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Court of Appeals No. 72343-0-I

COURT OF APPEALS, DIVISION I, OF THE STATE OF WASHINGTON

In Re The Marriage Of:

BYRON MCNAUGHT,

Appellant,

v.

ANGELIKA MCNAUGHT,

Respondent

INITIAL REPLY BRIEF OF ANGELIKA MCNAUGHT

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TABLE OF CONTENTS

I. INTRODUCTION 1
II. RESPONSE TO ASSIGNMENTS OF ERROR 2
III. FACT STATEMENT – REPLY 10
a. Angelika's Home Was In Texas 10
b. Angelika had done the majority of the parenting; Alaina was very, very close to her.. 12
c. Angelika testified that it was important for Alaina, to grow up in a house 7
d. Angelika could afford to buy a nice house in Texas and was qualified to buy one 7
e. The cost of living was substantially lower in Texas 8
f. Angelika did not blindside Byron or the trial court in her relocation. 8
g Angelika made much less than Byron; her income would stretch much further in Texas 9
IV. ARGUMENT 12
a. The Trial Court Did Not Misapply The Statutory Presumption 12
b. The Trial Court Heard Evidence on All Factors 17
c. The Mother Did Not Fail to Meet Her Burden 25
d. The Mother Did Not Waive Application of RCW 26.09.530 27
e. Restricting the Father's Designation of Family Members is Not Manifest Error 28
f. Every Clause In A Parenting Plan Is Not Required to Be Supported by both Findings and Substantial Evidence 30
g. None Of This Is A Basis To Vacate The Parenting Plan 33
h. Sufficient Findings Were Made 33
i. The Court Properly Split Only Air Travel Expenses 33
j. An Award of Attorney Fees is Warranted 35
V. CONCLUSION 35

TABLE OF AUTHORITIES

US SUPREME COURT CASES

Troxel v. Granville, 530 US 57, 120 S.CT. 2054, 147 L.Ed.2d 49 (2000) 2, 34

STATE CASES

Marriage of Horner, 151 Wash.2d 884, 93 P.3d 124 (2004) 1, 17, 18, 19, 38
Estate of Langeland, 177 Wash.App. 315, 312 P.3d 657 (2013) 16
Bank of Washington v. Hilltop Shakemill Inc., 26 Wash.App. 943,
614 P.2d 1319 (1980) 16
Marriage of Wehr, 165 Wash.App. 610, 267 P.3d 1045 (2011) 17
Marriage of Fahey, 164 Wash.App. 42, 262 P.3d 128 (2011) 19
Marriage of Bay, 147 Wash.App. 641, 196 P.3d 753 (2008) 19
Magnusson v. Johanneson, 108 Wash.App. 109, 29 P.3d 1256 (2001) 33
Marriage of Jensen, 147 Wash.App. 641, 196 P.3d 753 (2008) 37
In re Marriage of Scanlon and Witrak (2001) 109 Wash.App. 167, 34 P.3d 877,
amend. on den of recon., rev. dism., 146 Wash.2d 1014, 52 P.3d 519 38
Murphy v. Miller, 85 Wash.App. 345, 932 P.2d 722 (1997) 39

WASHINGTON STATE STATUTES

RCW 26.09.520 ..... 17, 18, 20, 37
RCW 26.19.080(3) 38

COURT RULES

RAP 18.1 47

I. INTRODUCTION

COMES NOW Respondent, Angelika McNaught, by and through counsel of record, and replies to the Brief of Appellant as follows.

II. REPLY – ASSIGNMENTS OF ERROR

Because there are numerous assignments of error made, we can only touch on each one.

1. The trial court did not err when it found the father had no rebutted the presumption in favor of relocation. The test in Marriage of Horner, 114 Wash.App. 495, 58 P.3d 317 (2002) is an overall balancing test; the Appellant's two part test is not supported in the stature or the case law.

2. The trial court did not err when it granted the relocation of the child. The overwhelming majority of the evidence was in favor of the relocation. Because the test is an overall balancing of all factors, the father cannot win by arguing the court weighed the evidence incorrectly on any one factor.

3. The trial court did not err when it ordered a parenting plan that awarded ample long distance visitation to the father. The fact that the father may not be able to exercise all of his time, in any one month, simply

means a future court cannot hold him in contempt; but it is not error to benefit the father with time that he may not choose to exercise. In fact, the evidence since trial is that he has been able to exercise the visitation he was awarded.

4. The trial court did not err when it did not allow the father to delegate his long distance visitation to other members of his family, when he could not be in Texas. The effect of allowing him to delegate to his mother would be impermissible under Troxel v. Granville.

5. The trial court did not err when it awarded Skype/Facetime contact two to three times per week. The amount of phone contact, in any divorce, is within the discretion of the trial court, just as any other specific clause in the parenting plan. And as well, the Facetime contact seems to be working fairly well. See Mother's Sur-Reply to Motion to Vacate Stay, already on file with the court.

6. The trial court did not err when it required 45 days advance notice of the father's coming to Texas; requiring advance notice in long distance plans, to allow both parties to plan appropriately, is well within the discretion and judgment of the trial court.

7. The trial court did not err by not entering findings on all 11 factors in the Findings of Fact; or if it did, the result of the error should be

a remand for specific findings. There is no evidence that requiring specific findings would end in a different result, or in the relocation being denied; even a cursory examination of all 11 factors, in the trial evidence, supports the relocation.

8. The trial court did not err when it only required a proportional split of air travel: the father makes in excess of $140,000 per year; the mother makes about $20,000 per year, and is unlikely to ever make more than $45,000 per year; the father is vastly better able to bear additional expenses; and nothing in the statute or case law defines long distance travel expenses as including car or hotel rentals. This is well within the discretion of the trial court.

9. The court did not err when it awarded attorney fees: the husband makes in excess of $140,000 per year; the wife makes much less; the court was correct in finding the husband had the ability to pay and the wife had the need. This is well within the discretion and judgment of the trial court.

III. STATEMENT OF THE CASE – BACKGROUND

Much of Appellant's statement of the case is accurate. Much of the evidence he relies upon, however, is misleading; mischaracterized; or leaves out much of the trial evidence.

a. Angelika's Home Was In Texas. The evidence was clear that Angelika's heart was in Texas. RP at 1033-1034. She and Byron had lived in Texas before moving to Washington. They had gotten married in Texas. Byron's brother and sister – with whom he was close – lived in the Dallas area. RP at 58-59.

She could have a much better life in Texas. Before moving to Washington, they had owned a house in Texas, where she had an art studio and a fenced backyard. It had about 2200 square feet. RP at 1248-1249. By comparison, Byron's apartment in Mercer Island, which cost him $1,370 per month, about the same cost as their mortgage had been in Texas, had a thousand square feet; no secured parking; and did not even have a microwave. RP at 1252-1253.

Angelika's mother, sister, and her children lived in the Dallas area, and had for years. RP at 16. Angelika talked to her mother and to her sister frequently. Alaina and her cousins were close as well. RP at 22-23; RP at 66. The cousins were the only extended family close to her age that Alaina had. Byron's siblings in Texas had no children.

All of Angelika's close friends – that she had grown up with – were all in the Dallas area. RP at 59-60.

It was important to Angelika to raise Alaina close to her family and cousins. Angelika testified that she wanted Alaina to grow up, close to her cousins and family. She wanted their support. RP at 432.

Angelika also testified that she had no support system to speak of in Washington, to help raise Alaina. Byron had made it clear he was going to insist on the exact terms of the parenting plan; he planned to have witnesses at every exchange until Alaina was 18, RP at 1289-1290, despite being asked by Angelika to dial down the hostility.

While it was true that Laurel McNaught and she had been close, Laurel McNaught had taken sides in the divorce. She had insisted on accompanying Byron to every single exchange, solely to protect him from Angelika. She sat or stood where she could watch and listen to the exchanges. RP at 885. That was intimidating to Angelika. RP at 198-200. Angelika had asked not to be at exchanges all the time. RP at 896. She refused to stop. RP at 896.

Laurel testified at trial she was prepared to do that – to go along and watch at exchanges – if asked, until Alaina was 18 years old. RP at 901. This taking Byron's side, directly against Angelika, destroyed the trust and any relationship between the two women. Laurel McNaught was not going to be any support to Angelika; she had made herself the enemy.

The time Laurel spent with Alaina did dwindle over time. By her enmity to Angelika, she made it impossible for Angelika to trust her at all. Angelika's employer cut back her hours to 20 hours a week or so; she was able to do her work when Alaina was sleeping, and so had no need for babysitting. RP at 87-88. By the time of trial, Laurel's contact with Alaina was only when Byron had Alaina.

While Angelika's mother, Lara Bach, had spent a good deal of time in Washington during the divorce, her parents could not make a living in Washington and they could not continue to come up here. RP at 166-168; 174-179. After the divorce, Angelika would be alone in Washington.

b. Angelika had done the majority of the parenting; Alaina was very, very close to her. The evidence was clear that Angelika had done the majority of raising Alaina, and was the primary residential parent. RP at 385-387.

The evidence was also clear that Alaina was attached to her mother far more than she was to her father. Alaina co-slept with her mother. When she was upset, or scared, she went to her mother. RP at 25-28; 109-116; 154-156. Byron had admitted that as well. RP at 170-172; 223-224; 228. Byron had not taken care of Alaina by himself for extended periods. RP at 273. He was uncomfortable taking care of Alaina by himself, RP at

1292-1293, and didn't like it. RP at 1293. In his own materials for Dr. Hutchins-Cook, he had estimated that he had done less than 40% of the parenting duties. RP at 1301. Dr. Hutchins-Cook found Angelika had done 75%-85% of the parenting. RP at 384-385.

Byron reacted coolly when Angelika texted him about Alaina's progress. RP at 230-232. When they went on family vacations in Texas, Byron went and visited his family by himself, leaving Alaina with Angelika. RP at 21-22. When Angelika took Alaina to Texas for a two week vacation, Byron never once called and asked how Alaina was. RP at 1304.

Their text messages also showed the depth of Alaina's attachment with her mother. RP at 220-225; Trial Exhibit 24, page 2.

Byron liked his "alone time", when he did not have to be with Angelika and Alaina. RP at 1302-1305. He took time off from work and went to the movies, or snowboarding, without his wife or daughter. RP at 1303-1304. He went out to social events, drinking with friends, while Angelika stayed home with Alaina. RP at 1067-1069.

Even Laurel McNaught's testimony showed the attachment between Alaina and her mother. During the day, when Angelika was working, when Laurel as at the apartment, she saw Alaina crawling to her

mother and playing with her mother. RP at 855-856. Laurel testified that Angelika was a very good mother and she had no concerns about her. RP at 860. (To be fair, she praised Byron as well. RP at 861. But it was apparent Angelika had spent the vast majority of the time with Alaina.)

Dr. Hutchins-Cook even testified that Byron could not calm her as Angelika could. RP at 374-375; 272-273. She testified that Angelika had done the majority of the parenting prior to the divorce. RP at 250; 257. While she did say that Alaina was attached to both parents, she did not compare the two attachments. RP at 291. That was left to the other witnesses.

While Dr. Hutchins-Cook did recommend an eventual 50/50 parenting plan, she was clear this was conditioned on development and a plan that suits time away from each parent according to developmental stage. RP at 248. She could not specify what that actually meant, however. RP at 248.

Alaina had never been in daycare. Angelika chose to work from home, specifically so that she would be there for Alaina. RP at 75-76.

c. Angelika testified that it was important for Alaina, to grow up in a house. In a house, unlike an apartment, she would have a back yard to play in, without having to be watched constantly. RP at 1034-1037; 939-

941. Alaina knew how a house was better than an apartment. RP at 1034-1036. She could play outside in the back yard. RP at 927. She could have a pet – one of Angelika's dreams was to have a pet dog for Alaina to play with. RP at 926-927. She could have the kitchen she had always wanted. RP at 928. All of this is impossible or minimal in an apartment.

d. Angelika could afford to buy a nice house in Texas and was qualified to buy one. Angelika was pre-qualified, on her salary of $45,000 a year or so, to buy a house for about $200,000. RP at 451. There was a wide variety of very nice homes in Plano in that price range. Trial Exhibit 29. She did not want to buy a condo; RP at 931-933. She could not make more money in her career, as a practical matter, than $45,000 a year. RP at 1004-1005. She did not want to spend Alaina's childhood in a rental. RP at 447-4550; 1004-1006; 1036-1037.

With current mortgage rates, Angelika could buy a house for $190,000, with a monthly payment of between $1100 and $1300 a month. RP at 928-931; 451-454. That was much cheaper than her apartment rent on Mercer Island of $2,500 per month, which was going up each year. RP at 929-931; 447-450. The cost of a home in Texas, far better than a comparable home in Washington, was comparable to the apartment rent ($1370 per month) that Byron was paying. RP at 1252.

Byron cannot argue here that Angelika did not demonstrate that she could not meet her expenses if she purchased a home in Washington; he argued that she could buy a home in Washington. RP at 1311-1312.

Byron had put together a selection of comparable homes in Washington that he felt were appropriate for his child, and that were in that price range. Trial Exhibit 163. (These were the "ugliest homes" that Appellant refers to. In fact, this exhibit was gathered and submitted by Byron, not Angelika. RP at 1262; 1316.) The contrast between a $190,000 home in Plano and a $190,000 home in Washington speaks for itself. That became quite clear when Byron was walked through the details of the homes he had used in Exhibit 163. See Trial Exhibit 31; RP at 1262-1273.

e. The cost of living was substantially lower in Texas. Testimony showed most living expenses were substantially lower in Texas. RP at 104-105; 457-466. Also Trial Exhibit 23. Byron testified the house they had owned in Texas, a house with 2200 square feet and an art studio for Angelika, had cost only $1423 per month. RP at 1248-1249. That house also had a fenced back yard. RP at 1249. Byron, at trial, was thinking of buying a home; he expected to pay about $290,000 and he expected to be a condo. RP at 1251. He thought he could afford that much on his salary.

The lower expenses have two effects: first, Angelika can afford a nicer home for Alaina; second, she can afford more – or better – extra enrichment activities for Alaina. If on Mercer Island she could afford one activity – say, gymnastics – in Texas, she could afford both gymnastics and ballet. A dollar simply stretches farther, where expenses are lower. This can only benefit Alaina.

f. Angelika did not blindside Byron or the trial court in her relocation. It is important to understand what happened in the parenting evaluation. After the temporary orders were entered, Angelika made a real effort to try to make staying in Washington work. She tried to get along with Byron.

Her mother came up a lot, and her parents tried to buy a home in Washington. Her parents were trying to make a living by buying and flipping houses. Angelika did tell Dr. Hutchins-Cook she intended to stay here; she felt it was important, if at all possible, to try to make it work.

It turned out to be impossible. Her parents tried to buy two different houses. Trial Exhibits 26 and 27. Both sales fell through, and it was clear to them that Washington was simply too expensive. The first attempt was on March 6, 2014; that deal fell through. RP at 167-170; Trial Exhibit 26. The second attempt was on May 21, 2014. Trial Exhibit

27. Dr. Hutchins-Cook released her report on April 21, 2014 – a month before her parents' second attempt to buy a home. Trial Exhibit 3.

That deal also fell through; the sellers had multiple offers and her parents could not compete. RP at 432-440.Her parents decided they could not live here. Angelika would be alone. By the time of trial, her parents had actually signed a purchase and sale agreement for a house in McKinney, right next to Plano, for $215,000. See Trial Exhibit 32. That house is far better than the average $215,000 home in Mercer Island. Trial Exhibit 32, pages 11-14.

But the evidence is indisputable that her parents were seriously trying to buy a house here, and Angelika was still trying to make it work here, a month after Dr. Hutchins-Cook released her report. The recommendations were not the reason she decided to relocate.

The relationship with Byron had gotten worse. There was evidence that Byron was following her; and despite her request, he insisted on having both of his parents at every single transfer, looking at her, intimidating her.

She decided that staying in Washington was impossible and she had to move. She provided a Notice of Relocation appropriately.

g. Angelika made much less than Byron; her income would stretch much further in Texas. Finances drove her decision to move as well. Byron's income was $144,000 for 2013, and likely to be better than that in 2014. Byron's career was in very good shape; he had ample ability to live on Mercer Island and buy a home.

Angelika was in the exact opposite position. She made only about $20,000 in 2013. She had made about the same by the time of trial in 2014. Trial Exhibit 10; Financial Declaration at Trial Exhibit 7. Even working full time, the most she could likely make was $40,000 or so a year – not enough to buy anything in King County. She would never make anything close to what Byron was making. While she assumed the court would order some maintenance, the chances were it would only last 2-3 years at most.

Cost of living was a huge factor. The Mercer Island apartment rent had gone up to $2,500 per month – over half of her income. It was likely going up again the following year. RP at 929-931; 447-450. Most expenses were either the same or much less in Texas. See Trial Exhibit 23.

Angelika did provide the Zillow details on Byron's comps, however. Trial Exhibit 31. They showed one of his houses was located

next to a junkyard; others were condos with tiny kitchens. The comparably-priced houses in Texas were far superior.

It was true that moving to Texas would not increase her income. But it was also very true that her income bought a lot better lifestyle in Texas, for her and Alaina, than it ever would in King County.

Byron produced no evidence that a move to Texas would harm Alaina. In fact the opposite was true: she would end up living in a much nicer house. She would be able to afford many more activities than Angelika could pay for in Washington, since activities are paid for from discretionary income.

Dr. Hutchins Cook did not testify that Alaina should not relocate. She specified that she had no opinion, though she was not a fan of relocations in general. She did testify that Angelika had done the majority of the parenting. She did say Byron had come a long ways in his parenting.

She also testified, when asked specifically about which would cause greater harm to Angelika – disrupting her relationship with her mother, or with her father – disrupting the relationship with her mother would cause greater harm. There was no equivocating in her answer.

She also testified that in a long distance relocation, Skype can be a viable means to maintain a relationship.

Byron did have the time and money to travel. He made over $145,000 per year, and his career was on the rise. He could work from home, with prior coordination with his supervisor, and he had 20 days per year of vacation in addition.

There is a cost to long distance transportation. It is possible that, if Byron actually takes all the time he has under the Parenting Plan, that the costs of travel may equal the lower cost of Texas. But that assumes Byron will actually do all the travel; and it does not take into account the greater quality of life for Alaina, living in her own house, with their own backyard, and a pet, close to her cousins and aunt and grandmother –for the same cost as living in a two bedroom apartment somewhere in King County. This comparison is inapt.

Ultimately, Dr. Hutchins-Cook did recommend a parenting plan which would, eventually, in two years, go to a 50/50 plan. But initially, under her proposal, Byron actually had the same or a little less time than he had under the parenting plan.

It is also important to note that throughout the trial, Byron maintained that he should be named the primary residential parent. He has not appealed the court's decision to name Angelika as the primary residential parent.

IV. ARGUMENT

a. The Trial Court Did Not Misapply The Statutory Presumption.

Appellants argue for an application of the statutory presumption that is not supported either in the statute or the case law. They argue, essentially, that once Byron produced any evidence to rebut the presumption, the court should have discarded the presumption entirely, and made the decision as to the relocation based solely on the best interest of the child.

Appellants cite Estate of Langeland, 177 Wash.App. 315, 321, 312 P.3d 657 (2013), for the proposition that Washington courts have no general guidelines for presumptions. While that is a comment in Langeland, Langeland is a case priamrily dealing with conflicting presumptions. The court went on to prescribe how the trial court should resolve conflicting presumptions. That is irrelevant to interpreting the statutory Relocation Act presumption: there are no conflicts.

Appellants cite Bank of Washington v. Hilltop Shakemill Inc., 26 Wash.App. 943, 948, 614 P.2d 1319 (1980), for the proposition that the only purpose of a presumption is to establish which party has the burden of first producing evidence; then, when the opposing party has produced evidence to overcome the presumption, the presumption must be discarded.

That misstates the rule in Hilltop Shakemill. First, there is nothing in Hilltop Shakemill that made this a rule for all presumptions.

Second, there is no evidence in the statute or case law that makes this applicable to the Relocation Act. The Act itself makes the presumption an integral part of the balancing process. The case law, as laid out in Horner, clearly interprets the presumption as an integral part of the balancing of the Relocation Act factors. Marriage of Horner, 114 Wash.App. 495, 58 P.3d 317 (2002).

Marriage of Wehr, a 2011 case, makes clear that the Act does not indicate which parent bears the burden of proof in the fact finding hearing. Marriage of Wehr, 165 Wash.App. 610, 612, 267 P.3d 1045 (2011). After the hearing, the trial court has authority to allow or not allow the relocation, based on an overall consideration of the RCW 26.09.520 factors and the child's best interests. Wehr at 610. The standard is the preponderance of the evidence. But overall, it is very clear that there is no two-step process.

Further, no one factor is dispositive under the Act. The appellant – in picking and choosing specific factors it wants to emphasize- ignores all of the other factors.

For example, appellant argues that there will be damage to the relationship between the father and the child: that he will be reduced to a "visitor". The mother vigorously disputed that. But any one factor is not dispositive. That is not a basis to overrule the court's decision.

The Relocation Act, by its very nature, assumed that there would be damage to the relationship between the child and the non-relocating parent. RCW 26.09.520 et. seq. The Act does not distinguish between moving from Seattle to Tacoma; and from Seattle to New York. The factors are the same and the Horner test is the same. As a practical matter, as Dr. Hutchins-Cook testified, there is always damage in a long distance move. But the Relocation Act allows the same presumption – that the primary residential parent will be able to move – to a long distance move, as a move to Tacoma. Thus the presumption by definition includes acceptance of a certain amount of damage to the non-relocating parent's relationship.

In this case, Dr. Hutchins-Cook testified that the only impact of the move on Alaina would be from the disruption of her relationship with her father. RP at 390-391. She also testified that it would be more detrimental to Alaina to disrupt her relationship with her mother than with her father. (Factor 2.3.3.) RP at 388-389.

Appellant argues that Byron met his burden of proof, to prove by a preponderance of the evidence that the harm to Alaina outweighs the benefits of relocation.

As his primary basis, he argues that the evidence for this came in through Dr. Hutchins-Cook. He seems to be arguing for a bright line test: if a parenting evaluator says there is harm to the relationship of the child and the non-residential parent, then the parent has proven the harm from the relocation outweighs the benefit, and the court must deny the relocation.

That is not the balancing test laid out in the Act. That is only one, non-weighted factor. Dr. Hutchins-Cook had opinions as to several, not all, of the factors, and had no overall opinion as to a relocation. She stated that she did not have any opinion - or knowledge - as to the economic factors. She stated that there would be greater harm to Alaina from disrupting her relationship with her mother than with her father.

In making this argument, Byron is asking the appellate court to weigh the evidence; decide credibility; and otherwise stand in the shoes of the trial court. This is not what an appellate court does. The appellate court does not review credibility determinations or weigh evidence on appeal. The appellate court defers to the trial court's ultimate relocation ruling unless it is manifestly unreasonable or based on untenable grounds or untenable reasons under the abuse of discretion standard.

Marriage of Fahey, 164 Wash.App. 42, 56, 262 P.3d 128 (2011), citing Horner, 151 Wash.2d at 893, 93 P.3d 124; Marriage of Bay, 147 Wash.App. 641, 651, 196 P.3d 753 (2008).

In the present case, the trial court heard several days of testimony from not just the parenting evaluator, but from the parties and several collateral witnesses. The evidence is clear the trial court properly applied the presumption.

b. The Trial Court Heard Evidence on All Factors.

Contrary to Appellant's claim, there was ample evidence to support the court's ultimate ruling. The court heard evidence as to all factors in RCW 26.09.520:

2.3.1 The relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent and other significant persons in the child's life.

The court had ample evidence that the mother was the primary person in this child's life. See Background, above. Angelika testified that she and Alaina had been co-sleeping virtually all of Alaina's life, RP at 118; though Byron testified that he had shared it to some degree. Byron agreed that Angelika had done the majority of the parenting.

A major bone of contention was that Byron liked his "alone time", when he could do his own thing, RP at 126-127; Angelika meanwhile

spent all of her time with Alaina. RP at 110-130. Byron liked to create music, RP at 126-127. But even though she asked him to create a song for his daughter, he never did. RP at 126-127.

When they went to Texas as a family, Byron went off and spent the vacation with his family, but without Alaina, RP at 21-22; Alaina spent all of the vacation with her mother. When Angelika, after separation, took Alaina to Texas for two weeks, Byron never once called and asked how Alaina was doing. RP at 1304. Byron complained in text messages, about the time of separation, that he could not quiet Alaina; that Alaina needed her mother; and he was unhappy that Angelika had left Alaina with him. RP at 1292-1293.

The other witnesses all testified to the depth of Alaina's bond with her mother: Evelina Clopp, RP at 22-28; Lara Bach, RP at 173-176; Cameron Ousbey, RP at 154-156.

Dr. Hutchins-Cook testified that in her expert opinion, Angelika had done 75 to 85 percent of the parenting, and she had the most involvement with the child. RP at 384-385. She had no opinion on the costs of living in Texas (or Mercer Island). RP at 392-394.

It is true that Laurel McNaught used to have a very significant role in Alaina's life as her grandmother and babysitter. That changed in the

divorce for two reasons: the need for babysitting was cut back as Angelika's hours were cut back; and because Laurel McNaught purposely took sides, agreeing to accompany Byron to all transfers, to protect him from Angelika. RP at 199-200. By the end of the divorce, her contact with Alaina - by her own choice - had dwindled to seeing Alaina on Byron's time.

Alaina was very attached to her grandmother, and her aunt and cousins. RP at 22-24. Byron's siblings had no children, so the only extended family (that were children) were on Angelika's side.

The evidence was also clear that everyone on Angelika's side - grandmother, sister, and Alaina's cousins - were living in Texas. , and could not get to Washington to see Alaina after the divorce was over. RP at 174. .

Dr. Hutchins-Cook testified that Alaina was well-bonded to both parents, but did not compare the extent of the attachment to each parent. **She did not say the attachment was equal**.

Overall, the evidence was clear this child's primary and strongest bonding was with her mother. The preponderance of the evidence for this factor favored the relocation.

2.3.2 Prior agreements of the parties.

There was no agreement of the parties. While it was true that Angelika had decided to try to work things out and stay in Washington, this was not an "agreement" with Byron in any sense of the word. Byron had always insisted on a 50/50 plan, and actually demanded that he be designated the primary residential parent. RP at 1201-1202. The overall evidence was that they could not agree on anything at all. This factor was not applicable.

2.3.3 Disrupting contact between the child and the objecting party or parent is more detrimental to the child than disrupting contact between the child and the person with whom the child resides a majority of the time.

Dr. Hutchins-Cook testified that it would be more harmful to Alaina to disrupt her relationship with her mother than with her father. RP at 389. That is consistent with Alaina's primary and strongest bond being with her mother. The preponderance of the evidence for this factor favored the relocation.

2.3.4a The objecting party or parent is not subject to limitations under RCW 26.09.191.

This factor was not applicable.

2.3.5 The reasons and good faith of each person seeking or opposing the relocation.

Dr. Hutchins-Cook testified that there was no bad faith. RP at 390.

Angelika had changed her mind about staying in Washington when Byron continued to create problems, and when her parents, after trying to buy two homes in Washington, gave up and decided to stay in Texas. Angelika was seeking to move to be close to her family, and to have a better quality of life. There was no bad faith. The preponderance of the evidence for this factor favored the relocation.

2.3.6 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.

While Alaina was young, she had no connection to Washington other than her father and paternal grandmother. She was not in daycare or preschool, and had few friends. Dr. Hutchins-Cook did not consider Alaina's friends, at her age, to be a factor. RP at 391. She was living in an apartment. Dr. Hutchins-Cook had no opinion about Texas schools. RP at 392-393. Dr. Hutchins-Cook testified that the only harm to her would be from the lessened contact with her father. RP at 390. As well, the testimony was that Angelika was the parent that did the work helping Alaina adapt to new situations. The preponderance of the evidence for this factor favored the relocation.

2.3.7 The quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations.

There were equal educational and extra-curricular opportunities in Washington and Texas. There were ballet; gymnastics, and Montessori preschools. RP at 458-470; 30-32. Montessori schools cost less in Texas. RP at 30-32. The overall costs in Texas were about a third less than in Washington. RP at 463. Gas was cheaper. RP at 506-507. While both parties agreed that Mercer Island is a good place to live, Angelika could not afford to live there for long. Byron's own house comparisons, that he felt were good choices for Angelika, were in Renton or in North Seattle, not Mercer Island. Trial Exhibit 163. (He did have some condos in his exhibit, on the Eastside.)

The evidence was overwhelming that Angelika's housing options were much better in Texas. She was pre-qualified to buy a house on her limited income. RP at 451. She and Alaina could have a backyard and have pets. RP at 447. They could have a house like they used to have, when they lived in Texas, years earlier, that she had loved. She wanted stability for Alaina. RP at 663-664. Her dream was to raise Alaina in a house. RP at 1095-1096.

The available housing, that she could afford, were head and shoulders above Washington's housing options. RP Trial Exhibits 18, 31, and 163. Looking at the comparable homes in Texas and Washington, the

difference is obvious.

Quality of life also consists of family support and relations. Angelika's friends were in Texas. Alaina's cousins, aunt, and maternal grandparents were all in Texas. While Angelika could travel to Texas twice a year to see them, if she stayed in Washington, they did not have the resources to travel to Washington. The only way to have family support in any meaningful way would be to live in Texas. The preponderance of the evidence for this factor favored the relocation.

2.3.8 The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent.

While not perfect, there is no perfect solution to a long distance parenting plan, other than denying a relocation. But that also implies that the Relocation Act presumption includes the fact that the non-relocating parent's access to the child will be less than it was.

In this case, the court ordered regular Skype or Facetime contact, as well as ample in-person visitation in Texas. Dr. Hutchins-Cook agreed that she routinely recommended Skype or Facetime as an alternate arrangement. RP at 395. She agreed that flying to Texas to see Alaina would be an alternative arrangement. RP at 399. In fact, what the court finally ordered – five overnights a month in Texas – is almost precisely

what Dr. Hutchins-Cook recommended for a long distance parenting plan. RP at 400-405.

The father has the income to make that happen, when he is making in excess of $140,000 a year. That visitation is currently happening. See Declaration of Angelika McNaught In Response to Motion for Stay, already on file with this court. The preponderance of the evidence for this factor favored the relocation.

2.3.9 Alternatives to relocation and whether it is feasible and desirable for the other party to relocate.

There were few good alternatives to relocation. Angelika testified that if she stayed here, she would have to move to a cheaper apartment soon. She could not buy a house. Byron's apartment in Mercer Island, although cheaper than hers, was substantially worse. It did not even have a microwave oven, or covered or secure parking. She would never be able to buy a home here in Washington. She would never make substantially more money.

There was conflicting testimony about Byron's ability to move. He had the ability to find a job in Texas. His last job in Texas had paid about $80,000 a year, RP at 1101. That was substantially less than he was making in Washington, and his career was going very well in Washington. RP at 1105-1108. So while it was technically feasible for him to relocate,

it would be at substantial cost to him, both in income and in terms of his career.

The preponderance of the evidence for this factor was a wash.

2.3.10 The financial impact and logistics of relocation or its prevention.

There was substantial financial impact to Angelika from denying the relocation. She would have to live here, with Angelika, and inevitably move to more and more down scale housing. Alaina would grow up in a series of apartments.

There was some financial impact to Byron as well. While the impact of air travel costs were split - and so hit both sides equally - he would bear the cost of hotel rooms and cars. On the other hand, he would save substantial amounts of money from not having Alaina with him for most of the year. Angelika would bear those day-to-day costs.

There was some argument that the costs of long distance travel would outweigh - or at least equal - the savings from living in Texas. This was, we argue, a red herring. Travel expenses are incurred only to the extent Byron actually travels to Texas. If he chooses not to, then he has no travel expenses. On the other hand, all the other expenses - housing, food, gas, Montessori, gymnastics, etc. - will be incurred whether Angelika and Alaina lived in Texas or Washington. Those are not discretionary.

There are opportunity costs as well, that are borne by Angelika. If she stayed in Washington, she could not afford a decent house to live in. She could only afford to rent an apartment. That is a financial opportunity that is a cost to her, in practice, by staying in Washington.

The preponderance of the evidence for this factor favored the relocation.

c. The Mother Did Not Fail to Meet Her Burden.

a. The father argues that Angelika's evidence was primarily that she was moving to be close to her parents. He argues that the court should not give any weight to the adult's relationship with their family. He argues that RCW 26.09 orders the court to fashion an order which is in the best interest of the child.

This ignores the plain language of the Relocation Act. That finds, as a presumption, that it is in the best interest of the child to remain with the relocating parent. Thus, allowing the relocation is presumptively in the best interest of the child. It is not an even playing field.

In this case, being close to her family meant she could rely on their support in being a single parent. There would be someone who she could talk to about parenting; that she could ask to watch Alaina; that Alaina could play with and spent time with.

She could not rely on Byron or his mother for support. Byron had made it clear during the divorce he went back and forth: he claimed he wanted to co-parent with her; but also, when she wanted to delay a transfer by 15 minutes, insisted on sticking strictly with the parenting plan. Laurel McNaught had made herself an enemy, as well.

There was no evidence the court elevated her desire to be close to her parents above the statutory factors, in any impermissible way.

b. There is no case law that states lower cost of housing is insufficient as a matter of law to support a relocation.

Appellant argues that the court failed to consider the other factors in the Relocation Act, and that the lower cost of housing is insufficient to support the relocation.

There is no evidence that the court did not consider other factors. There was clearly evidence and testimony as to all the factors. How relevant the other factors were, is up to the discretion of the trial court.

The court considered not just the cost of housing, but the quality of housing. While there was conflicting evidence on the cost of utilities, the evidence was that property taxes were about the same for Texas and Washington. RP at 1364-1365; 1373-1374. However, condos have HOA fees; houses do not.

But that is not the end of the analysis. The question is not just what the housing expenses are, but what kind of housing she could afford. And here there was no question that the housing she could afford in Texas, was far superior to the housing she could afford in Washington.

The trial court's job is weigh the evidence and determine credibility. The only way the appellate court can find the trial court was wrong in finding her housing was better in Texas or here, as a matter of law, is if no reasonable person could find what the court found. That is patently not the case.

d. The Mother Did Not Waive Application of RCW 26.09.530.

Appellant argues the mother waived application of RCW 26.09.530, when she stated in her Notice that - at the time she filed the Notice, well before trial - that relocating was dependent on the court granting permission.

It is correct the Notice of Relocation said her relocation - at the time it was filed - was dependent on the court's granting the relocation. But there is no evidence the court ever considered that as testimony at trial, that the mother would not move if the court denied relocation.

There are many times, in every case, when things are stated in pleadings, which turn out to have changed by the time of trial. That is why

there is live testimony at trial. Here, she was never asked if she would forego the relocation if the court denied it. Byron's attorney specifically did not ask her. Her own attorney did not ask her. She did not volunteer it. The court, in its oral ruling, did not indicate that was a factor, or that it was considered at all.

In order to find a court considered an impermissible factor, here must be more than one statement in a pleading. There must be something in the record that indicates the court actually considered it: some comment by the court; some testimony by the parties; some argument by the attorneys. Here there is nothing at all to indicate this was considered.

It would be unfair to hold that a statement in a routine pleading, made well before trial, poisoned the trial so much that the court could not grant a relocation at all.

e. Restricting the Father's Designation of Family Members is Not Manifest Error.

Appellant argues that restricting the long distance visitation primarily to the father is an impermissible restriction. We argue it is not.

As an initial matter, however, this is not remotely a basis to deny the relocation. At most it warrants remand for this one issue.

There is no question that when Alaina is with the father, he can leave her with anyone he wants to. There is also no question that when he is in Texas, he can do anything he wants to with her, while he is there.

The sole restriction is that he cannot tell Angelika, for five days a month, you have to put Alaina with my mother, or brother, or sister.

The intent of the parenting plan is to give the father as much time as possible, given his schedule, and money, to keep a strong relationship with his daughter. It was not to order visitation to his mother, or his other family members.

It is true under Magnusson v. Johanneson, 108 Wash.App. 109, 113, 29 P.3d 1256 (2001), that a parent normally has the right to delegate residential time to his family members while he is away.

But appellant misapplies Magnusson. Magnusson is a case where the father normally resided in the same town as the mother. The trial court found he could designate members of his family to provide child care during the first weekend he was gone fishing. Magnusson at 112.

The Magnusson court did not state that there must be .191 findings to restrict delegation to family members. It was careful to state that "Ordinarily, a parent may designate other caretakers even though the parenting plan makes no special finding or conclusion on that topic." It

also stated that designation was a normal right of parental decision making. Magnusson at 112-113.

That is quite different from this case. This is a long distance plan: the father has to travel to Texas and has no routine every-other-weekend visitation. There is no need for caretakers or daycare. If the father cannot get to Texas, he simply does not have residential time with the child at all. It simply does not exist.

In order to delegate time to his mother, his mother would have to come to Texas, by herself, and the father would have to coordinate and reserve the five day period. To find that he has the authority to do this would, as a practical matter, be in conflict with Troxel v. Granville, 530 US 57, 120 S.Ct. 2054, 147 L.Ed.2d. 49 (2000).

Angelika was willing to work with Laurel, if she came to Texas, to see that she got to spend time with Alaina. RP at 540-541. But the intent was to make sure Byron saw his daughter. RP at 540.

f. Every Clause In A Parenting Plan Is Not Required to Be Supported by both Findings and Substantial Evidence.

1. There is no dispute that findings of fact must be supported by evidence. We also agree with appellant that substantial evidence is a

quantum of evidence sufficient to persuade a fair minded person of the truth of the matter.

But terms in a parenting plan are neither Findings of Fact, or conclusions of law. There is no requirement that every specific term in a parenting plan be supported by a specific Finding of Fact. A trial court is not bound by the arguments or proposals of either party, or their attorneys. The judge in a family law case, within the limits of his discretion, is free to fashion any parenting plan he wants to, that he feels is fair and in the best interest of the children. He uses his own judgment in doing that. All of the decisions appellant complains of, are well within the trial court's discretion.

2. A 45 day advance notice is reasonable. Byron testified that if he was taking time off, he had to coordinate around his co-worker's schedules, and his requirement to support company training activities. RP at 1106-1108. Most companies will plan major national training activities well in advance. This means that Byron has to coordinate taking time off well in advance, anyway.

As well, the farther out one gets air tickets, generally the lower the price. 45 days is not an unreasonable period of time to plan for trip to Texas.

3. The Mid-Trip Break Is Supported By the Evidence. Again, the court is free to fashion the parenting plan. The appellate court should defer to the trial court. There is no case which requires a trial court to fashion a parenting plan which changes as the child grows longer.

Having said that, Ms. McNaught has no objection, 3-4 years out, to not having the father's time with Alaina interrupted by the mid-period return to her, as the court ordered. But this is not a reason to overturn the relocation; at most this is a remand to the trial court for a limited purpose.

4. The Special Occasions Are Not Arbitrary. All special occasions, by their nature, are limited duration: running at most 24 hours, and usually less. Father's Day and Mother's Day are on Sundays and there is typically school the following day. It would be irrational - and clearly not in Alaina's best interests - to fly her to Washington, for a one day visit with her father. She would have to be in school the next day; and the only way to accomplish that would be either fly her back the same Sunday, or have her fly with a redeye to Texas, and arrive Monday morning. This is not an arbitrary decision; this simply recognizes reality.

5. Facetime Is Not Arbitrarily Limited. Again, the amount of telephone contact between parents - either local or long distance - is a question well within the discretion of the trial court. There is no statute or

case law, which requires any set amount of contact. The trial court has to balance the father's wants, to have unlimited, constant contact with the children, with the mother's need to live her life; have a family life of some kind, without having the father constantly on the phone with the children.

No matter which way the court goes, one side or the other is apt to feel it is unfair. But two times per week, is a reasonable compromise.

g. None Of This Is A Basis To Vacate The Parenting Plan. None of these terms are arbitrary or capricious. They do not mean the parenting plan is so flawed that it must be vacated entirely.

h. Sufficient Findings Were Made.

Appellant argues the court should have made specific findings with respect to every factor. Under Marriage of Jensen, 147 Wash.App. 641, 196 P.3d 753 (2008). If the court did not make specific written Findings, the appellate court is to look to see if substantial evidence was presented on each factor, and whether the trial court's findings of fact and oral articulations reflect that it considered each factor. Jensen at 655.

In this case, there was no oral ruling. The court sent out a Memorandum Decision, which was then turned into the final orders. See Email and Memorandum Decision, at Exhibit 1.

It is very apparent there was substantial evidence, on every factor, to support the trial court's decision. The memorandum decision, while sketchy, does reflect that it considered all the 26.09.520 factors.

However, even if the court finds the memorandum decision was insufficient, this is not a basis to overturn the trial court's decision, or to order the mother to return to Washington. The evidence on every factor - as outlined above - overwhelmingly favored allowing the relocation. There is no evidence that more formal findings would result in a different decision, or that the trial court's decision was wrong. At most, this should result in a remand for more specific Findings.

It is true that Jensen found that Horner required reversal of the two temporary orders. Here, that would be unfair to the mother, to reverse the decision, without first remanding the case to the trial court for more specific Findings.

i. The Court Properly Split Only Air Travel Expenses. RCW 26.19.080(3) does require long distance expenses be shared. It states in part:

> (3) Day care and special child rearing expenses, such as tuition and long-distance transportation costs to and from the parents for visitation purposes, are not included in the economic table. These expenses shall be shared by the parents in the same proportion as the basic child support obligation.

RCW 26.19.080(3).

The case law states that the children's long distance transportation expenses must be shared by parents in the same proportion as the basic child support obligation; the applicable statute allows no room for a court to exercise its discretion in this area. In re Marriage of Scanlon and Witrak (2001) 109 Wash.App. 167, 34 P.3d 877, *amended on denial of reconsideration, review dismissed* 146 Wash.2d 1014, 52 P.3d 519.

But this is limited to transportation expenses. This is by definition airfare for the parent and child. Scanlon makes no reference to sharing hotel bills, food expenses, etc. No court in Washington has defined "transportation expenses" as including hotel bills, car rental, food, or a per diem. See Scanlon, supra; also Murphy v. Miller, 85 Wash.App. 345, 349, 932 P.2d 722 (1997).

This makes sense: the ancillary expenses involved in having a child are the responsibilities of the residential parent. If Byron had Alaina in Washington, he is responsible for his own apartment rent; his own food; the cost for his own car or bus travel; etc. If he took her out to McDonald's, or Applebees, in Washington, that would be his expense. If he took her on vacation to Disneyland, under a normal parenting plan, the mother is not responsible to help pay for their meals.

Similarly, this is part of his routine residential time in Texas. He bears his own costs of living while he is there.

This is fair when the court considers the great disparity in incomes. Byron makes over $140,000 per year, and his income is going up each year. Angelika makes a little over $20,000 per year, and while she does have maintenance for three years, that will be gone at that time, and Byron will likely be making five times what she does. Byron agreed that he could afford to pay for travel to Texas. RP at 1255.

j. An Award of Attorney Fees Was Warranted Attorney fees are awarded on the basis of need and ability to pay. There was no question Byron had superior resources and greater income than Angelika did. It was also clear that in the future, Byron would be making more money; Angelika would not.

Byron testified that with his current income of $140,000 per year, he only had expenses of $4,959 per month. RP at 1257; Trial Exhibit 17. He expected to make about $12,000 per month this year. RP at 1256. (This was without maintenance or child support factored in.) His W-2, bank statements, and his 2013 tax return all support the court's decision that he has ample ability to pay. See Trial Exhibits 7 (W-2); 14 (Husband's 2013 tax return), and Exhibit 109 (Husband's Bank Statements).

An award of attorney fees was well within the discretion of the trial court.

V. CONCLUSION

We would ask the court to deny the appeal and award the mother attorney fees under RAP 18.1.

RESPECTFULLY SUBMITTED this 19th day of November, 2014.

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Exhibit 1

Jonathan Hansen

From: Powell, Mary <Mary.Powell@kingcounty.gov>
Sent: Friday, August 01, 2014 8:13 AM
To: 'Jon Hansen'; 'Kathryn V. Fields'
Subject: McNaught v. McNaught, 13-3-09493-6 SEA
Attachments: McNaught v. McNaught.pdf

Good Morning,

Attached, please find the Memorandum Decision, which will be filed today.

Take care,
Mary

Mary Powell
Bailiff for Judge Richard D. Eadie
206.477.1525
Mary.powell@kingcounty.gov

IMPORTANT: In order to avoid inappropriate ex-parte contact, you are hereby directed to forward this communication to all other counsel not already copied on this e-mail.

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

In re the Marriage of: **ANGELIKA McNAUGHT,** Petitioner, and **BYRON McNAUGHT,** Respondent.	NO. 13-3-09493-6 SEA **MEMORANDUM DECISION**

The court has considered the evidence and arguments in this matter. Many issues have been resolved by the parties, and the court makes the following decisions on the remaining issues. In making these rulings the court recognizes that both parties are very committed to the happiness and well-being of their daughter.

1. Maintenance:

The maintenance ordered during the pendency of this action was fully committed to the rental payment on the apartment in which the parties resided prior to their separation, and allowed their child, as both parties seem to have intended, to have as little disruption in her life as possible while her parents worked out the details of the dissolution of their marriage. Petitioner will continue to have responsibility for the remainder of the current lease on the

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apartment. Therefore maintenance in the amount agreed to by the parties will be for 36 months, beginning with the payment due for the month of August 2014.

2. Day care:
Day care or Montessori costs shall be divided between the parties under child support worksheet ratios.

3. Primary Residential Parent:
Petitioner mother is found to be the primary residential parent, and custodian under RCW 26.09.285, and is the parent with whom the child is scheduled to reside a majority of the time.

4. Relocation:
Petitioner's motion for relocation is granted. The Court has considered the factors in RCW 26.09.520, and those factors favor the mother and her preferred relocation to Texas. Both mother and father are fairly recent residents in King County, coming here from the Texas area to which the Petitioner wishes to relocate. The parties moved here to allow Respondent to accept a job offer. His parents followed not long after.

Mother begins with a presumption in favor of her requested relocation because of being designated the primary residential parent. In addition the quality of the child's relationship to her, and to her family in Texas, is at least as strong as the child's connection with her father and paternal grandparents in King County. The child can look forward to a substantially better housing by granting the motion to relocate. She can expect to enjoy the stability of residence that home ownership usually provides. The community to which Petitioner proposes to move is, by the evidence, rated highly in all categories, most particularly, in the quality of schooling to which she will have access.

Judge Richard D. Eadie
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While Mercer Island, from which she will move, has high quality schools, she probably could not continue to reside there. Considering all the factors of RCW 26.09.520, the very substantial weight of the evidence supports granting Petitioner's motion.

Petitioner shall provide Respondent with notice of her planned move to Texas, by email to his current email address, or whatever email address he may hereafter designate to receive such notice, 30 days before the date she will leave King County to take residence in Texas.

5. Parenting Plan:
The Petitioner's proposed parenting plan based on relocation is adopted. Petitioner shall reimburse Respondent for his airfare to exercise his visitation in Texas in the same proportion provided in the child support worksheets. The airfare must be coach, and at the best rate 30 days in advance for a non-stop flight from Respondent's residence to Dallas, Texas.

The Court does not believe there is any basis for concern that the Petitioner will move to a foreign country without court approval, and therefore no restrictions will be placed on her travel, except that she must inform the father thirty days in advance if she plans to travel with the child outside of the United States or Canada.

Petitioner shall prepare and present all necessary documents to reflect these rulings and the agreements of the parties, without oral argument, as follows:
Petitioner shall present proposed documents to Respondent on, or before, 8/5/14.
Respondent's objections shall be presented to the court on, or before, 8/7/14.
Petitioner's Reply shall be presented to the court by 12:00 pm on 8/8/14.

Judge Richard D. Eadie
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Any agreed orders may be presented to this court before August 8, 2014. Petitioner may present a petition for an award of fees, which the Court will consider.

Dated this 1st day of August, 2014.

Richard D Eadie

Richard D. Eadie, Judge

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