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ORIGINAL

No. 72343-0-1

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

BYRON MCNAUGHT

Appellant,

vs.

ANGELIKA MCNAUGHT

Respondent.

AMENDED OPENING BRIEF OF APPELLANT

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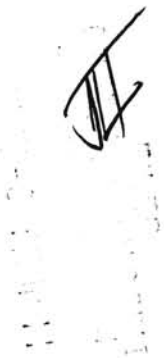

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Angelika McNaught and Byron McNaught married in 2004 while she was still in college. *RP 931; Exhibit 25 at 97.* Angelika was pursuing a fine arts degree. *Exhibit 25 at 97.* Byron had finished his degree. *Exhibit 130 at 3.* They lived in Texas. *Exhibit 130 at p. 3 and p.7.*

In 2010, Angelika was unemployed and Byron felt his career was stifled in Texas. *RP 72 at 6-7, 23-25.* He widened his job search and secured a position in Seattle with F5. *RP 1102 at lines 13-16.* They settled into an apartment on Mercer Island, a neighborhood with excellent schools. *RP 940 at 23-25, and RP 941 at 1-3.*

Angelika was offered a web design position by Swift Management, Inc. *RP 73 at 22-25.* Her employer allowed her to work from home. *RP 75 at 13-17; RP 78* Byron was promoted at F5. *RP 1077 at 1-2.* He had never earned that level of income in Texas. *RP 73 at 12-14; Exhibit 14.*

In 2012, their daughter, AJM, was born. *Exhibit 25 at p. 148.* Both parents took time off work. *RP 1056 at lines 18-22.* AJM's infancy was difficult. She woke up four to five times per night. *RP 1060 at lines 19-25, RP 1063 at lines 23-25, and RP 1064 at lines 1-3.* The parents, especially Angelika, didn't get enough sleep. *RP 1059 at lines 10-18.*

When AJM was three months old, Byron's parents moved from Florida to Mercer Island to be near the family and to provide for their childcare needs. *RP 845 at lines 24, and RP 846 at lines 2-7.* Laurel McNaught became "Nana," and for the next 15 months, provided daily child care with AJM. *RP 852 at lines 7-19.* AJM became very attached to her Nana and her grandfather. *RP 361 at 19-21, 23.*

But despite the help, the couple's relationship became troubled. Angelika was convinced that Byron was not committed to parenting because he joined his co-workers for social/networking events. *RP 1191 at 24-25; RP 1192 at 1-6.* Her work schedule was flexible enough to take a yoga class or exercise in the middle of the day, because Laurel McNaught was there each day to care for AJM. *RP 856 at 10-15.* Angelika could not see that Byron did not have that flexibility. The time he needed to rejuvenate on his own needed to have come after his workday of 7:00 a.m. to 4:00 p.m. *Exhibit 130 at 103.* Although Byron was generally

home between 4:30 p.m. and 5:30 p.m. each day, Angelika considered his time away from the family to be proof that he did not want to be a parent. *RP 1072 at 24-25; Exhibit 130 at 100.*

By the summer of 2013, the parties could go on no longer. Byron left the family home and Angelika petitioned for dissolution of marriage. Angelika was 30 years old; Byron was 32. *CP 23.* AJM was not yet two. *CP 23.*

Angelika moved for temporary orders that would allow her to relocate AJM to Texas. *CP 166.* She stated that Byron made her life miserable, she wanted to be near her parents, and she wanted to buy a house. *CP 33 at 7-11.*

The court denied the child's relocation on a temporary basis and appointed Wendy Hutchins-Cook, Ph.D. to evaluate, *inter alia,* all aspects of a parenting plan and the relocation issue. *CP 161, 164.* Over Angelika's objection, the trial court also ordered that AJM's relationship and contact with her "Nana" would be preserved. *CP 217.* Laurel McNaught would continue to provide child care. *CP 217.*

By the time the evaluation started five months later, Angelika had had a change of heart. She reported to Dr. Hutchins-Cook that she did not contemplate a change in her residence in the foreseeable future. *Exhibit*

25 at 104, 108. She reported that she realized that it was better for AJM to be near her father. *RP 254 at 18-19.* She also reported that her parents were moving to Washington and would seek jobs here. *RP 254 at 18-22.* Indeed, Angelika's mother did move in with Angelika during this time. *RP 173 at line 8.* Suddenly, Angelika had no more need for child care and she let Laurel McNaught go. AJM's contact with her Nana was reduced. *RP 1129 at 1-4.*

Byron did his best to preserve the relationship by including his parents with him in his residential time with AJM. RP 886 at 10-21. Angelika saw that as proof that he was unable to parent on his own. *RP 194 at 15-16; Exhibit 125 at 107 (#107).*

Dr. Wendy Hutchins-Cook waded through the hurt and allegations that accompany a contested parenting plan dispute. She had the opportunity to see AJM with each of her parents. *Exhibit 130 at 2.* She spoke with third parties. *Exhibit 130 at 2.* All agreed that AJM is a very sensitive child. *RP 361 at 11-14.* She is cautious and shy. She does not do well with abrupt changes. *RP 290 at 22-23.* She needs gradual shifts. *RP 290 at 22-23.*

Developmentally, at the age of two, she is also in her critical bonding years. Dr. Hutchins-Cook observed that AJM is very bonded

with each parent. *RP 291 at 13-17.* She has also formed important attachments to her paternal grandparents and her maternal grandmother. *RP 361 at 19-21, 23.* These are important relationships that need to be protected. *RP 361 at 22-23.*

After psychological testing, observation, and interviews with the parents and third parties, Dr. Hutchins-Cook concluded that each parent was skilled and able to parent AJM. *Exhibit 130 at 17.* Consistent with AJM's developmental level and her need for gradual changes, Dr. Hutchins-Cook recommended a gradually shifting residential schedule that reached a 50/50 schedule by the time the child was 5 years old. *Exhibit 130 at 19.* Dr. Hutchins-Cook further recommended strategies to reduce the emotionality of child exchanges and to help the parties better co-parent. *RP 1186 at 21-25; 1187 at 105.*

She did not address, nor had she evaluated, the relocation issue because Angelika had agreed that relocation was off the table. *RP 255 at 10.* Her report was issued to the parties on April 25, 2014. *Exhibit 130.*

One month later, six weeks before trial, Angelika served on Byron a new Notice of Intent to Relocate. *Exhibit 156.* Her parents had decided not to move to Washington after all. Angelika wanted to be near them.

She expressly stated in her Notice, "I plan to move only if the Court gives me permission." *Exhibit 156.*

Trial was held over eight days. Angelika called Dr. Wendy Hutchins-Cook as a witness on her case. *RP 239.* She, herself, testified for four days, focusing primarily on her conflict with Byron and how much nicer the homes in Texas were to Washington. She did not intend to change her employment. *RP 78 at 4-10.*

Dr. Hutchins-Cook testified that relocating AJM so far away at such a young age would transform the parent/child relationship to a visitor relationship. *RP 293 at 19-20.* While that has its perks of great joy on reunions, it also meant grief and loss upon separation. *RP 293 at 22-23.* At a minimum, some hands on contact on a weekly basis could preserve the relationship. *RP 311 at 11-12.* But with a distance as great as that of Seattle to Texas, that seemed silly to even discuss. *RP 311 at 11-12.* Effectively, AJM would lose her father. *RP 392 at 18-19.*

The evidence by both parties showed the truth of Dr. Hutchins-Cook's statement both in terms of Byron's ability to take time off from work and in cost. Byron testified, and the evidence was unrebutted, that he had only three days of vacation time accumulated by the time of trial. *RP 1108 at 13-15.* He accrued only 1.67 days per month. *RP 1108 at 11-*

12. But just the travel time to get to Texas took most of a day with another day to return. *RP 1111 at 21-25.* Bracketed around a weekend and taking a red-eye each time, his maximum trip could be three days and two nights with AJM once per month. *RP 1113 at 7-9.* The cost of the trip: $1,000 (composed of airfare of $350, hotel at $100/night, car rental of $46/day, and food for two of $100/day). *Exhibit 19 at 2-6.*

Neither was Byron's relocation to Texas feasible. The evidence was unrebutted that he had never earned the kind of salary in Texas that he earns here. *RP 73 at 12-14; CP 569.* He testified that each time he had sought employment, it had taken nine months to secure a position. *RP 116 at 25; 1161 at 1-13.* The maintenance and child support awarded to Angelika was based upon his Seattle salary. *CP 569.* He needed to remain in Seattle.

By contrast, Angelika worked from home and thus could work either in Seattle or in Texas. *RP 78 at 4-10.* A relocation would change nothing about her employment, opportunities, or income.

Byron offered evidence that he planned to stay on Mercer Island and that the schools on Mercer Island were among the best. *Exhibit 130 at 159 (#84); RP 1252 at 13-15.* He offered evidence that AJM had toddler classes here, and that the plethora of activities available to AJM in Seattle

were comparable in price to the activities available to her in Texas. *RP 413 at 1-13; Exhibit 159.*

In all, Byron produced substantial evidence to show that the relocation and parenting plan proposed by Angelika would harm AJM. The plan's restrictions in notice period and time with AJM effectively severed his parent/child relationship with her. *CP 543-52.* Its restriction that he could not delegate his time to his family severed the important relationship between AJM and her paternal grandparents. *CP 543 at 13.* The limitation that Angelika was bound to facilitate only one Skype/Facetime call per week meant that he was effectively cut off from AJM. *CP 548 at 21.* The requirement that he exercise regular residential time in Texas and that such time be interrupted by overnights with Angelika until the child turned 18, further disrupted the parent/child relationship. *CP 543 at 15-16; 544 at 6-7.* The schools, opportunities, and activities in Texas offered no improvement to AJM compared to the schools, opportunities and activities in Seattle. *RP 368 @ 23-25; Exhibit 159.* And the cost of the long distance transportation more than offset any cost of housing gains Angelika might have. *See e.g. RP 104 at 10-11; Exhibit 19.*

Angelika testified at length about the importance of her relationship with her own parents and how much she wanted to be near them. *RP 432 at 14-17.* She spent much time focused on the types of houses that could be purchased in Texas for $200,000 and compared them with an isolated, ugly home in Washington. *Exhibit 29, 31.* She offered no evidence that she could actually afford the cost of home ownership, and in fact, her own financial declaration appeared to show otherwise. *Exhibit 7.* Indeed, the parties rented during the marriage and the evidence showed that it would most likely continue. *CP 594.*

In the end, the trial court entered cursory findings that evidenced little consideration of the factors, and then summarily adopted Angelika's plan. *CP 539, 542.* It denied Byron's motion for stay. *CP 698.* His motion for stay to this Court was similarly denied. The child is now two and a half years old, and the current orders have left him unable to maintain a parent/child relationship with her. *RP 56 at 18-19; CP 542.*

This appeal follows.

IV. **ARGUMENT**

1. **Standard of Review**. Generally, a trial court's rulings regarding parenting plans are reviewed for abuse of discretion. *In re Marriage of Kovacs,* 121 Wn.2d 975, 801, 854 P.2d 629 (1993). A trial

court abuses its discretion when its decision is arbitrary, manifestly unreasonable, or based upon untenable grounds. *Atwood v. Shanks*, 91 Wn. App. 404, 409, 958 P.2d 332 (1998). A decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and applicable legal standard. *In re Marriage of Fiorito,* 112 Wn. App. 657, 664, 50 P.3d 298 (2002). It is based on untenable grounds if the factual findings are unsupported by the record. *Fiorito,* 112 Wn. App. at 664. A trial court necessarily abuses its discretion if its ruling is based upon an erroneous view of the law. *Atwood*, 91 Wn. App. at 409.

2. Trial Court Misapplied the Statutory Presumption. Under RCW 26.09.520 a court presumes that the intended relocation of a child by a primary residential parent will be permitted. RCW 26.09.430, .520. To date, Washington courts have not provided guidance regarding how to apply that presumption. In general, Washington cases have addressed presumptions in specific cases, but have not provided general guidelines or standards when it comes to presumptions. *In re Estate of Langeland*, 177 Wn. App. 315, 321, 312 P.3d 657 (2013). It has left the subject of presumptions difficult for lawyers and trial judges alike. *Langeland*, 177 Wn. App. at 321.

In *Bank of Washington v. Hilltop Shakemill, Inc.,* 26 Wn. App. 943, 948, 614 P.2d 1319 (1980), this Court explained the role and purpose of a presumption. It first underscored that a presumption is not evidence. *Hilltop*

Shakemill, Inc., 26 Wn. App. at 948. The purpose of a presumption is to establish which party has the burden of first producing evidence. *Hilltop Shakemill, Inc.,* 26 Wn. App. at 948. Once the opposing party has produced evidence to overcome the presumption, the presumption has served its function. *Hilltop Shakemill, Inc.,* 26 Wn. App. at 948. The trial court must then discard the presumption, evaluate the evidence presented by both parties, and reach its conclusion. *Hilltop Shakemill, Inc.,* 26 Wn. App. at 948.

In *Hilltop Shakemill, Inc.,* a bank contended that the trial court had not given proper weight to the presumption that a debt of one spouse is a community obligation. *Hilltop Shakemill, Inc.,* 26 Wn. App. at 948. This Court disagreed. It held that the debtor had produced evidence to rebut the community debt presumption, and thereafter, the trial court had properly discarded the presumption and evaluated the evidence to reach its supported findings. *Hilltop Shakemill, Inc.* 26 Wn. App. at 948. This application of presumption is known as the Thayer analysis. *In re Estate of Langeland,* 177 Wn. App. at 321.

In the context of relocation of a child, the primary residential parent enjoys the presumption that the child will relocate with that parent. RCW 26.09.520. This presumption shifts the evidentiary burden to the objecting parent to demonstrate that the harm to the child outweighs the benefit of relocation to the child and the relocating parent. *In re Marriage of Horner,*

151 Wn.2d 884, 895, 93 P.3d 124 (2004); RCW 26.09.520. That showing is made by a preponderance of the evidence. *In re Marriage of Wehr,* 165 Wn. App. 610, 613, 267 P.3d 1045 (2011) (Parent successfully rebutted presumption of relocation).

Once a parent has produced the requisite evidence, the function of the presumption has been satisfied and should be discarded, consistent with policy and express provisions of Chapter 26.09 RCW. RCW 26.09.002 sets forth the policy regarding parental responsibility and determining the best interests of children. It recognizes the "fundamental importance of the parent/child relationship" and charges a court with forming a parenting arrangement that best maintains a child's emotional growth, health and stability and physical care. RCW 26.09.002. It expressly states that ordinarily, a court will do its best to continue the existing pattern of contact between parent and child. RCW 26.09.002

Except as required under RCW 26.09.191 to avoid harm to a child, Chapter 26.09 RCW in no way favors or defers to one parent over another. To the contrary, RCW 26.09.187 rejects any presumption of one parent over the other. RCW 26.09.187(3) (Greatest weight goes to relative relationship, not greater performance of parental functions); *In re Marriage of Kovacs,* 121 Wn.2d 795, 809, 854 P.2d 629 (1993)(Primary residential parent given no preference when forming a final parenting plan).

This is consistent with the fundamental Constitutional right of each

parent to rear their children. *In re Custody of Smith,* 137 Wn.2d 1, 13-14, 969 P.2d 21 (1998). In the context of relocation, both parents have a substantial right to parent their child. *Wehr,* 165 Wn. App. at 613-14. The application of law must protect both of their interests. *Wehr,* 165 Wn. App. at 614. To retain a presumption after it has been rebutted would be to impermissibly elevate one parent's fundamental parenting right over the other's. So long as Byron rebutted the presumption, the trial court should have discarded it and thereafter weighed the evidence offered by each party on equal footing. The trial court's express reliance on the presumption for relocation was error. *CP 539.*

Byron met his burden to demonstrate the harm standard under RCW 26.09.520. RCW 26.09.520 requires a court to consider 11 statutory factors when determining whether the intended relocation of a child will be permitted. The factors in the statute are not weighted. RCW 26.09.520. In this case, Byron addressed each of the factors as set forth below and met his burden of production to prove by a preponderance of the evidence that the harm to the child would outweigh the benefits of relocation. Much of this evidence was elicited through the parenting plan evaluator, whom Angelika called as a witness on her case.

(1) The relative strength of child's relationship with parents/significant persons: Dr. Wendy Hutchins-Cook, the parenting plan evaluator and only expert witness in the case, testified that by the age of

six months, a child is equally attached to each parent. *RP 387 at 3-4.* She testified that the attachment of AJM was well established and very good with both parents. *RP 387 at 13-14.* She observed AJM with her father, describing how AJM kept herself close to her father, settled right into play with her father, and was easy and comfortable with him. *Exhibit 130 at 11.* Her observations were corroborated by third party witnesses, Linda Myers, the parent educator at Bellevue Community College, and Laurel McNaught, the paternal grandmother, who provided full-time child care for 15 months. *Exhibit 130, at 15-16.* Dr. Wendy Hutchins-Cook testified that the day to day duties of parenting go to the nature of division of labor rather than the strength of the bond between child and parent. *RP 359* at 10-14. Angelika did not enjoy an advantage over Byron in this area and the trial court did not so find. *CP 539.*

Dr. Hutchins-Cook also reported that AJM is very bonded with both paternal grandparents and with her maternal grandmother. *Exh 130 at 18.* The paternal grandmother testified that she had provided child care on a daily basis from the time the child was an infant. *RP 852 at 16-19.* The attachment between this small child and these three individuals has been made and is very important. *RP at 361, lines 19-21, 23.* Dr. Hutchins-Cook testified that it is very important that those relationships be maintained. *RP 361 at 22-23; Exh 130 at 18.* The paternal grandparents had moved from Florida to Mercer Island when AJM was three months

old. *RP 845 at 5-7, 9-11.* They continue to live on Mercer Island, as does Byron. *RP 56 at 11-13.* To maintain the relationship, the child should remain here.

(2) Prior Agreements of the Parties. Consideration of prior agreements encompass more than just express agreements not to relocate. In *In re Marriage of Grigsby*, 112 Wn. App. 1, 11, 57 P.3d 1166 (2002), this Court observed that the trial court properly considered the parents' agreed 50/50 schedule when considering agreements in relation to the mother's proposed relocation. In this case, Ms. McNaught sought to relocate in July 2013. *CP 21-22.* Dr. Wendy Hutchins-Cook was appointed to expressly evaluate the relocation issue. *CP 160-62.* But the parties later agreed that parenting was going to continue in Washington. *RP 360 at16.* As of January 25, 2014, Angelika specifically reported to Dr. Wendy-Hutchins-Cook that she did not contemplate any move of her residence in the foreseeable future. *Exhibit 25 at 104, 108.* She reiterated to Dr. Hutchins-Cook that she realized it was better for AJM to be near her father. *RP 254 at 18-19.* Because of her agreement not to relocate, Dr. Hutchins-Cook did not address the issue. *RP 255 at 8-13.* Relocation was off the table. *RP 360 at 16-17.* From January 25, 2014, when she took relocation off the table, Byron relied on Angelika's agreement not to relocate.

(3) Whether disrupting the contact between the child and

the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation. In this case, Dr. Hutchins-Cook testified that with a child of AJM's age, two years old, residential time must be frequent and consistent. *RP 310 at 15-16.* She testified that at a minimum a schedule could work if hands on contact were at least weekly. *RP 311 at 11-12.* But she also acknowledged that it was silly to even contemplate such a schedule, because Texas is too far away to make weekly travel feasible. *RP 311 at 9-10.* She testified to the permanent damage the long distance would cause; that is, once the relationship changes between a child and parent, one can't go back and recreate it once the child grows up. *RP 414 at 20-22.*

In the end, she articulated the Hobson's choice in this case well: at the age of 2, it was likely more harmful to disrupt AJM's contact with her mother than with her father. *RP 389 at 15-17.* But allowing the relocation would mean that AJM would lose her father. *RP 392 at 18-19.* Either way, the mother's intent to relocate would cause harm to the child, either through disruption of contact with her mother, or through the loss of her father.

(4) Whether either parent or a person entitled to residential time with the child is subject to limitations under RCW 26.09.191. Neither party alleged or proposed that there be any restrictions under

RCW 26.09.191. It neither supported nor restrained the relocation.

(5) The reasons of each person for seeking or opposing the relocation and the good faith of each of the parties in requesting or opposing the relocation. Byron offered evidence related to all of the other factors that supported his opposition to the relocation. As articulated in the other factors herein, he showed that he was unable to relocate also, and that Texas was too far away to feasibly maintain a long-distance parenting relationship with a child as young as AJM. He showed that from a financial standpoint, the relocation would be as costly or more costly than not relocating. He showed that his parents had relocated to Mercer Island specifically to bond with AJM and to care for her. That bond was established and important to AJM's emotional well-being.

Dr. Wendy Hutchins-Cook opined that Angelika minimized the importance of Byron in AJM's life and considered herself the more important parent. *RP 271 at 18-22, 272 at 1-2.* Angelika didn't consider the parent/child relationship as important enough to consider not relocating. RP 272 at 17-19.

Consistent with that observation, Angelika spent significant time testifying about the cheaper price of houses in Texas. *RP 462; Exhibit 18.* But Angelika produced no financial declaration or testimony about how she would afford to own a home, once her maintenance terminated. She did not consider the higher property tax in Texas over Washington. *RP 1365 at 9-*

16. She did not consider the higher utilities costs of a single-family home compared to the costs of utilities in an apartment. She did not consider the higher energy bills for air conditioning in Texas. *RP 1363 at 22-25; RP 1364 at 1-4.* She did not demonstrate that she would be able to meet her expenses if she purchased a home in Texas. All she showed was that homes were available at a lower cost than in Seattle. The only evidence she provided about where she would actually live was with her sister. *Exhibit 156; RP 656-57*

(6) The age, developmental stage, and needs of the child, and the likely impact the relocation or its prevention will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child. Dr. Hutchins-Cook testified that at the small age of AJM, her world consists of her family and family routine. *RP 365 at 21-23.* She opined that it is important to have frequent short contact when children are young. *RP 310* at 15-16. She also testified that both parents are competent, able and good parents to such an extent that by age five, it would be developmentally appropriate for AJM to have a 50/50 residential schedule with both parents. *RP 289 at 20-25.*

She also testified that a parental role fills its own spot in a child's emotionality. *RP 294 at 7-8.* That role cannot be filled by somebody else. *RP 294 at 8-9.* A long distance between a parent and a toddler changes the quality of the connection. *RP 292 at 12-13.* The parent/child

relationship is reduced a visitor relationship. *RP 293 at 19-20.* There is usually happiness at the reunion and grieving when they are separated. *RP 293 at 22-23.* In the end, a long-distance relationship between a toddler and her father is not a decent relationship. *RP 398 at 23-24*

Dr. Hutchins-Cook testified and the evidence was unanimous that AJM is a shy and cautious child. *See eg. Exh 130 at 16.* She fares better with gradual changes. *RP 290 at 22-23.* She does not do well with dramatic changes in her time with or away from either parent. *RP 290 at 23-24.* Such a drastic move so far away would be harmful.

(7) The quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations. The testimony at trial was that the child has always resided on Mercer Island in a rental situation. *RP 1167 at 24-25; 1168 at 1.* Mercer Island is a great location for children, and has the best schools in the country. *RP 1252 at 13-15.* AJM is involved in toddler groups in Washington. RP 413 at 10-13. Her doctors are here. *RP 413 at 4-15.* The Northwest has all a multitude of activities -- sports, music, art, whatever a child's inclination -- readily available for a child. *RP 368 at 23-25.* Byron planned to remain on Mercer Island. *Exhibit 125 at 159 (#84).* This would enable AJM to continue to partake of all that Mercer Island had to offer.

He showed that Angelika had no better employment opportunity in

Texas. *RP 78 at 4-10.* Indeed, she planned to keep the same job. There was no evidence that the schools and activities for AJM were better in Texas than in Washington.

He showed that Angelika could rent a similar apartment on Mercer Island for less than cost she proposed to spend on housing in Texas. That is, his parents live in a two bedroom apartment home on Mercer Island for $925 per month. *RP 847 at 12-17.* He lives in a two bedroom apartment home on Mercer Island for $1,300 per month. *RP 1252 at 24-25.* The rent included water and trash costs *RP 1252 at 24-25.* Angelika proposed a housing cost of $2,500 per month, a sum she could not afford whether in Seattle or Texas. *Exhibit 7 at 3; CP 594.*

If she wanted to own a home, he showed that Angelika could purchase a condominium in Kirkland or Redmond for the budget she set of $200,000. *Exhibit 163.*

He showed that any potential cost savings in housing in Texas (which Angelika testified to be about half of what housing costs in Washington) would be more than offset by long-distance transportation costs. He showed that AJM would have to spend her residential time with her father in a hotel if she lived in Texas, where she would be able to live in a home with her own room, if she remained here. *RP 1114 at 12-13.*

In all, there was no real gain in opportunities and resources for AJM and her mother in Texas over remaining in Washington.

(8) The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent. Byron testified that he has 20 PTO (paid time off) days per year, including sick pay. *RP 1108 at 11-12.* As of July 2014, he had only 3 left. *RP 1108 at 13-15.* Under Angelika's proposed schedule, if he leaves on a Thursday night red-eye, he would have to take Friday, Monday Tuesday and Wednesday off. *RP 1113 at 7-9.* He doesn't have enough PTO to do that, even if he never ever gets sick. *RP 113 at 10-11.* Neither could he take unpaid time off and keep his job. *RP 1114 at 2-6.* It was physically impossible for him to meet the residential schedule proposed by Angelika.

Moreover, it was expensive. Airfare is $383 for a red-eye non-stop flight. *Exhibit 19, p. 6.* Hotels are $84-$122 per night not including taxes. *Exhibit 19, p. 2-4.* Renting the cheapest car available would be $26-$46 per day, not including taxes and fees. *Exhibit 19, p. 5.* He would be relegated to eating out. Nutritious food for himself and his daughter would not be inexpensive. In total, his trips would cost more than $1,000 per month, offsetting whatever reductions in housing costs Angelika offered. And even with all of that effort and expense, the time was still insufficient to maintain any more than a visitor relationship between Byron and AJM. *RP 414 at 14-17.*

(9) The alternatives to relocation and whether it is feasible and desirable for the other party to relocate also. Byron had never earned

in Texas what he earns now. He also testified that when he has sought employment in his field, it has taken a nine month job search each time. *RP 1160 at 25; 1161 at 1-13.* He testified that his employer, F5, does not have offices in Texas. *RP 1161 at 14-15.* There is no feasible way for Byron to also move to Texas.

(10) The financial impact and logistics of the relocation or its prevention. Byron showed that he does not have the funds to pay for long-distance transportation. His net income after payment of maintenance and child support is $5,800 and his expenses are $5,700. *CP 569-70; Exhibit 12l.* The trips are $1,000+ each. As described earlier, the logistics of relocation require that AJM spend nearly all of her residential time with her father in a hotel room.

(11) Factor 11, regarding temporary parenting plans, did not apply.

In sum, Byron demonstrated by a preponderance of the evidence that the harm to the child in relocating outweighed the benefit to the mother and the child if they did relocate. After that, the presumption in favor of relocation had served its purpose and should have been discarded. The burden then shifted to Angelika to present evidence moving forward. But the trial court in this case erroneously relied on the presumption throughout the case. *CP 539 at 11.* It summarily concluded that relocation should have occurred. This was error.

3. **Mother Failed to Meet Burden of Going Forward.**

a) Elevating Adult's Family Relationship's over Child's Family Relationships Unsupported as a Matter of Law. The mother's evidence moving forward was primarily that she was relocating to live near her sister and parents. Chapter 26.09 RCW expressly directs a trial court to fashion orders that serve the best interests of the child, who is the subject of the proceedings. RCW 26.09.002; RCW 26.09.187. It is a child-centered, rather than parent-centered inquiry. Consistent with that policy, in the context of an intended relocation, a trial court considers the relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent. RCW 26.09.520(1). It does not consider and gives no weight to the adults' relationships with their own parents and family members.

In this case, Angelika's express reason for moving was because family is really important to her and she wants to be close to them. *RP 546 at 17.* As a matter of law, this reason impermissibly elevates the emotional desires of a parent over the emotional and developmental needs of a child. It contravenes the statutory obligations of a trial court. This reason should have no weight in the relocation decision.

b) Availability of Lower Cost Housing, By Itself, Insufficient to Support Relocation as a Matter of Law. In this case, the trial court emphasized the opportunity for the child to experience homeownership in

Texas. *CP 539.* But the "resources" available to a child is one part of one of the 11 factors required to be considered in a relocation. The failure to balance any of the other statutory considerations required under RCW 26.09.520 constitutes a failure to apply the law and is an abuse of discretion.

Substantively, Angelika produced no evidence that home ownership was any more available to her in Texas than it is in Washington. Neither her financial declaration nor testimony addressed how she would afford to own a home, once her maintenance terminated. Her income would be $2,903/mo. *CP 574.* She did not consider the higher property tax in Texas over Washington. *RP 1365 at 9-16.* She did not consider the higher utilities costs of a single family home over the costs of utilities in a condominium or apartment. She did not consider the higher energy bills for air conditioning in Texas. *RP 1363 at 22-25; RP 1364 at 1-4.* She did not demonstrate that she would be able to meet her expenses if she purchased a home in Texas. All she showed was that for the same price, nicer homes were available in Texas over Washington.

Finally, there was no support in the record for the idea that home ownership was only available to Angelika in Texas. If she could buy in Texas, she could buy in Washington. To order a relocation on this basis was error as a matter of law.

4. Mother's Statement Waived Application of RCW 26.09.530. In this case, Angelika gave the Court the evidence to avoid the relocation

altogether and to preserve the child's relationship with both parents. She did this when she waived the provisions of RCW 26.09.530. A party may waive the benefit of a statute enacted for her protection. *Clark v. Capital Credit & Collection Services, Inc.,* 460 F.3d 1162, 1170 (2006) (Debtor may waive rights created by a cease communication directive). A waiver occurs when a person voluntarily relinquishes a known right or takes unequivocal acts to show an intent to waive. *McLain v. Kent School Dist., No. 415,* 178 WN. App. 366, 378, 314 P.3d 435 (2013). In *McLain*, a teacher challenged the school district's decision not to renew his contract. *McLain,* 178 Wn. App. at 368. But he failed to comply with the statutory procedure to select a hearing officer and schedule a hearing. *McLain*, 178 Wn. App. at 368. This Court held that his failure to comply constituted a waiver of his right to an administrative appeal. *McLain*, 178 Wn. App. at 379.

RCW 26.09.530 provides that a court may not admit evidence on the issue of whether the person seeking to relocate the child will forego her own relocation if the child's relocation is not permitted. This protects the relocating parent from the trial court's consideration of evidence that could influence its ultimate decision regarding the child's relocation. But in this case, Angelika offered this evidence herself into the record. In her notice of intended relocation, she stated, "My relocating is dependent upon the trial court giving permission." *Exhibit 156 at 1.* She reiterated that in testimony at trial when she stated again, "My relocating is dependent upon the trial

court giving permission." *RP 545 at 1-5.* Unequivocally, she averred evidence that was inconsistent with her statutory right to exclude such evidence at trial. Where she has waived that statutory right, a trial court may properly consider it.

In this case, the interest at stake for this small, two year old child, is whether she will get to have two parents or one. It is axiomatic that a child is entitled to two parents wherever possible. Where the mother offered evidence that she would stay in Washington so that the child need not suffer the loss of one parent, the trial court should have been allowed to consider that option.

5. Restricting Father's Right to Designate Other Caretakers for Child Manifest Error. A normal right of parental decision-making involves designating other persons to care for one's child. *Magnusson v. Johannesson,* 108 Wn. App 109, 113, 29 P.3d 1256 (2001) (Right of commercial fisherman to delegate residential time to his relatives while he was away affirmed). That right may only be restricted upon the grounds set forth in RCW 26.09.191. RCW 26.09.191(3) allows a court to impose restrictions in a parenting plan when necessary to prevent physical, mental or emotional harm to the child by a parent. *In re Marriage of Chandola*, 180 Wn.2d 632, 644, 327 P.3d 644 (2014. Before imposing restrictions, a trial court must find "'more than the normal hardships which predictably result from a dissolution of marriage.'" *In re Marriage of Chandola*, 180

Wn.2d 632, 645, 327 P.3d 644 (2014), quoting *Katare,* 175 Wn.2d at 36, 283 P.3d 546 (alteration in original) (quoting *Littlefield,* 133 Wn.2d at 55, 940 P.2d 1362). Actual harm need not be shown, but the imposition of restrictions must be supported by substantial evidence that the danger of damage exists. *Chandola,* 180 Wn.2d at 645.

In *Chandola*, a trial court limited the paternal grandparents' contact with a child to not more than 20% of the father's residential time. *Chandola,* 180 Wn.2d at 641. It did so to "promote direct parenting by the father without the presence of the grandparents." *Chandola*, 180 Wn.2d at 641. The Washington Supreme Court reversed the trial court, holding that in the absence of any evidence that the restriction was necessary to prevent mental, physical or emotional harm to the child, it was an abuse of discretion. *Chandola*, 180 Wn.2d at 655-56.

In this case, restrictions under RCW 26.09.191 were never an issue. Ms. McNaught did not ask for any in her proposed parenting plan. *Exhibit 21* at 1-2. She offered and the trial court accepted as substantive evidence the report of Dr. Wendy Hutchins-Cook, in which she described Mr. McNaught as a competent parent and opined that there was no reason to be concerned about the parenting of either parent. *Exh 130 at 17.*

Ms. McNaught's basis for seeking the restriction was her desire to "encourage" Mr. McNaught to travel to Texas for his residential time with AJM. RP at 23-25. The record is devoid of any evidence that such a

restriction was necessary to prevent harm to AJM. As in *Chandola*, the trial court abused its discretion in imposing this restriction. This provision of the parenting plan should be reversed.

6. Terms of Parenting Plan Unsupported by any Findings or Substantial Evidence. Findings of fact must be supported by substantial evidence. *Miles v. Miles*, 128 Wn. App. 64, 69, 114 P.3d 671 (2005). Substantial evidence is a sufficient quantum of evidence sufficient to persuade a fair-minded person of the truth of the matter. *Miles,* 128 Wn. App. at 69. In turn, findings of fact must support the conclusions of law. *Miles,* 128 Wn. App. at 69. Several terms in the parenting plan the trial court adopted fail this test.

a. Advanced Notice Requirements in Parenting Plan Arbitrary and Unsupported. At trial, testimony was elicited to determine what advanced notice was appropriate for Byron to provide in traveling to Texas. Dr. Hutchins-Cook testified that 15-30 days notice to Angelika would be appropriate. *RP 402 at 19-20.* Angelika, herself, testified that she thought 30 days was reasonable so that she could plan. *RP 470 at 22-23.* Yet the court entered a parenting plan that requires a 45 day advanced notice for monthly visits until the child is in school and thereafter it is 60 days. CP *CP 543-44.* The parenting plan also requires the father to provide notice of his winter break travel plans eight months in advance. *CP 544.* This degree of advanced notice is an onerous burden that does nothing to advance the

best interests of the child, but does considerably add to the administrative barriers Byron must hurdle in order to maintain any relationship with his daughter. Such a provision is arbitrary, unsupported by the evidence and should be reversed.

b. Interruption of Residential Time Unsupported/ Restriction to Texas Unsupported. At trial, testimony was elicited about what residential provisions would serve AJM in a long-distance parenting plan. Dr. Hutchins-Cook testified, *inter alia,* that at her age, two to three overnights with Byron would be appropriate, then an overnight with the mother, and then with the father again. *RP 401 at 18-22.* She testified that such an arrangement would be appropriate until AJM was 3 to 3.5 years old. *RP 401 at 18-22.* In addition, every third trip or so, it was appropriate for the child to come to the state of Washington. *RP 403 at 16-17.*

Yet the parenting plan adopted by the trial court provides that the child may not, through the age of 18, spend time with the father on a monthly basis in excess of three to four days without an interruption to spend time with the mother. *CP 543-44.* The parenting plan provides that even the child's winter vacation time with her father must be interrupted through the age of 18. *CP 544, lines 20-21.* It limits the child's ability to travel to Washington to see her father in a home setting, rather than a hotel. The provisions are arbitrary, unsupported by substantial evidence, and do not further the best interests of the child. To the contrary, they increase the

disruption of the child's time with her father and her comfort level in the home and surroundings in which she spends that time with her father. This was manifest error and should be reversed.

c. Time Restrictions Arbitrary and Capricious. No evidence supports the provision in the parenting plan that Byron must fly to Texas if he wants to see AJM for special occasions, such as Father's Day, birthdays, and Easter, but then restricts the holiday to a single day from 10:00 a.m. to 8:00 p.m. This provision serves no purpose other than to make even more difficult the opportunity for the child to see her father.

d. FaceTime/Skype Arbitrarily Limited. The Parenting Plan provides that Angelika need only facilitate Skype/Facetime 1-2 times per week. CP 943 at line 20. There is no evidence in the record that suggests that such limited time with a child serves that child's best interests. To the contrary, the evidence was clear that contact for the child should be frequent and consistent.

Taken as a whole, the parenting plan should be vacated. The matter remanded for entry of a new parenting plan that contemplates the child residing in the state of Washington.

7. Findings Required. At a minimum, under RCW 26.09.520, the trial court failed to expressly consider the 11 statutory factors in determining whether AJM should be relocated. To ensure that all 11 factors are considered and balanced, a trial court must either a) have entered specific

findings of fact on each statutory factor, or b) have made findings and oral articulations that reflect that the trial court considered each factor. *In re Marriage of Horner*, 151 Wn.2d 884, 896, 93 P.3d 124 (2004). Failure to satisfy either method is necessarily an abuse of discretion and the case must be reversed. *Horner*, 151 Wn.2d at 896-97.

The reason for this careful analysis is important. None of the 11 factors is given more weight than another. *In re Marriage of Kim*, 179 Wn. App. 232, 241, 317 P.3d 555 (2014). Thus, it could be that while disrupting contact between the child and the relocating parent would be more detrimental to the child than with the non-relocating parent, that factor could be offset by the age/developmental needs of the child, the reasons of the relocating parent for moving, alternatives to relocation, and/or the logistics and financial impact of the relocation. RCW 26.09.520. No one or two factors are dispositive.

In this case, the trial court made summary reference that it considered the statutory factors, but it neither entered findings of fact on each factor, nor articulated consideration of each factor in its memorandum decision. At the very least, remand is required on this basis.

8. Proportional Split of All Transportation Expenses Required. RCW 26.19.080(3) requires that parents share special child rearing expenses in the same proportion to the basic child support obligation. Special child rearing expenses are not limited, but examples

include tuition and long-distance transportation costs. RCW 26.19.080(3). Once the reasonable costs are determined, those costs must be shared in proportion to the parents' respective child support obligation. *In re Paternity of Hewitt*, 98 Wn. App. 85, 89-90, 988 P.2d 496 (1999).

In this case, there was extensive evidence about the actual costs the long distance residential schedule would impose. Not only was airfare an issue, but Byron would be obliged to rent a car, hotel room, and eat out. The costs of the trips totaled approximately $1,000 each. But the trial court in this case divided only the cost of airfare between the parties. It left 100% of the remaining expense to Byron. The special costs of hotel, car rental and eating out should have been divided pro rata. This was error and should be reversed.

9. Award of Attorney Fees Abuse of Discretion. RCW 26.09.140 provides for an award of attorney fees after consideration of the financial resources of each party. Although one party may have a need for an award of fees, such an award is not appropriate if the other party has no ability to pay. *In re Marriage of Schnurman*, 178 Wn. App. 634, 644, 316 P.3d 514 (2013). In this case, the parties each received an equal property division. The maintenance award substantially equalized the parties' respective net incomes. Byron had no ability to pay.

V. CONCLUSION

The relocation should be reversed. The case should be remanded for entry of a local parenting plan. The attorney fees award should be reversed.

RESPECTFULLY SUBMITTED this 3rd day of ~~October~~ November 2014.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

I am employed at Olson & Olson, PLLC. On November 3, 2014, I caused to be delivered the original Amended Opening Brief of Appellant to:

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