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NO. 63438-1-I

WASHINGTON STATE COURT OF APPEALS, DIVISION I

LYNETTE KATARE,

Respondent,

v.

BRAJESH KATARE,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM KING COUNTY SUPERIOR COURT
Hon. Mary Roberts

REPLY BRIEF

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I. INTRODUCTION & GENERAL REPLY.

Brajesh's Reply need not and will not address each point raised in the Response, most of which are disposed of by the Opening Brief.

Anything that is not addressed is not, however, conceded.

Brajesh concentrates on the fact the latest rulings from the trial court are not based on proper, admissible evidence, and do not have a factual basis for determining that in 2009, Brajesh is a serious, genuine, or realistic risk to commit double Class C felonies by abducting the children such that passport controls and travel restrictions are required to protect them. There simply is no such evidence in the record. Because those restrictions do not have an adequate factual basis, they violate Brajesh's statutory and constitutional rights as a fit parent entitled to raise his children and have freedom of activities during his visitations and vacations with them. As unlawful restrictions, which have been continuously unlawful while in place for nearly seven years, they must finally be vacated as were the two-county travel restrictions in the initial appeal. At the conclusion of this third appeal, the matter must be remanded to a different judge for expedited determination (by the new judge if the parties cannot agree) of any safeguards deemed necessary for international travel by the children, safeguards which will apply equally to both parents.

Despite two reversals and two remands, this long-running, false accusation child custody case continues to allow an *unlawful* order from 2003 stay in effect due to the trial judge's closed mind. The order unnecessarily harms the parties' two, mixed-race children. It needlessly robs the children of the chance to visit their paternal grandparents and the

rest of their extended family of color in India, and to learn about and be immersed in that part of their ethnic and cultural heritage and, hence, see that part of their identity in conjunction with their American identity. They cannot meet and play with their Indian cousins. They cannot learn the foods, recipes and cooking techniques from their paternal grandmother in her kitchen, while they have been able to be immersed in just those activities in their maternal grandmother's kitchen. The unlawful order needlessly deprives them of any and all other foreign trips with their father until they are 18, be they educational or for vacation.

These restrictions are not merely contrary to the children's best interest. They are harmful to the children. As the parenting evaluator testified in 2003, 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.¹

Whatever the bickering or bitterness between the two ex-spouses, it must not be permitted to cloud judicial judgment when it comes to crafting a parenting plan that governs the children's upbringing and which must be premised on the best interests of the children -- doing what helps them most and does not harm them. Yet harm to the children is precisely what has happened here. Because Lynette's mind is frozen on her old 2002 fiction that Brajesh will kidnap the then-infants of two and nearly one and never return with them from India, she has created and clung to a

¹ 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.

story that he would abduct them. As a false accusation against a brown-skinned immigrant, Lynette, as an America-born white woman, had total advantage of crying that her babies would get taken to India and never be seen again. This is demonstrated by the events. Even though Judge Roberts determined that Lynette was not credible in the 2003 trial and refused to make a finding that Brajesh had threatened to abduct the children, and even though Judge Roberts ruled that Brajesh was “not a substantial risk to abduct the children” in 2003, the trial court nevertheless imposed a draconian set of parenting plan restrictions (including the absurd two-county restriction in Florida) to prevent a theoretical possibility that is not based on any facts in the record: the pure speculation that, as Judge Roberts put it, “in case I’m wrong.”² In short, Judge Roberts’ non-factual speculation vacated her fact-based decision so that she imposed the passport and travel restrictions without a proper factual basis. She was reversed twice by the Court of Appeals and is still searching for a proper factual basis for imposition of the restrictions.

On the Second Remand, Judge Roberts misconstrued the directions from the Court of Appeals, as well as common sense, failing to focus on the only germane issue: whether substantial admissible evidence demonstrates that, in 2009, Brajesh is a genuine, serious risk to commit a double Class C felony and abduct the children? Is there a genuine risk and danger of such criminal act that requires the restrictions in 2009 when the

² While this may have been understandable in the post September 11, 2001 hysteria that still gripped the entire country in 2003 at the time of trial, it does not make it correct or provide a proper basis for letting it continue seven years later. Minds must be open.

children are nearly 9 and seven and a half? Rather, as discussed *infra*, she focused on whether new or old evidence should get her to change her earlier finding that Brajesh was not a serious threat to abduct, since she told the parties at the hearing that she would not be changing her mind about imposing the restrictions. IX RP, p. 82:2-10; *infra*, n.7. Brajesh never got a fair hearing, which requires it be vacated.

This false accusation case involves reasserting old, unsubstantiated allegations by Respondent Lynette Katare against Brajesh Katare that are criminal in nature. They were rejected by the judge in the 2003 trial but are now supposedly substantiated, only after the Second Remand, by hearsay statements admitted through an expert who, in turn got them from another expert's second-hand relation of them, the parenting evaluator's 2003 testimony, and by Brajesh's national origin and the fact he is ethnic East Indian. This is despite the actual evidence presented to the trial court of who Brajesh is, how he lives, his U.S. citizenship, his love for his children, and *his recognition* that they need their mother Lynette in their lives – his recognition that *the children* would be devastatingly harmed were Lynette removed from their lives by him spiriting them away to India or anywhere else and that, as a loving father, he would not intentionally harm his children by doing that.

Nevertheless, Lynette's theory, adopted by the trial court, is that because Brajesh, now a U.S. citizen for over ten years, was raised in India, he must be prevented from committing the future criminal act of abducting the couple's children and keeping them in India because that is a

theoretical possibility -- based on her irrational fears. Even though there is no competent evidence that such a scenario is likely, or probable, or a genuine risk to occur, prior restraints were nevertheless imposed to prevent the theoretical possibility of an event that exists only as an irrational fear in Lynette's mind. Her fear was "justified" for the trial court by her so-called "expert" who does not even purport to predict that Brajesh himself is a genuine risk to abduct the children, just that he belongs to "groups" as to which he contends there may be a heightened risk -- but then, only if Brajesh himself had any of the attributes of those group members, which his current life situation does not. Mr. Berry, in fact, had no first-hand experience or education as to India and showed that he knew virtually nothing about India, its culture, or its legal system.

There simply is no evidence in this record specific to Brajesh to which anyone can point which demonstrates that, as of the hearing date of January, 2009, **Brajesh** presents a clear, genuine risk of abducting his children such that they must be protected from him. The most that is established is that, despite his U.S. citizenship he has had for ten years, he is categorized as a member of certain groups based on his ethnic and national background. But even so, Brajesh still did not fit into the high risk categories -- the parents who railed against the American way of life and wanted to protect their children from it; the parents who were unemployed or poorly employed with little economic prospects in this country; parents who had violated court orders; parents who had made documented attempts to abduct their children. In short, nothing in this

record gives a factual predicate on which to base an opinion or conclusion that Brajesh is *likely* to commit a felony and abduct the children so that pre-emptive measures are required to prevent the crime³ -- and that those pre-emptive measures must stay in place until the children are no longer children, until 2018 for AK, 2019 for RK.

Brajesh is 45, has been in this country since for 21 years since 1989, became a naturalized citizen in 2000, and is in his 11th year working for Microsoft where he is based in Redmond. The childhoods of the two children, AK and RK, are half over; AK will be 18 in 2018, and RK in 2019. The children's elderly paternal grandparents cannot leave India for health reasons and are unlikely to ever see AK and RK again unless the restrictions are removed. The case raises important constitutional issues of Brajesh's fundamental rights as a parent and as a U.S. citizen.

II. REPLY ARGUMENT.

A. **Whether the Parenting Plan Violates Brajesh's Constitutional Rights is Still Before This Court. Since the Parenting Plan Still Fails to Comply With the Statute After Two Remands and Nearly Seven Years, it Violates Both the Statute and the Constitutions.**

The Response focuses its initial argument on the issue of constitutional rights and states clearly that a parenting plan that complies with the statutory requirements to promote the best interests of the child

³ The crime which these measures are imposed to prevent would be, minimally, custodial interference in the first degree, a class C felony, punishable by five years in prison and up to \$10,000 fine for each offense. RCW 9A.40.060(2) (committed by a parent); RCW 9A.20.021(1)(c). Brajesh testified at the 2nd Remand hearing that if he abducted the children he would be subject to criminal prosecution and he would be fired by Microsoft. Opening Brief, p. 10; XI RP, 13-14.

does not violate a parent's constitutional rights. Response, pp. 25 - 34. The Court of Appeals was very clear on this point. *Katara v. Katara* 125 Wn. App. 813, 822, 105 P.3d 44, rev. denied, 155 Wn. 2d 1005 (2005) ("*Katara I*"). Of course a proper parenting plan does not violate constitutional rights. The issue hinges on the language "that complies with statutory requirements". *Id.*

At this juncture, after two appeals and two remands, the threshold issue still remains, is this a proper parenting plan? Are the international travel restrictions and passport controls proper, based on the actual facts and the law and the constitution? If one looks at both appeals, the court remanded based on the question of whether *factual* grounds even exist for the limitations. "We conclude the court cannot impose limitations without an express finding under 26.09.191." *Katara I*, 125 Wn. App. at 826. Since the trial court has still failed to make this finding with substantial evidence, the parenting plan restricting Brajesh's visitation does not comply with statutory requirements and is therefore subject to Brajesh's argument that it unconstitutionally limits his parenting rights. Contrary to the arguments of the respondent, this issue was not settled in *Katara I*. The Court of Appeals simply stated a fact about the constitutionality of parenting plans in general without ruling on this particular plan since it was unclear if it actually met statutory requirements which the Court of Appeals determined it did not, hence the remand.

The Response goes on to assert that the trial court has the authority of impose limitations or restrictions under RCW 26.09.191(3)(g) to

prevent the risk of abduction. Response, p. 11. That is stretching the language of the statute a bit far. The actual language of the statute,

(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, 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,*"

requires more than just a "risk" to justify any restrictions at all. The Response sets out *In re Marriage of Sanders* 63 Wn.2d 709, 388 P.2d 942 (1964) for the premise that the trial court has the discretion to place travel restrictions on a parent. However, in that case the father had already removed the children from the state twice and failed to return them in a timely manner. Brajesh has always met the strictures of the existing parenting plan despite its questionable validity. In addition, in *Sanders* the trial court simply imposed a bond on the father, it did not deny the father traveling rights as in this case. The trial court certainly has the discretion to impose restrictions in a parenting plan that are "reasonably calculated" to promote the best interests of the child. In this case *Sanders* seems to support the argument that refusing to allow Brajesh to travel to India with his children is a restriction that is excessive in light of his willing compliance with the law.

Denying a father the right to take his children to visit family members based on the unreasoned fears of the mother is not a "reasonably calculated" solution. The only evidence before the court is the claim by Lynette that Brajesh threatened to take the children to India without her, a

claim made during a trial where the judge found her statements to be unreliable and uncredible. The Response tries to make a big deal about the supposed witness corroboration of Lynette's claim. Response, p. 13. In truth, even the trial court dismissed this evidence specifically at the first trial. The reliable witness testimony from the parenting evaluator expresses doubt about the incident. Lynette then argues that the trial court does not need any evidence that Brajesh may in the future kidnap the children, citing *In re Marriage of Burrill* 113 Wn. App. 863, 56 P 3d. 993 (2002). However *Burrill* is distinguished simply by noting that the mother kept the children from their father for nine months before the court determined that, while that extended separation did not permanently alienate the children from their father, future similar behavior might. Even though there was only a danger of damage, the mother's prior *acts*, her *established extra-legal behavior* warranted the caution of the trial court. In this case Brajesh's behavior and attitude towards his children has never been an issue and he has done nothing to warrant any sort of restrictions.

B. It is Legal Error and an Abuse of Discretion to Take Third Party Statements Not Entered as Evidence Via an Alleged Expert Witness's Review of Another Expert Witness's Testimony Into Consideration When Determining the Outcome of a Hearing.

The parenting evaluator's reference to "eyewitnesses" was only made to help her reach her conclusion in her report. The evidence that was brought before the trial court was the evaluator's report, ostensibly for the conclusions she reached, not for the underlying substantive information from who she interviewed to reach that conclusion. While the court may

use the conclusions reached in that report, as discussed at length at the Opening Brief at pp. 16-18, the trial court cannot use the unsubstantiated comments made by third parties to the expert or evaluator as substantive evidence. That inadmissible hearsay *only* is relevant to the expert's opinion, *not* as a conduit for new facts to the judge, which otherwise is inadmissible.⁴ The so-called expert witness in 2009, Mr. Berry, blithely referred to "witness testimony" that Brajesh threatened to abduct the children, relying on the parenting evaluator's reports of her conversations; double hearsay, twice. In reality all Mr. Berry can refer to is that the parenting evaluator's conclusions were equivocal, which may or may not raise doubt about Brajesh as a risk to abduct, but which clearly does not establish that he is, in fact, a serious risk to likely abduct the children. Finally, at no time did Brajesh "champion" the risk factors set forth by Mr. Berry. Assertions to the contrary by the Response are simply incorrect. .

Lynette continues to imply that witnesses heard Brajesh make threats to kidnap the children when in fact the only person who heard him was Lynette. Even the parenting evaluator questioned whether he did or didn't make the statement and even if he did, based on all her other findings, she concluded that he likely spoke in the heat of the moment not with the intent to abduct his children. This insistence by Lynette that there

⁴ The "witnesses" referred to in passing by the parenting evaluator in 2003, and then relied on by Mr. Berry in 2009 never appeared in court to make their statements or be subject to cross-examination and confront Brajesh with their claims he was going to engage in criminal activity -- with good reason. The two witnesses' "corroboration" was suspect and, because of that, the trial court disregarded their declaration testimony in the 2003 trial. *See* Corrected Opening Brief in *Katara II*, p. 16 & n. 11, App. H-231, and Appendix H to the Reply Brief in *Katara II*, pages 11 – 13 of Brajesh's 2003 trial brief, attached hereto at App. H-387-390.

is irrefutable proof that Brajesh made threats is a frantic attempt on their part to identify the necessary “substantial” evidence the Court of Appeals has insisted twice, must exist for the restrictions in the parenting plan to be valid. The Response’s assertion that Brajesh cannot object to witness statements proffered by Lynette because he entered the witness statements as evidence is not accurate. He never offered such statements, much less claimed they were accurate or reliable at trial, as noted in footnote 4, *supra*, which one glance at the excerpts from his 2003 trial brief make abundantly clear. Rather, those declarations were not relied on by Judge Roberts in 2003. More to the point, those declarations were not the basis for Judge Roberts’ findings in the Second Remand. She relied on the “expert” testimony of Mr. Berry, whose hearsay proffering cannot provide a basis for facts for her to consider. *Group Health Co-Op. v. Department of Revenue*, 106 Wn.2d 391, 399-400, 722 P.2d 787 (1986) and discussion in the Opening Brief, pp. 16-18.

The Response’s attempted use of out of state laws to “prove” the validity of risk factors and red flags presented in literature by Mr. Berry, is simply ludicrous. Without a showing that the legislatures of these states actually relied on that same literature when drafting their laws, there is no grounds for even implying that these same laws validate the theories of Mr. Berry. Besides it is not the actual validity of these factors that are at issue, although they are largely unproven in preventing parental abductions. The central issue is the application of these factors to Brajesh, identifying him as having several of the key factors and the trial court’s

reliance on the same. One “expert” took the stand and based on evidence provided solely by the respondent identified Brajesh as an abduction risk. If the court disregarded that conclusory testimony there would be no problem. Instead the trial court bases its findings on that information, concluding that since Brajesh meets the criteria, that is “substantial” evidence that he is not acting in the children’s best interests. The expert freely admits the information on which he based his conclusions was not complete but, nevertheless, goes on to paint Brajesh with a red flag brush.

Finally it is absurd on this record for the Response to claim Brajesh’s national origin was not a key factor in the remand. Most of the factors Mr. Berry uses are concerned with nationality of the parent or his relatives. Each time it is noted that Brajesh is Indian, Mr. Berry applied a negative connotation to that fact. His nationality is highlighted simply to identify him as a threat to his children. Interestingly, the same amount of time, energy and evidence were not presented by the Respondent or Mr. Berry as to Brajesh’s status as a fully naturalized American Citizen.

C. Remand Must be to a Different Trial Judge to Meet the Appearance of Fairness and Impartiality Requirements by the Judiciary.

The Opening Brief recounted how Judge Roberts has made statements and decisions throughout this case which could call into question to disinterested observers whether she can be open-minded or impartial on remand, and the clear case law in Washington and the federal courts that, where the appearance of fairness and impartiality of the judiciary is implicated, recusal is required or where, as here, the case is

returning to the lower court after appeal, remand must be to a different judge. Opening Brief, pp. 57-61. Tellingly, the Response's counter utterly fails to even address the concept of the appearance of fairness and impartiality, much less the cited cases, even though that standard is a required hallmark of our state's judicial system and has been since even before it was first invoked in 1898. *State ex rel Barnard v. Board of Education of City of Seattle, et al.*, 19 Wash. 8, 17 – 19, 52 Pac. 317 (1898).⁵ Rather, the Response merely states there is no evidence of bias and that, because Judge Roberts has had the case since 2003, she must remain on it. Response, pp.46-49. Even this tepid response fails since it is basic that, for very good reasons which go to the heart of the legitimacy of the courts, even where there is no actual bias the appearance of fairness is still required. *See, e.g., State v. Romano*, 34 Wn. App. 567, 662 P.2d 406 (1983), and further discussion of *In re Custody of R., infra*.

The Supreme Court set the stage in *Barnard* for what is kind of appearance is required of decision-makers who, like the trial court here, decide not just the law, but also the facts:

. . . The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts; in fact, the administration of justice through the mediation of courts is based upon this principle. It is a fundamental idea, running through *18 and pervading **321 the whole system of judicature, and it is the popular acknowledgment of the inviolability of this

⁵ See Van Noy, "The Appearance of Fairness Doctrine: A Conflict in Values", 61 WASH.L. REV. 533 & n. 2, 547-549 & n. 89, 554-556 (1986) (citing *Barnard* as the first appearance of fairness decision in Washington and discussing why public confidence in the judicial system requires going "beyond proven bias . . . to maintain public confidence by giving the benefit of the doubt to the potentially injured party, not the potentially biased one.").

principle which gives credit, or even toleration, to decrees of judicial tribunals. Actions of courts which disregard this safeguard to litigants would more appropriately be termed the administration of injustice, and their proceedings would be as shocking to our private sense of justice as they would be injurious to the public interest. . . .

. . . **To compel a litigant to submit to a judge who has already confessedly prejudged him, and who is candid enough to announce his decision in advance, and *insist[ed]* that he will adhere to it, no matter what the evidence may be,** would be so farcical and manifestly wrong that it seems to us that the idea must necessarily be excluded by the very expression “administration of justice.” . . .

State ex rel Barnard, 19 Wash. at 17-18, 19 (emphasis added). It is Judge Roberts’ public declarations quoted *infra* that she would adhere to her decision on restrictions no matter what facts were presented -- her ***insistence that she will adhere to it, no matter what the evidence may be,*** and despite two reversals by the Court of Appeals⁶ – that calls into question her impartiality and the appearance of fairness in the proceeding to a disinterested observer and requires that remand be to a different judge for any further proceedings. *State ex rel Barnard*.

The requirement that judicial proceedings appear to be fair is so deeply part of the judicial system that Washington and the Ninth Circuit cases are explicit in not just stating the language, but remanding to different trial judges on just that appearance of fairness basis. *See* Opening Brief at pp. 57-58 and cases cited therein. The Response fails to cite or discuss any of them.

⁶ Repeated reversals in the same case on the same issue is one of the automatic flash points for sending the case to a different judge in the Ninth Circuit. *See* cases cited at p. 58 of the Opening Brief.

A good rejoinder to the Response's limited "change of judge can only be by provable bias" approach and an example of when the touchstone appearance of fairness and impartiality requirements are different from a limited bias analysis and require a new judge is in *In re Custody of R*, 88 Wn. App. 746, 947 P.2d 745 (1998) (*superseded on other grounds by statute*). This, too, was cited in the Opening Brief but not cited or discussed in the Response, for reasons as will become apparent. But first, it must be placed in context.

When Judge Roberts refused Brajesh's request to put in a sunset or review provision as to the passport controls on visitation at the entry of final orders on July 30, 2003, she gave the following reason:

I am going to leave it because I don't know as time goes by I will feel less concerned about that. There is no particular reason at this point in time to think as time goes by that this concern will be lessened. ***The only way to find out*** is to test it by not having the restrictions, ***and I am not willing to do that.***

VII RP, p. 31:18-23. To a disinterested observer, this demonstrates a closed mind.

Then, nearly six years later after getting reversed a second time for failing to enter a parenting plan that had a lawful basis for the restrictions she had imposed and kept in place (*i.e.*, findings supported by competent and substantial evidence which demonstrates that Brajesh is a genuine threat to abduct his children), when ruling on the motion *in limine* to exclude Mr. Berry's testimony, Judge Roberts stated:

I think I have been given the authority by the court of appeals to essentially reconsider that opinion based on new evidence⁷ as opposed to simply changing my mind, *which I won't be doing*.

I'm happy to hear this kind of expert testimony to assist me in making that determination which I, and I alone, will be making.

IX RP, p. 82:2-10. Finally, the Order on Petitioner's Request for Fees and Costs ("Fee Order") entered November 24, 2009, contains a statement that is similar to the personalized statement from the trial judge in *In re Custody of R*, 88 Wn. App. 746, 754, 947 P.2d 745 (1998) (*superseded on other grounds by statute*) that the Court of Appeals previously held required remand to a new judge to promote the appearance of fairness. In this case Judge Roberts stated in her Fee Order, entered 10 months after the remand hearing and over four months after the briefing of the fee motion:

While the father's conduct following this court's ruling is of serious concern, it does not demonstrate intransigence of the sort that will support an award of fees and costs *at this juncture*. It is possible that this most recent conduct *could support a finding of intransigence in the future*.

Fee Order, CP 181, App. E-2 (emphasis added). The situation in *Custody of R* was described by this Court as follows:

Ms. Abdulla seeks disqualification of Judge Aubrey on remand. In considering this argument *we assume no actual bias*. Nonetheless justice must satisfy the appearance

⁷ Judge Roberts misinterpreted the Court of Appeals remand order by improperly limiting the remand hearing to a "reconsideration of that opinion based on new evidence" that Brajesh was not a substantial risk to abduct, but not that changing her mind as to the travel restrictions, which as she stated, "I won't be doing". If the travel restrictions and passport controls were not on the table at the remand hearing, then what was the point of it at all? But the fact that this is how Judge Roberts chose to limit the proceeding shows both that she would not follow the remand directions from the Court of Appeals, and that her mind was closed to any modification or change to the travel restrictions, no matter what the evidence.

of impartiality. [citations omitted] *Chicago, Milwaukee, St. Paul and Pac. R.R. Co. v. Washington State Human Rights Comm'n*, 87 Wn.2d 802, 557 P.2d 307 (1976) (judiciary should avoid even mere suspicion of irregularity, or appearance of bias or prejudice.)

Here, Ms. Abdulla spontaneously responded to the trial court's questioning of her with this question, "Are you mad at me, your honor?" To which the judge replied, "I don't like what you did.... We don't like that as judges." Based on this dialogue, coupled with the trial court's denial of Ms. Abdulla's requested continuance, we remand for a hearing before a different judge to promote the appearance of fairness.

In re Custody of R., 88 Wn. App. at 754. Judge Robert's written message in the Fee Order was a clear as Judge Aubrey's verbal response to Ms. Abdulla. Judge Roberts's written order clearly communicated that she "did not like what Brajesh did"; to paraphrase Judge Aubrey, by labeling Brajesh's *post-hearing* conduct as a "serious concern" to her followed by the written warning to behave differently if he was in front of her again in this case. In short: "watch your step, Brajesh, I don't like what you just did." Whatever Judge Roberts had in mind with that Fee Order, it requires remand to a different judge no less than did Judge Aubrey's comment in court in order "to promote the appearance of fairness" to disinterested observers.

The trial judge in this case has given ample evidence of her bias including inflammatory statements in court documents related to the 2009 hearing. While the Response attempts to soften these by pointing to Brajesh's actions after the hearing; the frustrated response of a distraught father after the fact of the hearing and receipt of the decision has absolutely no bearing on the propriety of the trial court's decision at that

hearing. Since a judge must remain above reproach and avoid at all times even an appearance of bias, and because this judge unfortunately failed in this throughout proceedings and as reinforced by the intemperate language in the order denying a fee award which, at the same time, threatened Brajesh, any further proceedings must be in front of a different judge.

A recent decision by our Supreme Court both reminds the courts of a potential substantive component to the abuse of discretion analysis and also shows how to resolve repeated remand issue by itself making the ultimate determination after two remands were unsuccessful. *Yousoufian v. Office of Ron Sims*, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 1225083 (Mar. 25, 2010). The Court held in relevant part:

¶ 25 [T]he trial court's determination of appropriate daily penalties is properly reviewed for an abuse of discretion." . . . A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. . . . ***A trial court's decision is manifestly unreasonable if 'the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take.***

Yousoufian, ___ Wn.2d at ___, ¶ 25 (emphasis added)(internal citations and quotations omitted). This abuse of discretion standard incorporates a substantive analysis and review along with the traditional legal analysis which requires reversal for failure to apply the correct legal standard or the facts do not meet the requirements of the correct standard, or for applying the correct legal standard where the facts as found are not supported by the record. See Opening Brief, p. 15, quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). The substantive analysis will

still require reversal where the trial judge adopts a view no reasonable person would adopt, despite use of the correct legal standard and supported facts.

In *Yousoufian*, the case was remanded to the superior court twice to impose a proper measure of penalty for King County's unexcused failure to comply with public records requests and in both cases the appellate courts found that the amount of the penalties was inadequate under the circumstances. When the case returned to the Supreme Court following the second remand it helped end what was also long-running litigation by making the final determination of the proper penalty amount, rather than engage in a time-consuming and potentially futile remand.

The same approach should be applied here to bring this case to conclusion. The record here, updated to 2009 and now far removed from the country-wide hysteria against foreigners following the events of September 11, 2001, does not support imposition of the travel restrictions and passport controls at this point in time, whatever may have been the justification in 2003. The only relevant question is whether Brajesh is now established to be a genuine, serious threat to abduct the children such that they need to be protected by the restrictions. Brajesh respectfully submits that the imposition of the restrictions fails under each independent prong of analysis of the abuse of discretion standard. They therefore must be vacated and the matter remanded with directions to expeditiously put in place safeguards for international travel which apply equally to each parent and which make such travel relatively simple and accessible.

D. Lynette's Fee Request Should be Denied.

Lynette's fee request should be denied. As was evident from the fee materials filed in superior court in July, 2009, Lynette has ample resources to engage in the litigation, particularly given her substantial family resources which are available to her, unlike Brajesh, who is still helping support his parents in India. The relative income and expenses of the parties is set out clearly in Brajesh's response materials at CP 209-210 and will not be repeated in detail, except for the following point from Brajesh's response brief which responded to Lynette's claim of need as against Brajesh's claimed ability to pay:

Here, similar to *Pennamen*[*In re Marriage of Pennamen*, 135 Wn. App. 790, 807, 146 P.3d 466 (2006)], both parties are essentially "breaking even" with respect to their monthly income and expenses, and neither can afford to pay the other's fees. (See B. Katare Financial Decl.) Lynette's brief overstates Brajesh's financial resources while understating her own. Brajesh's payroll statements indicate that his monthly gross income is approximately \$14,500, not \$17,000, and his employer has frozen all salaries this year. (B. Katare Decl. ¶ 6 & B. Katare Financial Decl.) In addition, Brajesh incurred his own attorney's fees for the remand hearing totaling more than \$35,000, which he paid using a credit card and is paying off in \$500 increments. (B. Katare Decl. ¶ 8.)

Even where an ability to pay is established, the Court must find a corresponding need and balance the two. See *Pennamen*, 135 Wn. App. at 808. Although Lynette appears to be "breaking even" based on her financial declaration, her submission paints an incomplete picture of her financial resources. At the time of trial, Lynette reported \$1,000 in guaranteed monthly payments from the DeGuzman family limited partnership, which presumably are continuing. (B. Katare Decl. ¶ 7.) In addition, the trial court awarded to Lynette an interest in the partnership that

was worth \$200,000 to \$300,000 several years ago at the time of trial. (*Id.*)

Response to Lynette's Fee Application, pp. 2-3, CP 208-09.

This request should be seen for what it is: a claim that he is not entitled to appeal, and a tactical effort to put more pressure on Brajesh to try and stop his efforts to have the courts finally put in place a lawful parenting plan which permits the children to travel with him internationally. Lynette's real complaint is that Brajesh keeps appealing -- and she wants to characterize that as intransigence. *See* Lynette's Reply re Fees, CP 226-227.

But Lynette's complaint is misplaced. It cannot properly be with Brajesh who is seeking nothing more than what the legal system says he is entitled to get: to have the law applied to him as the competent facts require, and as it applies to all other U.S. Citizens, no matter their nationality or place of birth. What is he supposed to do when he believes - - and his belief is twice ratified by the appellate courts -- that an error was made that should be corrected? He should do that when the restrictions hurt the children by cutting them off from half their family and cultural heritage? She forgets that Brajesh is working for what is in the children's best interest -- having relationships with **both** sets of grandparents, **both** sets of cousins, not just one.

Lynette's real complaint must be partly with her insistence on restrictions which are not necessary and not legally justified, but which harm the children's development because of her irrational fear of an abduction that would never occur, and her unfounded belief that Brajesh

would ruin himself and the children just to get back at her. *See* Opening Brief, p. 10 & VIII RP, pp 100-103;⁸ IX RP pp. 8-9. Lynette actually testified that her belief is that “Brajesh is more concerned with punishing [her] than he is concerned with his Microsoft career” (IX RP p.8:8-13); and that, even if child abduction were a crime in India (which Lynette believed it was not, though she had not investigated that point), Lynette believed that Brajesh “would be willing to live in hiding in order to hurt [her] by abducting the children.” IX RP p. 8:14 – p. 9:14. In her mind, Brajesh is obsessed with “getting back” at her and she is continually at risk, even though there is no evidence to support this irrational paranoia.

Lynette’s complaint with Brajesh’s decision to follow the law, play by the rules, and follow the legal process to conclusion – as opposed to self help -- also lie partly with Judge Roberts, who has continued with each remand to enter orders which impose restrictions that are not

⁸ VIII RP, p 100: 19-23; p. 101:12-24; p. 102:21 - 103:1;

L. Katare: Now, it’s evolving into something where I can -- he can use the children to get to me because he can’t -- I’m not married to him anymore. So it’s the children or the children are the tool. . . .

Q (Ms. Banahan) And, in particular, what makes you think that he is going to abduct the children versus, for example, just concluding that he still doesn’t like you very much? . . .

A Okay. I think that he will, and I’ll try to separate that, use the children and abduct the children to essentially punish me and get back at me for exposing his true nature and what he intended to do to this Court and to his friends, to colleagues, to his manager, to everyone.

Q I’m going to make a statement and ask you to reflect on it and ask whether you agree with it or don’t. Do you believe that Brajesh wishes to punish you more than he loves his kids? Do you believe that his wish to punish you is stronger than his love for [AK] and [RK]?

A I do agree with that.

supported by competent evidence, and has still not gotten it right despite two reversals.

Brajesh has been and remains more than ready to discuss reasonable provisions for international travel that apply to both him and Lynette, including specified itineraries with phone access, an open plane ticket and travel fund in case of emergency, and the like, and restates his willingness here and his hope that this can end the litigation with agreed orders.

III. CONCLUSION.

The Court must vacate the second remand order because there is no evidence Brajesh is likely to commit double Class C felonies and violate the parenting plan provisions requiring return of the children after visitations to the mother at the end of his scheduled visits. There simply are no facts which support a finding that Brajesh will engage in any conduct adverse to the best interests of his two children, much less facts in the record that would support a finding that he would be likely to engage in conduct harmful to them – kidnapping or spiriting them away to India, not to return. There thus is no factual basis for restrictions under RCW 26.09.191(3)(g), either the passport controls on Brajesh, nor the travel prohibition on his children with him outside the United States.

This Court should step in and help bring this case to conclusion as the Supreme Court was forced to do in *Yousoufian* to stop the endless cycle of remands that result in non-complying new orders, and send a strong message that, where a party is alleging the other parent will engage

in future criminal behavior, restrictions may not be imposed based on those allegations absent clear proof that such behavior is both likely to occur by that parent and that whatever behavior that is likely to occur will harm the children. Thus, in *In re Marriage of Wicklund*, 84 Wn. App. 763, 932 P.2d 652 (1996), the father's established admitted behavior of socializing with his male lover was admitted and established that it was likely to occur. The legal fight was over whether that particular behavior was harmful. Because it was not deemed *per se* harmful, the activity could not be restricted and, to avoid further litigation, the Court of Appeals struck the improper restrictions, as should be done here.

Here, the only activity that Brajesh will engage in is international travel to Canada or India or the Caribbean or Europe with his children during normal visitations scheduled pursuant to the parenting plan, including summer or other school vacations. There is no evidence otherwise after seven years of Brajesh living under the parenting plan restrictions and always complying with all visitation requirements, even those he believed were illegal, until they were vacated by the courts. There is no evidence that any such international trips with Brajesh would be harmful to the children. Rather, all evidence from the parenting evaluator is to the contrary, that it would be beneficial to the children, if not critical to a health development of their identities given their mixed-race and mixed-culture backgrounds. Lynette has not provided any evidence to the contrary. And since there is no competent evidence in this record that Brajesh would have in 2009 at the date of the Second Remand hearing, (or

now in 2010 at age 45) commit a double felony and forfeit the life he has built over 20 years as a successful immigrant and U.S. Citizen which has given him a measure of financial success and stature in both this country and among his family in India, there is no basis to impose restrictions on the travel other than the normal parenting plan requirement that the children be returned to Lynette as scheduled.

In order to assure the appearance of fairness and impartiality, and to be true to the facts, the law, and the Constitution, this Court's decision should both remand the case to a different judge and also stay the current travel restrictions and the passport controls of Brajesh as of 60 days after the decision is filed to permit the new judge to either confirm the agreement of the parties on international travel safeguards or to determine safeguards that are equally applicable to both parties for international travel by each parent with the children.

Respectfully submitted this 27th day of April, 2010.

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Attorneys for Appellants

NO. 63438-1-I
WASHINGTON STATE COURT OF APPEALS, DIVISION I

In re the Marriage of:

LYNETTE KATARE,

Respondent,

vs.

BRAJESH KATARE,

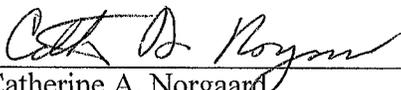
Appellant.

CERTIFICATE OF SERVICE

I declare under penalty of perjury that I caused copies of the *REPLY BRIEF*, and this *Certificate of Service* by causing a true copy thereof to be served to counsel of record on April 27, 2010 as follows:

Gordon W. Wilcox 1191 2 nd Ave., 18 th fl. Seattle, WA 98101-2996 P: (206) 233-9300 F: (206) 233-9194 Email: gwilcox@gwwinc.com	<input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> Fax <input type="checkbox"/> Email
Catherine Wright Smith Edwards Sieh Smith & Goodfriend PS 1109 First Avenue, Suite 500 Seattle, WA 98101-2988 P: (206) 233-9300 F: (206) 233-9194 Email: cate4appeals@washingtonappeals.com or cate@washingtonappeals.com	<input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> Fax <input type="checkbox"/> Email

DATED this 27 day of April, 2010.


Catherine A. Norgaard

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