copies of documents he would need to obtain immigration documents for the children. Lynette said she was especially concerned about the possibility that Brajesh might abduct the children to India because India is not bound by the Hague Convention on International Child Abduction.

Brajesh denied making threats. He testified that the job in India was no longer available but he was supervising employees there and traveling back and forth several times a year.

Waldroup addressed Brajesh's threats to take the children to India and the risk of abduction in the materials she submitted to the court and in her testimony at trial. Waldroup's report said:

No evaluation of this type can tell whether the father will abduct the children. I am not aware of any criteria that can predict if such would occur. The Katar's [sic] situation is somewhat unusual in that there is not only the allegation of abduction but corroboration of two witnesses hearing the threat that Brajesh would take the children to India "with our [sic] without" their mother. As Brajesh denies these statements it is impossible to evaluate whether the statements were said in crisis to pressure the mother to move to India, rather than being his literal intent or whether Brajesh truly intended to remove the children from the country without the mother's consent.^{FN12}

FN12, Exhibit 25 at 18.

Waldroup's recommendations also addressed the risk of abduction and restrictions that should be imposed.

There is no way to know if the father is at risk of taking the children to India and therefore I cannot recommend restrictions, or lack of them, based on the allegations. I do believe the father made the threats to take the children to India without Lyn, and had likely done so in an effort to coerce Lyn into moving to India. Whether he would take the children at this time to "punish" Lyn remains unknown.

*828 The current restrictions of supervised visitation should certainly not be lifted until the children's passports have been secured and the attorneys should pursue whether the father and children's passports [sic] numbers can be placed on a watch list with the appropriate agency (Customs and/ or Immigration). Consideration could also be given to the father posting a bond so that should abduction occur, the mother would have access to enough fund [sic] to retrieve the children from India.^{FN13}

FN13, Exhibit 25 at 19.

Waldroup testified that she consulted colleagues and research literature regarding the risk of abduction and concluded there were no criteria to predict whether someone who threatened to abduct children would actually do so. Waldroup said that because she was unable to predict the likelihood that Brajesh would abduct the children, the court had to decide whether the risk of abduction was significant enough to impose the restrictions she recommended.

Lynette also presented evidence and argued that Brajesh engaged in a pattern of emotional abuse of a child that required restrictions under RCW 26.09.191(1)(b) and that Brajesh's involvement or conduct may have an adverse effect on the children's best interests permitting restrictions under RCW 26.09.191(3) because of his negligent or substantial nonperformance of parenting functions (RCW 26.09.191(3)(a)), the absence or substantial impairment of emotional ties between him and the children (RCW 26.09.191(3)(d)), and his abusive use of conflict (RCW 26.09.191(3)(e)).

[8] The court in its oral decision found Brajesh had not engaged in a pattern of emotional abuse of a child or abusive use of conflict under RCW 26.09.191. The court then addressed the risk of abduction and whether restrictions should be imposed to prevent Brajesh

from taking the children to India.

***52** I gave a long and careful consideration to the issue of the risk of abduction and confess today being concerned about this. I'm ***829** not persuaded, based on all the evidence presented, including that of the expert witnesses who were called to testify, that Mr. Katare presents a serious threat of abducting the children. Nonetheless, if I'm wrong on this the consequences are incredibly serious and I'm mindful about that. I'm going to impose some restrictions in the parenting plan that will be designed to address this issue, and I hope that everything that has been brought to this Court, which I think indicates that, [sic] there is not a serious risk of abduction [sic] turns out to be the truth.^{FN14}

FN14, RP (July 7, 2003) at 10.

The trial court entered findings and conclusions regarding the specific RCW 26.06.191 sections Lynette raised, including RCW 26.09.191(1)(b) and RCW 26.09.191(3)(a), (d) and (e), but it did not address the risk of abduction under RCW 26.09.191.^{FN15} In the parenting plan, the court found there was no basis for restrictions under RCW 26.09.191. The Parenting Order provides:

FN15. Lynette argues in her cross appeal that the trial court erred in finding Brajesh did not engage in the abusive use of conflict for purposes of RCW 26.09.191(3)(e). Lynette's argument consists wholly of a recitation of the evidence that would support a finding in her favor. But she does not dispute that the courts finding to the contrary was supported by substantial evidence. Although Lynette presented evidence to support her argument, Brajesh presented contrary evidence and the court made a credibility determination in his favor. Credibility determinations are the province of the trier of fact and will not be disturbed on appeal. *In re Marriage of Olivares*, 69 Wash.App. 324, 336, 848 P.2d 1281 (1993).

Lynette also assigns error to the trial court's findings that Brajesh did not engage in a pattern of emotional abuse under RCW 26.09.191(1)(b) and that he did not have a long-term emotional impairment under

RCW 26.09.191(3)(b), but she does not present any argument to support these assignments of error. This argument is therefore abandoned. See RAP 10.3(a)(5).

II. BASIS FOR RESTRICTIONS

Under certain circumstances, as outlined below, the court may limit or prohibit a parent's contact with the children and the right to make decisions for the children.

2.1 PARENTAL CONDUCT (RCW 26.09.191(1), (2)). Does not apply.

2.2 OTHER FACTORS (RCW 26.09.191(3)). Does not apply.^{FN16}

FN16. CP at 615.

***830** Although the trial court found Brajesh "appears to present no serious threat of abducting the children,"^{FN17} it imposed limitations in the parenting plan to prevent Brajesh from taking the children to India. While Brajesh focuses on the court's findings that he presents no serious threat of abducting the children, the court also entered findings that limitations were warranted to prevent Brajesh from abducting the children based on the evidence.

FN17. CP at 168.

2.20.1 India is not a signator to the Hague Convention on International Child Abduction.

2.20.2 Based on the evidence, including the testimony of expert witnesses, the husband appears to present no serious threat of abducting the children. Nonetheless, under the circumstances of this case, given the ages of the children, the parties' backgrounds, ties to their families and communities, and history of parenting, the consequences of such an abduction are so irreversible to warrant limitations on the husband's residential time with the children, including location of exercise of residential time, surrender of his passport, notification of any change of his citizenship status, and prohibition of his holding or obtaining certain documents (i.e., passports, birth certificates) for the children. The mother shall retain the children's passports.^{FN18}

FN18. CP at 168.

The court also found “[l]imitations on the parents' residential time with the children to a particular location is [sic] also justified by the age of the children.”
FN19

FN19. CP at 168.

These findings support restrictions under RCW 26.09.191(3)(g). But the court's finding **53 in the parenting plan that there is no basis to impose restrictions under RCW 26.09.191 creates an ambiguity. The trial court has authority to impose limitations or restrictions under RCW 26.09.191(3)(g) to prevent the risk of abduction. Brajesh does not dispute that the restrictions imposed by the parenting plan would be permissible if RCW *831 26.09. 191(3) factors were present. But he contends the trial court's conclusion that there was no basis to impose restrictions under RCW 26.09.191 cannot be disturbed on appeal. In the absence of some indication in the record that the court's failure to make a specific finding was intentional, it is inappropriate to treat the absence of a finding as the equivalent of a negative finding on the issue. Douglas Northwest, Inc. v. Bill O'Brien & Sons Construction, Inc., 64 Wash.App. 661, 682, 828 P.2d 565 (1992). Here, the trial court's findings of fact only addressed the specific portions of RCW 26.09.191(2) and (3) raised by Lynette. We do not interpret the general statement in the parenting plan that RCW 26.09.191(3) “does not apply” as a finding on whether the risk of abduction is a factor justifying limitations under RCW 26.09.191(3)(g).
FN20

FN20. CP at 615.

Although the trial court stated Brajesh “appears to present no serious threat of abducting the children,”
FN21 it addressed concerns about the risk of abduction and imposed limitations to prevent abduction. Whether the court found there was a risk of abduction that justified the imposition of limitations is at least ambiguous. Indeed, such a finding is implicit in the trial court's discussion of the risk of abduction, the findings it made and the limitations it imposed. Except for the inconsistent entry that states the RCW 26.09.191 basis for restrictions does not apply, the court's findings support restrictions under RCW 26.09.191(3)(g). Rather than speculate, we remand for

the trial court to clarify the legal basis for its decision to impose restrictions to prevent Brajesh from taking the children to India and if appropriate to make the necessary findings.
FN22

FN21. CP at 168.

FN22. Lynette cites out of state cases In re the Marriage of Long v. Ardestani, 241 Wis.2d 498, 624 N.W.2d 405 (2001), Abouzahr v. Matera-Abouzahr, 361 N.J.Super. 135, 824 A.2d 268 (2003), Soltanieh v. King, 826 P.2d 1076 (Utah App.1992), and Bergstrom v. Bergstrom, 320 N.W.2d 119 (N.D.1982), as examples of cases that have held the best interests of the child governs whether conditions should be placed on a parent's residential time where there is a risk of abduction to a non-Hague Convention country. In all four cases the dispositive factor was the trial court's factual finding about the basis for imposing the restrictions. Where the likelihood of abduction was greater, based on the factual circumstances in the case, the courts imposed restrictions to prevent abduction. See, e.g., Soltanieh and Bergstrom. Where abduction was unlikely, the courts declined to impose preventive measures. See, e.g., Abouzahr and Long.

[9] *832 Unlike the passport requirements and the prohibition on removing the children from the United States, we conclude the prohibition on removing the children from a two-county area in Florida until Rohan turns five is not logically related to the risk of abduction. Brajesh argues he should be allowed to take the children outside the two-county area to Orlando to visit Disney World. The apparent source of the two-county limitation is Lynette's proposed parenting plan. The court's stated reason for the two-county restriction, namely, that the children were too young to travel any farther during a three day visit, is not supported by any evidence in the record. We conclude the two-county limitation was based on untenable grounds. On remand, the court shall allow Brajesh to take the children to Orlando during his visits with them in Florida.

Make Up Visitation Time

[10] Brajesh argues the trial court abused its discretion

when it denied his request on reconsideration to add a provision to the parenting plan to allow him to make up visitation time when he is unable to travel to Florida for his regularly scheduled visitations. Brajesh asked the court to provide for a five day visitation (including overnights) in the month following the missed visit, and he agreed to limit the make up clause to two years, until Annika is in school.^{FN23} The trial **54 court denied Brajesh's request.^{FN24}

FN23. The proposed provision reads:

In the event that the father is unable to have residential time during one of the monthly three-day periods provided for above in this Parenting Plan, he may have make-up time constituting two additional overnights, for a total of five days, provided that this make-up time shall take place the month following the month when residential time was missed.

CP at 582.

FN24. See CP at 630-31 (order denying reconsideration in part), 637-38 (final parenting plan).

*833 Brajesh contends that because the court found relocation would have a severe impact on his ability to bond with his children, and because it is in the children's best interests to learn about their Indian cultural heritage, it was an abuse of discretion to deny his request for make up visits. But there was undisputed evidence in the record that five day visits would not be in the children's best interests, especially within the first two years after entry of the parenting plan.^{FN25} The trial court did not abuse its discretion when it denied the request for a make up time provision.

FN25. Waldroup testified that because the children were so young, it would be detrimental for them to be away from their primary caretaker (Lynette) for long periods of time. She said that if the children were away from their mother for more than a few days, they would start to feel abandoned and angry and would start acting out. Waldroup also said that because Rohan was so young (20 months at the time of trial), he did not have the verbal ability to understand reassuring

words and would therefore have a hard time processing separation from his mother for more than a couple of days at a time.

Long-Distance Travel Expenses

[11] Brajesh argues the trial court erred in ordering him to pay all the costs for long-distance travel to visit his children in Florida until Rohan turns five. In the child support order, each parent was ordered to pay the proportional share of expenses, 65 percent to Brajesh and 35 percent to Lynette. Brajesh contends that under RCW 26.19.080(3), long-distance travel expenses must be allocated in the same proportion as the basic child support calculation.

[12][13] Long distance travel expenses are considered extraordinary expenses not accounted for in the basic child support obligation. RCW 26.19.080(1). Under RCW 26.19.080(3), "[t]hese [extraordinary] expenses shall be shared by the parents in the same proportion as the basic child support obligation." This statutory language is mandatory. *In re Paternity of Hewitt*, 98 Wash.App. 85, 988 P.2d 496 (1999).^{FN26} Once the trial court determines that extraordinary *834 expenses are "reasonable and necessary,"^{FN27} it is required to allocate them in proportion with the parents' income. *Murphy*, 85 Wash.App. at 349, 932 P.2d 722.^{FN28}

FN26. See also *Murphy v. Miller*, 85 Wash.App. 345, 349, 932 P.2d 722 (1997); *In re Marriage of Scanlon*, 109 Wash.App. 167, 34 P.3d 877 (2001), review denied, 147 Wash.2d 1026, 62 P.3d 889 (2002).

FN27. RCW 26.19.080(4) grants trial courts the discretion to determine the "reasonableness and necessity" of extraordinary expenses.

FN28. The rule requiring apportionment of long-distance travel expenses applies where the parent must travel to visit the child because the child is too young to travel. *Hewitt*, 98 Wash.App. at 89, 988 P.2d 496.

This court recognizes an exception to the rule requiring allocation in the same proportion as the basic child support obligation where findings support a deviation.

In re Marriage of Casey, 88 Wash.App. 662, 967 P.2d 982 (1997). In *Casey*, the trial court entered a child support order that deviated from the basic support obligation for the mother and imposed 100 percent of the travel expenses on the father because of a significant disparity in the parents' incomes. On appeal, this court affirmed the child support order, including its allocation of 100 percent of the travel costs to the father, because the trial court made the findings to support the deviation from the basic support obligation.

Here, in the dissolution decree, the trial court awarded all of the community property air miles to Brajesh. "The husband is awarded as his separate property the following property: ... All air miles in his name, taking into account that he may use some of those miles to travel for his residential time with the children." ^{FN29} The Order of Child Support states that the amount ordered does not deviate from the standard calculation and that a deviation was not requested. But the **55 court ordered Brajesh and Lynette to pay for day care and transportation expenses in proportion to their share of income, except that "[t]ransportation expenses for the children's residential time with the father prior to Rohan's 5th birthday shall be the father's obligation using the air miles he is awarded in the Decree of Dissolution and accrues due to his work." ^{FN30} In its oral *835 decision the court explained why it struck the reference to air miles: "If he wants to use those air miles, that is great. But he doesn't have to use them." ^{FN31}

^{FN29}. CP at 172.

^{FN30}. CP at 147 (strikethrough in original).

^{FN31}. RP 7/30/03 at 33.

Below, Brajesh challenged the court's ruling on travel expenses and argued that, under *Hewitt*, "to the extent that the father has to travel to Florida because the children can't come here, that the mother would share in those travel expenses. If he can't use air miles, she should share 65/35 in his expense." ^{FN32} The court responded,

^{FN32}. RP 7/30/03 at 34.

I don't have any evidence before me that he can't use

the air miles. Everything that came before me during trial indicated that that worked just great for him. And that is why all the miles were awarded to him so he had access to them. So I am not going to change that with regard to his transportation. And I made a specific finding with regard to that. ^{FN33}

^{FN33}. RP 7/30/03 at 34.

On appeal, Brajesh argues the trial court erred when it imposed 100 percent of the transportation expenses on him because, under *RCW 26.19.080(3)*, a court does not have discretion to deviate from the standard apportionment for extraordinary expenses. Notably absent from Brajesh's argument, however, is any reference to the trial court's decision to award to him of all of the community air miles to travel to Florida to visit the children.

Although the trial court did not make findings to deviate from the basic support obligation in the child support order, it made findings in the dissolution decree that would support a deviation. ^{FN34} In the dissolution decree, the trial court found the community owned 625,000 air miles, which the court awarded to Brajesh, "taking into account that he may use some of those miles to travel for his *836 residential time with the children." ^{FN35} Although the court's findings in awarding all the community property air miles to Brajesh support a deviation in the child support order, the child support order does not contain these findings. We remand for the trial court to clarify whether it intended to deviate in the child support order from the requirement that each parent pay a proportionate share of the travel expenses.

^{FN34}. This approach is consistent with this court's suggestion in *In re Marriage of Stenshoel*, 72 Wash.App. 800, 866 P.2d 635 (1993), that in some cases it may be appropriate to consider property distribution payments pursuant to dissolution order a resource to be taken into account when determining whether to deviate from a child support schedule.

^{FN35}. CP at 172.

CONCLUSION

On remand, the trial court should clarify its intent in imposing the passport and foreign-travel restrictions and whether the risk of abduction was a factor justifying limitations under RCW 26.09.191(3)(g). We conclude the trial court's decision to prohibit Brajesh from removing the children from the two-county area in Florida is an abuse of discretion. We reverse and remand for the court to amend the parenting plan to allow Brajesh to take his children to Orlando. We affirm the trial court's decision to deny Brajesh's request to make up missed visitation time. Finally, we remand for the trial court to clarify whether it intended to deviate from the requirement that each parent pay a proportionate share of the travel expenses in the child support order.

WE CONCUR: BECKER and APPELWICK, JJ.
Wash.App. Div. 1,2004.
Katare v. Katare
125 Wash.App. 813, 105 P.3d 44

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APPENDIX F

Not Reported in P.3d, 140 Wash.App. 1041, 2007 WL 2823311 (Wash.App. Div. 1)
 (Cite as: 2007 WL 2823311 (Wash.App. Div. 1))

H

NOTE: UNPUBLISHED OPINION, SEE RCWA
 2.06.040

Court of Appeals of Washington,
 Division 1.

In re the Marriage of Lynette KATARE, Respondent,
 v.
 Brajesh KATARE, Appellant.
 No. 59061-8-1.

Oct. 1, 2007.

Appeal from King County Superior Court, Honorable
Mary E. Roberts, J.
Gregory Mann Miller, Reed Longyear Malnati Ahrens
 & West PLLC, Seattle, WA, for Appellant.

Gordon Wilson Wilcox, Attorney at Law, Catherine
 Wright Smith, Valerie A. Villacin, Edwards, Sieh,
 Smith & Goodfriend, Seattle, WA, for Respondent.

UNPUBLISHED OPINION

SCHINDLER, A.C.J.

*1 In *In re the Marriage of Katare*, 125 Wn.App. 813, 105 P.3d 44 (2004), rev. denied, 155 Wn.2d 1005 (2005) we held that RCW 26.09.191(3) gives the trial court the discretion to impose limitations in a parenting plan if the court expressly finds the parent's conduct is adverse to the best interests of the child and the limitations are reasonably calculated to address the identified harm. Brajesh Katare contends that on remand the trial court failed to comply with this court's mandate to enter findings that justify the passport and foreign travel restrictions in the parenting plan imposed under RCW 26.09.191(3). He also contends the trial court's decision to temporarily deviate from the child support obligation was an abuse of discretion. Because the trial court's findings in the parenting plan do not expressly address whether the parenting plan limitations are justified under RCW 26.09.191(3), we remand to the trial court. But based on the decision to award all of the air miles to Brajesh, the trial court did not abuse its discretion in temporarily deviating from

the allocation in the child support order.^{FN1}

^{FN1} Lynette Katare argues that Brajesh's challenge to the passport and foreign travel restrictions in the parenting plan is barred by the law of the case doctrine. *Roberson v. Perez*, 156 Wn.2d 33, 42, 123 P.3d 844 (2005) ("once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation."). But here, the doctrine does not apply because we remanded. See RAP 2.5(c)(2); *Fluke Capital & Management Services Co. v. Richmond*, 106 Wn.2d 614, 724 P.2d 356 (1986) (when an issue has not been decided by a prior appellate decision in the same case, the doctrine does not apply).

The facts in this case are fully set forth in *In re Katare*, 125 Wn.App. 813, and will be repeated only as necessary.

Brajesh was born and lived much of his life in India. His family still lives in India. Brajesh went to school in Florida and obtained a masters degree in 1989. Brajesh met and married Lynette while attending school in Florida.^{FN2} In 1999, Brajesh and Lynette moved to Washington to work for Microsoft. Brajesh and Lynette have two children, A.K., born May 27, 2000, and R.K., born September 20, 2001. In April 2002, Microsoft offered Brajesh a two-year position in India, which he accepted. Lynette did not want to leave the states and live in India.

^{FN2} We refer to Brajesh and Lynette Katare by their first names to ensure clarity.

Before separating in July 2002, Brajesh and Lynette often argued about moving to India. Lynette testified that Brajesh repeatedly threatened to take the children to India without her and was planning to do so. During discovery, Brajesh requested copies of the applications for the children's passports and India tourist visas and copies of the children's immunization records. Lynette also testified that she found an application for an India PIO card (similar to a United States "green

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card”) on Brajesh's computer. Margo Waldroup, who prepared a parenting assessment and parenting plan recommendations report, testified that despite Brajesh's denial that he threatened to take the children to India, two witnesses heard him threaten Lynette on two separate occasions. The witnesses each said Brajesh threatened to take the children to India with or without her. While Waldroup believed that Brajesh “used threats of kidnapping the children or killing the family in an effort to force Lyn's agreement to move to India,” because he denied making the threats, she concluded it was impossible to predict whether he would abduct the children.

No evaluation of this type can tell whether the father will abduct the children. I am not aware of any criteria that can predict if such would occur. The Kataras' situation is somewhat unusual in that there is not only the allegation of abduction but corroboration of two witnesses hearing the threat that Brajesh would take the children to India ‘with our [sic] without’ their mother. As Brajesh denies these statements it is impossible to evaluate whether the statements were said in crisis to pressure the mother to move to India, rather than being his literal intent or whether Brajesh truly intended to remove the children from the country without the mother's consent. Because Brajesh is not willing to acknowledge his anger over the mother's lack of agreement to move, I cannot assess whether his anger has decreased over time and if he has gained any perspective on his actions of last summer. His assurances that he has surrendered his Indian passport and citizenship are of no comfort given that he can easily be reinstated as an Indian citizen and obtain a passport.

*2 Waldroup told the court that because she was unable to predict the likelihood that Brajesh would abduct the children, the court had to decide whether the risk of abduction was significant enough to impose the restrictions she recommended.

At the conclusion of the trial, the court stated in its oral ruling that it was not persuaded that Brajesh posed a serious threat, but said “if I'm wrong on this the consequences are incredibly serious and I'm mindful about that.” The court then said, “I'm going to impose some restrictions in the parenting plan that will be designed to address this issue....”

In the parenting plan, the trial court expressly found that the provisions of RCW 26.09.191 did not apply, but nonetheless imposed limitations, apparently based on the risk of abduction.

2.20.1 India is not a signator to the Hague Convention on International Child Abduction.

2.20.2 Based on the evidence, including the testimony of expert witnesses, the husband appears to present no serious threat of abducting the children. Nonetheless, under the circumstances of this case, given the ages of the children, the parties' backgrounds, ties to their families and communities, and history of parenting, the consequences of such an abduction are so irreversible as to warrant limitations on the husband's residential time with the children, including: location of exercise of residential time, surrender of his passport, notification of any change of his citizenship status, and prohibition of his holding or obtaining certain documents (i.e. passports, birth certificates) for the children. The mother shall retain the children's passports.

On appeal, we held that a trial court has the authority under RCW 26.09.191(3) to impose limitations in a parenting plan if the court enters express findings to justify the limitations.^{FN3} Katara, 125 Wn.App. at 826. Because the trial court stated that Katara appeared to present no serious threat of abducting the children, yet imposed limitations to prevent abduction, we remanded to the trial court. “Whether the court found there was a risk of abduction that justified the imposition of limitations is at least ambiguous. Indeed, such a finding is implicit in the trial court's discussion of the risk of abduction, the findings it made, and the limitations imposed ... Rather than speculate, we remand for the trial court to clarify the legal basis for its decision to impose restrictions to prevent Brajesh from taking the children to India and if appropriate to make the necessary findings.” Katara, 125 Wn.App. at 831.

FN3. Under RCW 26.09.191(3):

A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan,

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if any of the following factors exist:

- (a) A parent's neglect or substantial non-performance of parenting functions;
- (b) A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in RCW 26.09.004;
- (c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;
- (d) The absence or substantial impairment of emotional ties between the parent and the child;
- (e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;
- (f) A parent has withheld from the other parent access to the child for a protracted period without good cause; or
- (g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

On remand, the trial court amended paragraph 2.2 of the parenting plan as follows:

OTHER FACTORS (RCW 26.09.191(3)). Based on the evidence, including the testimony of expert witnesses, the husband appears to present no serious threat of abducting the children. Nonetheless, under the circumstances of this case, given the ages of the children, the parties' backgrounds, ties to their families and communities, and history of parenting, and the fact that India is not a signator to the Hague Convention on International Child Abduction, the consequences of such an abduction are so irreversible as to warrant limitations on the husband's residential time with the children. The risk of abduction is a factor justifying limitations under RCW 26.09.191(3)(g).

*3 By basically restating its earlier findings as the justification for imposing limitations on Brajesh's residential time with the children under RCW 26.09.191(3)(g), the trial court does not resolve the ambiguity and does not expressly address whether the evidence supports the limitations under RCW 26.09.191(3). The amended parenting plan still states that "the husband appears to present no serious threat of abducting the children," and again, without express findings to justify the limitations, the court imposed restrictions, apparently based on an implicit risk of abduction. In addition, the court also does not expressly address the best interests of the children. Because these findings do not comply with the mandate to explain the reasons for the limitations under RCW 26.09.191(3), we remand. *In re Marriage of McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007) (cursory findings of fact, even when supported by the record, are insufficient); *In re Marriage of Horner*, 151 Wn.2d 884, 896-897, 93 P.3d 124 (2004) (conclusory findings are insufficient because its basis is unclear and appellate courts cannot review the trial court's decision); *In re Marriage of Kinnan*, 131 Wn.App. 738, 129 P.3d 807 (2006) (trial court's failure to make findings that reflect the application of each relevant factor is error). Given the passage of time, the trial court should also examine current relevant information concerning any limitations under RCW 26.09.191(3).^{FN4}

^{FN4}. We reject Brajesh's reliance on out-of-state statutes to argue that the trial court must find a "serious risk of abduction" before imposing limitations designed to prevent abduction as unpersuasive. RCW 26.09.191(3)(g) expressly gives the trial court discretion to examine whether the conduct of a parent is averse to the best interests of the child.

Brajesh also contends the trial court erred in deviating from the basic support obligation for long-distance travel expenses without a finding of financial need. In *Katara*, we recognized that "in some cases it may be appropriate to consider property distribution payments pursuant to a dissolution order, a resource to be taken into account when determining whether to deviate from a child support schedule. *Katara*, 125 Wn.App. at 835, citing *In re Marriage of Stenshoel*, 72 Wn.App.

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800, 866 P.2d 635 (1993). But we remanded to the trial court "to clarify whether it intended to deviate in the child support order from the requirement that each parent pay a proportionate share of the travel expenses." Katare, 125 Wn.App. at 836.

On remand, the trial court amended the child support order to expressly state that the court was deviating from the child support allocation for long-distance travel expenses because all of the community air miles were awarded to Katare.

REASONS WHY REQUEST FOR DEVIATION WAS DENIED. A deviation was not requested, except with regard to the apportioning of the father's long-distance travel expenses, which is set forth in Paragraph 3.15.

Paragraph 3.15 read:

The court deviates from apportioning the father's long-distance travel expenses per the percentages at Line 6 of the worksheets in consideration of the award of all of the parties' 625,000 air miles solely to the father, which he may choose to use towards those long-distance travel expenses.

*4 Because the trial court's findings on remand support the deviation, we conclude the trial court did not abuse its discretion in deviating from the basic support obligation for the long-distance travel expenses based on its award of all the community air miles to Brajesh in the dissolution decree.

While we affirm the trial court's decision regarding the long-distance travel expenses because the court did not comply with the mandate for the findings in the parenting plan under RCW 26.09.141(3), we remand to enter findings consistent with this opinion.^{FNS}

FNS. Because we conclude the trial court's findings do not support the limitations under RCW 26.09.191(3) and remand for the trial court to enter the necessary findings and if appropriate, Brajesh's alternative constitutional challenge is premature. And because Brejesh's appeal is not frivolous, Lynette's request for attorney fees under RAP 18.9 is denied.

WE CONCUR: ELLINGTON and BAKER, JJ.
Wash.App. Div. 1,2007.
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Not Reported in P.3d, 140 Wash.App. 1041, 2007 WL 2823311 (Wash.App. Div. 1)

END OF DOCUMENT

APPENDIX G

Brajesh Katare

From: "Lynette Katare" <lkatare@hotmail.com>
Date: Wednesday, November 02, 2005 12:37 PM
To: <lkatare@hotmail.com>
Subject: RE: Happy Diwali to Annika and Rohan - Nov 1st 2005

I will pass this on to them. Thanks for sharing. Happy Diwali by the way!!!
Lyn

>From: "Brajesh Katare" <bkatare@hotmail.com>
>To: lkatare@hotmail.com
>Subject: Happy Diwali to Annika and Rohan - Nov 1st 2005
>Date: Tue, 01 Nov 2005 14:28:46 -0800
>
>Convey my love and wishes to Annika and Rohan as today is Diwali. Tell them
>I love them and they will have their diwali gifts whenever they visit their
>daddy's home. They are stored in their play room. Tell them that I will
>explain what diwali and its significance is when they grow up.
>
>

02 3 05316 9 Sea
Lynette Katare
And
Brajesh Katare

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