73466-1

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Court of Appeals
Division I
State of Washington

No. 73466-1-I

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

In re the Marriage of

ALEXA INGRAM-CAUCHI
Appellant

and

STEVEN STOUT
Respondent

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This case involves two fit parents with two children, aged eight and eleven. The mother cared for the children while working part-time from home in a tech start-up she had designed in college, which is headquartered in California, the mother's original home. The father played a marginal role in child care, eventually withdrawing altogether in the year prior to the parties' separation. The parties divorced in 2012 and agreed to a parenting plan that gradually integrated the father into the children's lives, with the goal of achieving 50/50 parenting by 2015. In the meantime, the mother's business expanded exponentially and unexpectedly upon attracting the interest of prominent Silicon Valley executives, making it impossible for the mother to run the business from afar. Meanwhile, the father became engaged and moved from the family's long-term neighborhood of Capitol Hill to Snohomish County. The mother decided to relocate to California. The father objected and the ensuing litigation became a microscopic comparison of parenting styles, with the court ultimately denying relocation in order to guard against diminishing the father's relatively weaker bond with the children. The court's analysis turns on its head the statutory presumption, which favors continuity in the relationships as they presently exist. The court ignored this presumption, and the important policies underlying it, in favor of

attempting to engineer a family dynamic according to its own preferences. This approach violates Washington law.

II. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion by restraining the mother from relocating the children with her and ordering a parenting plan that requires the children to reside primarily with the father.

2. The trial court erred by misapplying the factors under the relocation statute, ignoring the statutory presumption in favor of relocation and policy in favor of continuity, relieving the father of the burden of persuasion, and failing to defer to a fit parent's decision to relocate.

3. The trial court erred by failing to consider the fact that the father had relocated out of the school district, causing major disruptions to the children's lives when his residence becomes primary.

4. The trial court erred by excluding the testimony of the mother's proffered witness on the necessity of her relocation.

5. The trial court erred by entering the following findings of fact and conclusions of law:

> a. "The detrimental effect of allowing the children to move with the locating person does outweigh the benefits of the move to the children and the relocating person." (Finding 2.3).
>
> b. "The children's relationship with their mother continues to be somewhat stronger and more stable than their relationship with their father… in part, due to the

narrative that the mother is a better parent that has been internalized by the children. Importantly, Respondent/father exhibits patience in the face of this dynamic and provides the children with a balanced perspective that there is more than one way to do something and provides a more flexible approach." (Finding 2.3.1)

c. "The children have also established relationships with their soon to be step sisters. . . . Both children are developing a nice relationship with Meredith Mallot, the father's fiancé." (Finding 2.3.1)

d. "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." (Finding 2.3.3)

e. "The children are excessively attuned to the mother's feelings, particularly with respect to her percept of the father's parenting, and this continues to undermine the children's confidence in the father's ability to care for them….in their minds, the mother's way is "right" and the father's way is "wrong." . . . she has a 'blindspot' about the ways in which she devalues the father's parenting role and the effect it has on her children." (Finding 2.3.3)

f. There are "concerns regarding the children's 'burgeoning perfectionism and associated rigid (black or white) thinking,'" and that they "would develop unduly concrete notions of good/bad instead of more flexible thinking skills and the ability to view a situation from multiple perspectives." (Finding 2.3.3)

g. "The primary concern for the children relocation to California is the potential negative impact on the children of losing day-to-day contact with the father, particularly given the problematic dynamics of this family, which are already marginalizing the father's parenting role. If the dynamic is not effectively intervened upon, such alignment could make these children increasingly vulnerable to becoming 'alienated' from their father; that is, becoming

increasingly resistant to spending time with him. . . . Should that proportion [of time spent with him] shift, such that father has less residential time with the children, or is in any other way further marginalized from the children's day-to-day lives, I have significant concerns that this would be highly detrimental to the children's regard for the value of the father's role in their lives and would increase the risk that his visits would be regarded as an unwelcome 'intrusion' in their lives in California." (Finding 2.3.3)

h. There would not be "any danger of any long-term negative impact on the mother's relationship with her children if they stayed in Washington…. Although the children would experience some initial sadness, given the strength of their bond and assurance that there would be regular and consistent visits/communication, the mother-child relationship would stay intact." (Finding 2.3.3)

i. The "primary concern about the children staying in Washington was due to the mother's behavior." (Finding 2.3.3)

j. "Given this family's dynamics, the Court finds disrupting contact with the father would be more detrimental than disrupting contact with the mother." (Finding 2.3.3)

k. "[I]t seems reasonable that [the mother] would have tried a 50/50 arrangement to see if it worked before completely disrupting the children's lives by proposing a move to California. . . The fact that she never tried a 50/50 parenting plan with half weeks every week in California indicates bad faith to the court." (Finding 2.3.5)

l. "[T]he mother has engaged in behavior (consciously or unconsciously) that has had a negative emotional impact on the children... these children appear to be anxiously monitoring [the father's] behaviors and home environment for evidence of parenting 'imperfections' and missteps and then reporting to these to their mother (i.e., consistent with the 'script' they have learned for navigating the differences between the two homes)." (Finding 2.3.6)

m. "[B]oth children are adjusting well post-divorce and integrating well into father's new family home in Brier." (Finding 2.3.6)

n. "Based on the mother's historic work history, the Court finds the mother has an alternate arrangement to foster a balanced relationship with the children without impacting the father's relationship with the children: she can reside in California with a midweek week on/week off basis and return to her Seattle home for her residential time with the children. This is the least disruptive to the children and the most beneficial for the children's emotional and physical well being. . . The court finds this would have been a reasonable alternative to at least try." (Finding 2.3.8)

o. The financial impact and logistics of relocating to California weigh against relocation. (Finding 2.3.10)

CP 442-449.

6. The trial court erred by awarding attorney fees to the father based on the disparate financial circumstances of the parties without any proof the father was unable to pay his own fees.

Issues Pertaining to Assignments of Error

1. Does the Child Relocation Act presumption require the court to grant relocation unless harm is proven and did the court here instead use a "best interests" analysis?

2. Did the trial court relieve the objecting parent of the burden of persuasion?

3. Does the fact that the objecting parent had just relocated out of the school district affect the analysis of the relocation factors?

4. Did the trial court err when it excluded a witness without finding the "*Burnet* factors" (i.e., whether the violation was willful and prejudicial and whether less severe sanctions are appropriate)?

5. Did the trial court err when it awarded fees based on the disparity of incomes, not on proof of the father's inability to pay his fees?

III. STATEMENT OF THE CASE

Alexa Ingram-Cauchi and Steven Stout were married in 2000. They met at the University of Washington and made their home in Seattle. RP 42-43. Alexa is from California and her family still resides there. RP 169. Steve's family is in Washington. RP 582-83.

Before she married, Alexa started a company with her brother and mother, iD Tech, which operates technology summer camps for children and is based in California, where both her brother and mother reside. RP 43, 751-54. Until recently, when the company expanded with the launch of Alexa Café, a program focused exclusively on technology education programs for girls, Alexa managed to work from her Seattle home office, shuttling back and forth to California as needed. RP 756-57, 762.

In 2004, Alexa and Steve had their first child, a daughter, G.S. In 2007, they had a son, W.S. Ex. 64 at 5; RP 42. After the birth of their children, Alexa did most the child rearing, while running her company from her home office. RP 1187-88. Steve was less engaged, deferring

mostly to Alexa on decision-making and the day-to-day parenting of their two young children. RP 1177; Ex. 64 at 27. Steve became increasingly distant and began to withdraw from Alexa and the children. Ex. 64 at 5-6. A former college athlete, Steve began to train for triathlons and to spend considerable time away from the family. Ex. 64 at 5-6.

In 2009, the couple sought counseling. A year later, the two began leading separate lives, with Alexa performing the bulk of the parenting while Steve "would come and go." Ex. 64 at 6. He was often too exhausted to help out with the children. Ex. 64 at 5-6; RP 1165-66. As a family friend, also a parent, observed, "I didn't really see Steve's role as a parent until they split up because Alexa was the primary parent." Ex. 67 at 11; see, also, *Id*. (another parent commented, "I didn't know Steven before the divorce, I had never seen him at school…).

By April 2011, W.S. was physically defiant toward Steve (hitting, kicking, spitting). Ex. 64 at 5-6. Alexa described their relationship as "rocky from the start"; for example, Steve was upset with W.S. playing dress-up with his sister and so hid the dresses from him. Id.

In the summer of 2011, Alexa and Steve decided to separate. RP 44. They began working with a parenting coach to work out a parenting plan during the separation. RP 41; Ex. 64 at 6. In August 2011, Steve moved out of the family home and into a one-bedroom apartment. RP

1180. Initially, the children spent most their time with Alexa, with Steve seeing them twice a week from 3-7 p.m. RP 1177; Ex. 64 at 6. They began spending some overnights with him in October 2011. Ex. 64 at 6. In November 2011, Alexa filed for dissolution. Ex. 66 at 3.

In September 2012, a parenting evaluation was completed by Dr. Jennifer Wheeler. Ex. 64. The evaluation recognized Alexa's "long-standing history of being the primary parent to both children," while noting Steve's pattern during the marriage of "learned helplessness" when it came to parenting and his withdrawal from the children "for much of their lives." Ex 64 at 27, 28; RP 1175-76. Following the evaluation, the parties entered into an agreed parenting plan in December 2012. Ex. 5. The plan designated Alexa as the primary residential parent, with 8/14 nights with the children. Ex. 5 at 2, 7. The parties agreed to move to a 50/50 schedule in June 2015. Ex. 5 at 2.

In February 2013, after a trial on financial issues, the dissolution became final. CP 1-6. A month later, Steve informed Alexa that he was dating Meredith Mallot; he introduced Meredith to the children shortly afterward. RP 677. Over the next several months, G.S.'s therapist, Dr. Lyons, had various discussions with Steve and G.S. to address her wanting more one-on-one time with him and more choice about spending time with Meredith. They also discussed Steve accommodating G.S.'s need for

more quiet / reading time and not pressuring her to be social while at his house. RP 684-695.

Meanwhile, in August 2013, outside investors purchased 40% of iD Tech's shares, requiring the organization be restructured. RP 829. An expanded and independent board of directors replaced the former board (consisting of family members) and demanded more accountability from the executive staff. RP 830-34. Within months, the company launched several new programs, including Alexa Café, a tech camp for girls, focusing on building skills in technology, entrepreneurship, and leadership. RP 708, 768, 861. This program drew the attention and backing of Cheryl Sandberg and Susan Wojcicki, two of the tech world's leading women executives. RP 779. The company viewed Alexa, a successful female technology entrepreneur, as crucial to this program's implementation and success. RP 862-63. Consequently, work made ever greater demands on Alexa, particularly as the program took off. RP 863-64. She was required to travel more frequently to California, where the program is based and where the majority of the café sites are located (i.e., in California universities and businesses such as Stanford and Intel). RP 865, 867, 782-83. As the "face" of Alexa Café, Alexa received increasing pressure from the board of directors to move to California in order to provide effective leadership for the program. RP 873, 1095-96.

In January 2014, Steve informed Alexa that he became engaged to Meredith. Ex. 203 at 6. A few months later, he informed Alexa that he and Meredith were building a house on property in Brier, Washington, a Snohomish County suburb, where Meredith's two teenagers and eight-year-old attend school, but 14 miles north of the children's primary residence, school, and community in Seattle. Ex. 203 at 4. While the new house was under construction, Steve lived with Meredith and her three children in her three-bedroom Bothell condominium, where his children then spent their residential time with him. RP 264, 271.

In the summer of 2014, Alexa Café had its initial roll-out, with projections for nationwide expansion. RP 785. With the program successfully launched, and the fact of its ongoing demands established, Alexa decided to move to California; in July 2014, she served her notice to relocate. RP 1316-17; CP 604. Along with her notice, she filed a proposed parenting plan which gave Steve substantial access to the children in California and included an offer to cover all his travel and lodging expenses, as well as his new wife's. CP 614, RP 1340-41. Steve filed an objection. CP 57. The court again appointed Wheeler to perform a parenting evaluation. Ex. 49.

In October 2014, Steve and Meredith moved into their new home in Brier. RP 571. As a result, during their residential time with Steve, the

children commuted to their school in Seattle (Stevens Elementary on Capitol Hill), their extracurricular activities in Seattle (dance, soccer), and to see their friends. RP 576, 704, 78, 65.

According to Steve and Meredith, the children (particularly W.S.) were bonded to Meredith and integrating into the blended family. RP 79. However, to Wheeler, G.S. reported she was "not really interested in having a relationship with Meredith… I don't really talk to her very much," but that she has just "gotten used to her" because "she was there all of the time." Ex. 66 at 6-7. G.S. also reported that she did not interact much with Meredith's children and that she was usually "on my own" at Dad's house. Ex. 66 at 6. During Wheeler's home observation, G.S. was noted as being "withdrawn and aloof" when Meredith arrived home. Ex. 66 at 3. G.S. also reiterated concerns about not having as much alone time with her father as she wanted. Ex. 66 at 6.

W.S. reported to Wheeler his struggles with Meredith's youngest daughter, Ava (age 8); that Dad won't address his concerns with Ava; and that it was unfair that Meredith can "get him in trouble." Ex. 66 at 9. During one home observation, he interacted with Meredith, but in a second observation he appeared more withdrawn. Ex. 66 at 13-14. Meredith's two older children (ages 14 and 17) were not present for any of the observations, nor did Wheeler have any conversations with them. RP

162, 273-74. The youngest child, Ava, was only present for the second observation, but she left the house without Wheeler observing any interaction between W.S. and her. Ex. 66 at 14; RP 162, 273-74.

In November 2014, while the children were in California with Alexa for Thanksgiving, she showed them property she was considering purchasing, explaining that she needed a place to "rest her head" during her frequent trips to California. RP 1113-1114. The children had lots of questions about her schedule; they had asked her if she was sleeping on the couch at Uncle Pete's (her brother). RP 1113-1114. In January 2015, she told the children about the possible relocation.[1] RP 1412.

In March 2015, Wheeler filed her report, in which she declared the "children's best interests will only be served by continuing to have equal access to both of these highly skilled and loving (yet very different) parents." Ex. 66 at 22. The mother's move "will preclude these children from having this best possible developmental outcome … of enjoying equivalent amounts of time, opportunities, and experiences with each of these loving and highly effective parents." Id. Wheeler said "short of persuading" Alexa not to move, "there is no clear recommendation that will meet the best interests of these children …." Id. However, given the

[1] The parties dispute whether there was an agreement that Alexa withhold this information, and the court made no finding that such an agreement existed. CP 445 n 2. Steve made no agreement regarding announcing his move to Brier. He told Alexa about the move in an email a few days before he told the children. Ex. 203.

weaker relationship between the children and their father, the "risk of harm to the children's relationship with their father appears to be somewhat greater if the children are separated from him geographically and socially …." Id.

As a persistent theme in both her evaluations, Wheeler noted the "powerful influence" of the mother's parenting style, which she thought consistent contact with the father could "counter-balance." Ex. 66 at 25. According to Wheeler, there was a "dynamic" of the mother "devaluing" the father's parenting role, which posed a risk of "marginalizing the father's parenting influence over time." Ex. 66 at 22. This "dynamic" could, Wheeler said, lead to the children "becoming increasingly alienated" from the father if relocation is permitted. Ex. 66 at 23. Therefore, Wheeler concluded it is in the children's best interest to have day-to-day contact with the father and, conversely, that disrupting the children's contact with the mother was less concerning because their bond with her is much stronger. Ex. 66 at 24, 25.[2]

Trial began in April 2015, with eight days of testimony from both parties, Wheeler, family, friends, Alexa's co-workers, and another psychologist who gave an opinion about the parenting evaluation. The

[2] The report also described interviews with several collateral contacts who did not testify at trial, including the children's pediatrician, therapist, former nanny, and dance instructor. Ex. 67.

trial court excluded a witness that Alexa sought to call on rebuttal, a non-family iD Tech board member who could testify about the necessity of Alexa working full time in California. RP 945-46. (Additional facts regarding this issue are included in the argument section.)

In addition to detailing the growth of her company – which grew from 19 employees to 150 employees and a summer staff of 1400 serving 45,000 campers - and expansion of her responsibilities and leadership in Alexa Café and other new programs since the divorce (RP 1044-45, 1093), Alexa presented evidence reaffirming her "long-standing" role as the primary caretaker of the children. The evidence showed she performed the majority of routine care (doctor appointments, meals, activities, daily/bedtime routines, communications with school about learning concerns, RP 1321, 710, 297, 245; Ex. 67 at 4); was a stable fixture at the children's school (volunteered in classroom, Ex. 67 at 9; did an "extraordinary amount of work" for the PTA, helped saved the Spanish program, ran the auction, RP 253-54); and facilitated the children's various extracurricular and social activities, Ex. 67 at 6 ("Alexa has been the more active parent, as far as getting the kids engaged in activities."), as well as encouraged and supported their passions and interests, RP 232,1318-19, 601; Ex. 67 at 3 ("she will prod them and push them into new activities… they seem to trust her, they trust their mom a lot); Ex. 67

at 11 ("Alexa went out of her way to help make [soccer] a positive experience [for W.S.] and reached out to [the coach]"). The evidence was undisputed that she was "very in tune" to their emotional needs and feelings, RP 24, that there was a deeply rooted bond between them, Ex. 67 at 8 ("it feels like their home base, their center, is their mother…those two kids, they would be lost without their mom… she is their home.); Ex. 67 at 9 ("they are very bonded with her…they hug her, they are physical with her, they talk to her about a lot of things that went on in their day… and she is very engaged."), and that she has been a consistent and stable parent, Ex. 67 at 8 ("no matter what is going on with her professionally, she is able to stay focused on her kids… she is able to stay steady with them…she stays positive about everything… how positive she is continually keeping things for the kids.") .

Steve challenged Alexa's motives for the move, suggesting his relationship with Meredith motivated Alexa's relocation. RP 1316-17. (Alexa gave notice of relocation after the initial roll out of Alexa Café, well after the engagement announcement. RP 1316-17; CP 604.) Steve also noted their original agreed 2012 parenting plan describes Alexa's intention to raise the children with Steve in Seattle. Ex. 5 at 10.

Mainly, Steve sought to support Wheeler's opinion that Alexa had "marginalized" his parenting role by allowing the children to absorb her

view that her parenting is superior. He, Meredith, and Wheeler testified that Alexa "micromanage[d]" the children, see e.g., RP 463-64 (keeping track of Tupperware, socks); RP 563 (expressing concerns about homework being done); RP 293 (concerns about dental care, conditions needing medical attention), and testified about the children's awareness of the differing parenting styles, offering up detailed instances of the children reacting differently to the two different households, see e.g., RP 662, 77 (reactions to different rules, bedtimes). In Wheeler's view, the children "are experiencing undue anxiety/distress while in their father's care," and "appear to be anxiously monitoring [dad's] behaviors and home environment for evidence of parenting imperfections and missteps and then reporting these to their mother." Ex. 66 at 21.

However, when asked if Alexa was currently minimizing his parental role, Steve testified she was not; he simply complained that the children feel "a burden" when dropped off with him. RP 715. Wheeler also acknowledged that Alexa was not "deliberately manipulating the children's emotions or perceptions, but rather that she has a very strong influence on these children's feelings…. " Ex. 66 at 16. The children's therapist characterized it differently: "I don't think Alexa was trying to make it worse… she provided a listening ear, I don't think she was

knowingly reinforcing it but I do think the parents' styles of responding to expressions of anxiety are different." Ex. 67 at 2.

While Wheeler feared these different parenting styles "could lead the children to become increasingly alienated from their father" (Ex. 66 at 23), Alexa's expert, Dr. Bruce Olson, pointed out that psychologists do not have the ability to predict that alienation will occur as a result of a child's attunement, affinity, or alignment with one parent. RP 1002-04 (these are "very, very subjective things," and "it isn't a natural sequence that inevitably has to occur.").

After hearing the evidence, the trial court ordered that Alexa was restrained from relocating the children, CP 450, finding that disrupting contact between the children and Steve was more detrimental to the children than disrupting contact with the children and Alexa. CP 444. In its findings, the court imported generously from Wheeler's evaluation, citing "the problematic dynamics of this family which is already marginalizing the father's parenting role," an "alignment" with their mother that "could make these children increasingly vulnerable to becoming 'alienated' from their father," and "concerns that the children would develop unduly concrete notions of good/bad instead of more adaptive flexible thinking." CP 444.

The court also found that Alexa's plans to move were made in good faith, but that she acted in bad faith because "she never tried" the 50/50 plan before proposing a move to California. CP 446. The court was "disappointed" Alexa chose not to try the schedule the court viewed as "optimal," which would require Alexa to split her time between Seattle and California. CP 557. Though Alexa had been commuting back and forth for several years, and found it exhausting and inadequate to do her job, the court "still believes that plan is feasible.…"; but, also, the court felt compelled to "take the mother at her word that her work needs are too pressing to accommodate such a schedule." CP 557. The court left Alexa the option of returning to court within a year for this schedule if she "determines that she can accommodate a 50/50 plan switching on Wednesdays for her children's benefit.…" CP 557 n.1. Finally, the court awarded attorney fees to Steve based on a finding of disparity in incomes. CP 456 ("Although the father has more means than many, he clearly has substantially less than the mother."). Alexa timely appealed.

IV. ARGUMENT

A. INTRODUCTION

Relocation presents families and trial courts with an especially thorny problem, one the trial court in this case described as "hideous." See RP 1589-90 (court acknowledges that "I don't like relocation cases").

Even intact families struggle with decisions whether to relocate and with the effects of relocation. In the post-separation family, these decisions and effects can be magnified, especially when complicated by consideration of the rights of the parents (to travel and to their relationship with their children) and the rights of the children (to their relationship with their parents and to the state's protection). Not surprisingly, the Washington courts struggled for over a decade to devise a framework for decision-making in this context. *In re Marriage of Littlefield,* 133 Wn.2d 39, 47-57, 940 P.2d 1362 (1997).

In 2000, the Legislature enacted its own solution, Washington's child relocation act, RCW 26.09.405-.560, in 2000 (hereinafter CRA). Under the CRA, the trial court must consider eleven factors to determine if a detrimental effect outweighs the presumed benefits to both the child and the relocating parent. RCW 26.09.520. In many respects similar to the court's solution, the CRA seeks to balance the competing interests of the parents and children but also to implement legislative policies on families.

For example, Washington defers to decision-making by fit parents, places a premium on finality in decisions affecting families, and highly values custodial continuity for children. Repeatedly, the court has emphasized that fit parents are presumed to act in the best interests of their children. *In re Marriage of Horner,* 151 Wn.2d 884, 895, 93 P.3d 124

(2004). The court has declared "[t]he emotional and financial interests affected by [dissolution] decisions are best served by finality." *In re Marriage of Landry***,** 103 Wn.2d 807, 809-810, 699 P.2d 214 (1985). And the Legislature has instructed that the "best interests" of children are ordinarily served when the "*existing pattern of interaction between a parent and child is altered only to the extent necessitated* by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm." RCW 26.09.002 (emphasis added). That is, protecting "continuity" for the children means continuity in the relationship between child and parent. *In re Combs*, 105 Wn. App. 168, 174, 19 P.3d 469, 472 (2001) ("'custodial' continuity…"). Accordingly, that custodial changes are disfavored as highly disruptive to children. *In re Marriage of McDole,* 122 Wn.2d 604, 610, 859 P.2d 1239 (1993).

The CRA reflects these policies in a number of ways, most prominently by establishing a presumption favoring relocation. RCW 26.09.520 ("There is a rebuttable presumption that the intended relocation of the child will be permitted."). "This presumption incorporates and gives substantial weight to the traditional presumption that a fit parent acts in his or her child's best interests, including when that parent relocates the child." *In re Marriage of McNaught,* 2015 Wash. App. LEXIS 1938 (Wash. Ct. App. Aug. 17, 2015) at ¶ 15.

This case concerns how the presumption works – or how it is intended to work. Here, the trial court invoked the presumption, but applied it only to the objecting parent's burden of production (if even to that). The court failed to effectuate the presumption as it pertains to the objecting parent's burden of persuasion. As this Court recently instructed, the burden of proof in the relocation context includes both of these aspects: the burden to produce evidence and the burden to produce sufficiently persuasive evidence. *McNaught, supra, at ¶¶ 15-20.*

Thus, the objecting parent must prove the relocation decision of the presumptively fit parent "will in fact be harmful to the child--and in fact, so harmful as to outweigh the presumed benefits of relocation to the child and relocating parent." *Osborne v. Osborne (In re Osborne),* 119 Wn. App. 133, 147, 79 P.3d 465, 472 (2003); *accord, In re Marriage of Momb,* 132 Wn. App. 70, 79, 130 P.3d 406, 411 (2006). This is not a "best interests" analysis, as the court here and the parenting evaluator both understood it, but an analysis that presumes the best interests are served by relocation. *Horner*, 151 Wn. 2d at 894 ("the standard for relocation decisions is not only the best interests of the child."). As clarified in *McNaught*, an objecting parent cannot transform the relocation analysis into a simple best interests analysis merely by producing evidence in support of the objection. That is, the act of production does not make the

presumption "disappear," nor shift the burden to persuade to the relocating parent. *McNaught,* at ¶ 16, *citing Larson v. City of Bellevue*, 188 Wn. App. 857, 355 P.3d 331 (2015).

In short, when a parent "with whom the child resides a majority of the time," must relocate, "[t]he CRA shifts the analysis away from only the best interests of the child to an analysis that focuses on both the child and the relocating person." *Horner*, 151 Wn. 2d at 887. Here, the trial court repeatedly lost that focus, ignoring the primacy of the child's relationship to the mother and the consequences to her of not relocating. Instead of employing the presumption as intended, which should have made relatively short work of this relocation inquiry given the plentiful evidence of custodial continuity, the court attempted to micro-manage this family to serve its own (and the parenting evaluator's) preferred outcome. The Supreme Court has warned against precisely this danger – the danger of forgetting the reality of the post-separation family.

> A child cannot escape the reality that his or her family is no longer the same. The trial court does not have the responsibility or the authority or the ability to create ideal circumstances for the family. Instead, it must make parenting plan decisions which are based on the actual circumstances of the parents and of the children as they exist at the time of trial.

Littlefield, 133 Wn.2d at 57 (emphasis added). While the CRA supersedes the mechanism set forth in *Littlefield,* it embraced this wisdom. The failure

of the trial court to do so made more arduous this litigation and more disruptive to the children the consequences of the parents' dissolution.

B. THE STANDARD OF REVIEW.

This court reviews relocation determinations for an abuse of discretion. "If the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis it necessarily abuses its discretion." *Dix v. ICT Group, Inc.,* 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). Here, the trial court failed to implement the statute's presumption, leading it erroneously to focus on the wrong facts and inadequate facts to deny the mother's petition.

C. THE TRIAL COURT FAILED TO EFFECTUATE THE STATUTORY PRESUMPTION IN FAVOR OF RELOCATION

The trial court here gave lip service to the presumption favoring relocation, yet, at every turn, disregarded its effect. Essentially, the court engaged in a "best interests" analysis, as did the parenting evaluator, one that invites too much subjectivity and transgresses the important policies behind the relocation statute.

Rather than applying the presumption in favor of relocation and weighing the factors in light of this presumption, the court instead sought to rebalance the relationships of the parents to their children, to allow the father time to "catch up" on forming the bond with the children that the

mother had established from birth, as outlined in Wheeler's recommendation:

> Each of these parents offers unique strengths to their children, and both of their parenting influences are significant to the children's long-term emotional well-being. Therefore, given the strength of mother's influence, if mother relocates then it is my opinion that the best way to promote this balance is to increase, rather than decrease, father's opportunities to exert his positive parenting influence.

Ex. 66 at 25. But the CRA does not invite this kind of restructuring of the family, nor sanction penalizing a parent (and her children) for having a strong bond with the children. Indeed, this effort defeats the policy of protecting the custodial continuity deemed crucial to the children.

Equally troubling is the effect on the desired goal of finality arising from the kind of intense scrutiny to which these parents' lives were subjected at trial. Granted, the court must consider evidence relevant to the eleven statutory factors, but misunderstanding the burden of proof resulted in days of testimony critiquing typical parenting decisions, indulging subjective preferences for and against different parenting styles, and dissecting the children's naturally variable reactions to the two cultures they must navigate. None of this evidence rose to the level of harm, let alone harm equal to depriving the children of continuity with their primary residential parent.

Here, instead, the court, following the lead of the parenting evaluator, focused on "best interests" (or "optimal" interests), ignoring both the reality of the post-separation family and the statute, which requires an analysis more like that pertaining under the modification statute. That is, the court's job is analogous to answering whether "[t]he child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child; …" RCW 26.09.260. Both tests protect the same interests: continuity, finality, and family autonomy. Instead, here, the court tried to design a perfect solution, in its view, one that faulted the mother for moving and resisted the unavoidable disruption. To properly apply the presumption, the court must presume the move is beneficial and confine its inquiry to whether there are some other compelling circumstances that would tip the scales against relocation. *See Parentage of R.F.R.*, 122 Wn. App. 324, 332-33, 93 P.3d 951 (2004). As the court recognized in *R.F.R*, this analysis necessarily assumes interference with the objecting party's residential time, "previously determined to serve the best interest of the child," an inevitable fact of relocation. *Id.*

Here, instead, the trial court turned the inquiry into a parenting contest, pitting the parents against one another in a way that disserves

them and the children. Both of these parents are fit. Together they constructed their lives as they exist today, with one parent taking a larger role in childrearing. That parent needs to relocate, or collapse from the effort of trying to work in one state and live in another. The CRA allows her to do so because the father failed to show that her move would be so harmful to the children or to her as to outweigh the benefits of disrupting that primary relationship. The presumption cannot be rebutted merely by evidence of different parenting styles, or by evidence the children aligned more with one of these styles. In fact, that alignment weighs in favor of continuity. This family has arranged their interrelationships and the CRA does not allow the court to experiment with rebalancing those relationships as it sees fit, which is what happened here. The trial court's failure to apply the presumption pervades its analysis of the pertinent statutory relocation factors, which are discussed below.

1) The court failed to effectuate the presumption when addressing the factor relating to the children's relationships with each parent and others.

The statute requires the court to consider "[t]he relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent, siblings, and other significant persons in the child's life." RCW 26.09.520(1). The evidence is undisputed that "[b]oth parents have very strong relationships with the children." CP 442. It is

also undisputed that the mother has been the primary caregiver and the attachment between her and the children reflects that fact: there is a greater alignment, though the court and the parenting evaluator seem to begrudge the mother the quality of this attachment. See CP 442 (describing children as having "internalized" the "narrative" that mother is the "better" parent).

Absent some limiting factor under RCW 26.09.191, Washington law favors maintaining the continuity of this relationship, yet the court declared this factor to be neutral on the grounds that "consistent contact with both parties is necessary for the best interest of the children." CP 442. This reasoning evades the central problem: the mother must move. In light of the undisputed primacy of the children's attachment to the mother, there is no "tie" with respect to this factor, and if there was, the presumption tips the factor weighs in favor of relocation.

2) The trial court improperly speculated on the effects of the relocation in its finding on the "disruption of contact" factor.

Not only did the trial court fail to give effect to the presumption in its consideration of the "disruption" factor; it strained to find this factor weighed against relocation, speculating that the children might become alienated from the father and speculating, against all common sense and policy, that the disruption of contact with the mother will do less harm because the bond is stronger.

The statute requires the court to consider "[w]hether disrupting the contact between the child and the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation." RCW 26.09.520(3). This analysis must take the family where it finds it, which, here, means with a history of primary child care performed by one parent, with the consequence of the children's greater comfort with that parent and her style. It is not for the court to find fault with how this family structured itself.

Moreover, the presumption requires the court to accept that disruption of contact with the objecting parent is an unavoidable consequence of relocation. *R.F.R.*, 122 Wn. App. at 332-33. Here, the court focused primarily on the disruption of the children's contact with the father, as did Wheeler (see, e.g., CP 442, 444-45, 447) and cited Wheeler's concerns about a "dynamic" of "marginalizing" the father's role and her opinion that "such alignment could make these children increasingly vulnerable to becoming 'alienated' from their father; that is, becoming increasingly resistant to spending time with him." CP 444.

This prediction of "alienation" is problematic in at least two ways: it is obviously speculative (i.e., not grounded in any present alienation) and it makes the mother wholly responsible for the children's relationship

to their father. First, there is no evidence of alienation. By all accounts, the children are bonded with the father. Second, the father agreed Alexa was not minimizing his role. RP 715. In fact, it is clear the mother has put considerable effort toward promoting the bond. See, e.g., RP 516 (helping him to find nearby residence); RP 1179, Ex. 5 at 2 (agreeing to 50/50 plan).

What seems to be Alexa's problem is that she has also put considerable effort toward parenting her children. For example, Wheeler testified about her "stronger sense" that the children saw Alexa as the better parent, so that when the children observe "Mom's house is more organized" or "Mom, you know, does things more predictably," that means the children believe, as Wheeler put it, "that Mom is right and Dad is wrong." RP 135. Wheeler went on to offer as evidence that the children "absorbed" this "narrative" by the fact that Alexa purchased a piano whereas Steve purchased a keyboard, RP 160[3], or that Alexa expressed concern about Steve not maintaining his car on a regular basis,

[3] Alexa initially bought a keyboard but later bought a piano when the children continued with piano. She then offered the keyboard to Steve; apparently he bought a different one, not the one recommended, as W.S. pointed out. RP 1135-36.

RP 134 (referring to her 2012 evaluation, Ex. 64, at 9), or W.S.'s sense that soccer is "dad's thing," and dance is "mom's thing," RP 158.[4]

Wheeler critiqued Alexa reporting her concerns that Steve's bad back might seize up while he was driving, and G.S. reporting the same concern. RP 132-33. Notably, Wheeler stopped short of accusing Alexa of planting that fear: "I'm not suggesting that Alexa necessarily, you know, planted that fear or stated that fear, but that the children are sensitive enough to her that they picked up on that fear." RP 133.

Something has gone terribly wrong in this process if the mother is faulted because the children tune into her emotional state and the mother is faulted if the children notice the father's lack of enthusiasm for dance.

Moreover, placing on Alexa the responsibility for the nature of the father's bond with his children eclipses his own part in constructing that bond. He chose to take the lesser role in his children's young lives. This choice has consequences. This view also ignores that the children have their own ideas and desires, a fact every parent faces every day.

[4] W.S. seems to be accurately describing Steve's lack of interest in dance. See, e.g., RP 1193 (resisted their participation, particularly W.S.'s); RP 1194 (did not take the children to dance rehearsals for their Nutcracker performance during his residential time and W.S. was anxious about having dance on weeknights during Steve's residential time); Ex. 66 at 13 (W.S. told Wheeler that he didn't think a dance rehearsal on "Dad's night" would be possible and that dad "doesn't like ballet.").

Nevertheless, Steven, his new wife, the court, and the evaluator blamed Alexa for the manner in which the children have reacted and adjusted to the different styles and households. See, e.g., RP 662 (G.S. insisting on her regular bedtime at Steve's house); RP 77 (children observing more table manners required at mom's and that there are different rules in both houses); RP 456 (Meredith testifying that W.S. remarked "Mom does it this way, why do you do it this way?"); RP 463-64 (the children's awareness of certain items belonging to mom's house, e,g., Tupperware, socks); RP 465 (W.S. keeping track of his sleep during a vacation in Hawaii); RP 458 (the children's awareness of the right of first refusal when asking how they long will be left with a babysitter). That is, they faulted Alexa for the fact that the children are more bonded to her and may often prefer the "culture" of her household.

Relationships are not made from cookie cutters. Children and their parents engage in a lifelong dynamic, rich and complex. The court is not asked in a relocation case to psychoanalyze these relationships. What mattered here was that, whatever the children's preferences as between their parents' different styles, they enjoy a close relationship with both. There is no evidence they were resisting contact with Steve or that their relationship was otherwise weakened by their awareness of their parents' differences. And certainly, there was no evidence of any impending

"alienation." See RP 1007 (Dr. Olson's testimony that if "a parent is being alienated, you would see a disruption… an aversion to that parent… You wouldn't see that child expressing love or interest in wanting to spend time with that parent."). Rather, the evidence showed simply that the parents have different styles (mom was more vigilant, "attuned to" the children's needs, while dad took a more relaxed approach, exposed them to more risks); that the children are aware of these differences; and that they in many instances prefer the mother's style (not surprisingly, given her history of being their primary caregiver). To raise the specter of "alienation" in this completely ordinary family dynamic is simply wrong, factually and scientifically. As Dr. Olson testified, "there is no predictive likelihood" that attunement to or even alignment with one parent would lead to alienation:

> these are very subjective -- very subjective things. And I don't think as psychologists we have much ability to predict those things. And I think the literature would suggest that we don't -- we don't have the ability to predict those things.

RP 1003. Indeed, neither the children's therapists nor their pediatrician reported any "undue anxiety/distress" experienced by the children about the parties' parenting differences. Dr. Behling (W.S.'s therapist) described the situation as mostly neutral. Regarding mom's response to the children's anxiety, he reported, "I don't think Alexa was trying to make it worse… she provided a listening ear, I don't think she was

knowingly reinforcing it, but I do think the parents' styles of responding to expressions of anxiety are different." Ex. 67 at 2. As to whether the children were more oriented toward mom or dad, he noted, "I think there are times where both parents were in the space, but I don't recall whether the kids gravitated more toward Alexa or Steve." Ex. 67 at 2. Regarding dad's parenting, he observed that

> there is this difference in how much attention, time, energy he gives to their reports, concerns, than mom… so it may be perceived by one of the parties that the other was not responsive, but I think it was relative…I imagine they would disagree as to how much responsiveness was appropriate.

Ex. 67 at 3. Dr. Meehan, the children's pediatrician, likewise reported "no red flags" about the effect of the differing parenting styles:

> Regarding the dynamic where mother regards father as "under-attentive," and father regards mother as "over-attentive," Dr. Meehan said, "That is how they see each other… mom might be overly concerned, but she listens and doesn't push me… their complaints of each other are very common in parental values… there are no red flags for me."

Ex. 67 at 5. And when asked specifically if she had any cause for concern, Dr. Meehan responded, "I do not… I think they [sic] kids are very appropriately cared for. They are healthy kids. I think they get a little anxiety and confusion… providing consistency in their life will help with that." Ex. 67 at 5.

Notably, the only evidence tending to show tension in the children's relationship with Steve appears to be of his own doing, e.g., his history of absenteeism, their difficulties adjusting to his relationship with Meredith and the blended family dynamics, see Ex. 66 at 6-7, 9, 15; him reacting with less sensitivity to their concerns and anxiety, see Ex. 66 at at 7 ("G.S. indicated that she did not feel that her father was as responsive to their problems/concerns as she would like,"); Ex. 64 at 29 (Wheeler notes Steve was lacking in his ability to effectively respond to the children's emotional reactions); and their awareness of his resistance to their dance rehearsal schedule, see RP 174, 287; Ex. 66 at 13. These are his choices, his style, to which his children will naturally react. None of this relationship-building calls for the court's intervening influence.

In finding this factor weighed against relocation, the court also improperly considered Wheeler's concerns "regarding the children's 'burgeoning perfectionism and associated rigid (black/white) thinking," and that "the children would develop unduly concrete notions of good/bad instead of more adaptive flexible thinking skills and the ability to view a situation from multiple perspectives." Again, these concerns are purely speculative and conclusory; they have no basis in the record. The only example Wheeler gave of this "black and white" thinking is the children's observation that mom's home is "more organized" than dad's. Ex. 66 at 5

("GS presented as having some rather black-and-white views about her mother's home versus her father's home: e.g., regarding her mother's house and routines as 'more organized.'"); see also RP 135 (children's comment that mom's house is more organized and she is more predictable evidences "a belief that mom is right and dad is wrong.") But this observation is simply a fact of them being in two different households; there is nothing to support the astronomical leap that this demonstrates "burgeoning perfectionism," "rigid black or white thinking," or an "unduly concrete notion of good/bad."

At the end of the day, the parenting evaluator and the court seem to have taken sides in a "culture war," one familiar to every family, including intact families, where family members navigate constantly shifting conflicts, preferences, alignments, bedtimes, screentimes, etc. This family is no different: it is a construct to which all four members contributed. The court's task here is to preserve that structure as it finds it, to the extent possible given the realities of relocation, unless there is evidence of harm outweighing the presumed benefits of continuity. Instead, the court here intruded into this family dynamic in an attempt to rearrange it and create some ideal of its own liking. This violates the presumption and the policies underlying it.

3) The court evaded the proper inquiry when it addressed the "age, development, and needs of the children."

The children here are happy and healthy, the product of good fortune and the care of two loving parents. This fact provides a foundation for the consideration of the statutory factor focusing on "[t]he age, developmental stage, and needs of the child, and the likely impact the relocation or its prevention will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child." RCW 26.09.520(6). Properly, the court found both parents support the children in respect of these considerations (age, development, needs). CP 447. This "tie" favors relocation; the mother's history of supporting the children in respect of all these considerations is clear. Instead, the court endorsed the parenting evaluator's goal of shoring up the father's parenting in the eyes of the children, and weighed this factor against relocation because the children are adjusted to spending six nights out of fourteen at the father's home in Brier. CP 447.

In other words, because the father's relocation and remarriage had already forced upon the children one adjustment, the court found it "unnecessary" to add another move into the mix, even a move with their primary caregiver. This "first in time" reasoning again reveals the court's failure to follow the statute's instruction and a persistent bias against the mother, whose decision to relocate should be accorded substantial weight.

This bias is especially apparent in the court's refusal to acknowledge the disruptive effect of the father's relocation to another county. Both children viewed the move to California less disruptive to their social lives than living in Brier. Ex. 66 at 7 (G.S. "thought moving to her father's house would be more difficult than moving to California, because she thought she would see her friends more often"); Ex. 66 at 10 (W.S. "noted that he would be able to walk to his friends' houses in California, but at his father's house, his friends would be 30 minutes away"). With the mother in California and the father in Brier, the continuity of the children's lives with respect to places and other people is necessarily disrupted. Thus, both factually and legally, what mattered most with respect to this factor is the effect on the children of disrupting the bond they have with the primary residential parent. Here, the court ignored what the presumption and the policy favoring custodial continuity protect.

4) In its findings on the "good faith" and "alternatives" factors, the court improperly faulted the mother for relocating and for the timing of her relocation.

The pervasive conceptual problem with the court's reasoning appears also in its analysis of the following factors: (1) "[t]he 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"; and (2) "[t]he

alternatives to relocation and whether it is feasible and desirable for the other party to relocate also." RCW 26.09.520(5) and (9).

The court rightly found the mother's move to be in good faith, acknowledging the demands of her work, the recent expansion of her job's responsibilities, and the difficulty of running her business from afar, including the physical toll it took. CP 446. Yet the court also noted the lack of a "Board mandate" that she move or else face "negative consequences," meaning, apparently, that the business might keep her on even if it meant running less efficiently and running her ragged. CP 446. As discussed below, the court excluded the mother's evidence on precisely this point, indicating the broader problem: the court's refusal to actually accept the mother needed to move and that she would move. For example, the court insisted the mother could do what she has always done (i.e., work remotely), despite the huge changes to her business. CP 448-449. The court found the mother should try to make work a week on/week off schedule, permitting her "a consistent three day work week in California" and was "disappointed" when the mother did not. CP 449, 557.

For these reasons, the court found both of these factors weighed against relocation. This does not make sense. Even as the court acknowledged the mother is exhausted from attempting precisely this kind of schedule, the court insisted this "alternative" weighed against

relocation. In so doing, the court contradicted its own findings that the mother's work-related reason for moving was substantiated by the evidence and in good faith and ignored that the mother's decision was entitled to substantial weight. More than anything, the court persisted in trying to avoid the reality of the situation, opting instead to inscribe a wishful result onto the facts, even to the extent of offering the mother the 50/50 schedule if she would change her mind within a year. CP 557 n.1.

The same defect appears in the "good faith" factor. Having found the mother's good faith in wanting to move, the court then found "bad faith" in her wanting to move sooner rather than later. CP 446. The court noted the parties were eventually headed toward a 50/50 plan, which, according to the court, would mean no presumption applied, though the statute is silent on this question and there is no case settling it one way or another. *See, e.g., In re Marriage of Fahey,* 164 Wn. App. 42, 55, 262 P.3d 128, 140 (2011). Nevertheless, the court faulted the mother for trying to maintain the "advantage" the presumption conveyed, despite having just found the mother was exhausted from trying to run her business (less efficiently) from Seattle. The court further faulted the mother for not trying a "50/50 arrangement" before seeking to move, a consideration that crosses the line drawn by Washington's respect for a fit parent's decisions. CP 446.

The court found the father's objection to be in good faith, despite that he did not wait to make his move to Snohomish County (out of the school district), nor give any official notice or subject his decision to a "relocation" scrutiny. CP 446. The court then found this factor weighed against relocation. CP 446.

This reasoning turns the statute into a no-win proposition for the mother and underscores how much the court fought the facts of the case, rather than taking guidance from the statute. The statute simply does not address 50/50 plans, so the court was incorrect to assume Alexa would not retain the presumption. Nor does the statute require parents to make some effort to come up with another solution. Indeed, RCW 26.09.530 directs the trial court to presume the primary parent will relocate:

> In determining whether to permit or restrain the relocation of the child, the court may not admit evidence on the issue of whether the person seeking to relocate the child will forego his or her own relocation if the child's relocation is not permitted or whether the person opposing relocation will also relocate if the child's relocation is permitted.

See also Momb, 132 Wn. App. at 82 (recognizing parent's fundamental right to relocate and that CRA gives the trial court authority to restrain only the child from relocating, not the parent). Even as a matter of fact, the court's wishful thinking about the 50/50 arrangement evades the central problem for Alexa – that she needs consistently to be at her workplace. She had already tried commuting, with a plan that approached

50/50, and it was killing her. She had waited until the success of Alexa Café was clear. She had done all, and more, the statute required of her.

Properly analyzed, both these factors weigh in favor of relocation. The evidence supported the mother's reason, and the court found a good faith basis for that reason. Her good faith is not neutralized by the father's good faith; the presumption tips the scale to her. The court's criticism of the mother for not choosing an alternative to relocation was both unfair and irrelevant. Alexa was not required to wait any longer than she had already waited or to experiment with her life and her children's lives in a way the court preferred.

Moreover, the trial court, in overanalyzing, paints itself into a corner: finding bad faith and good faith, an ambiguity that also undermines confidence in the court's order. *See, e.g., In re Marriage of Katare,* 125 Wn. App. 813, 830-831, 105 P.3d 44 (2004). The court's contradictory findings cannot logically support its ultimate conclusion that the mother's bad faith weighed against relocation. The court's finding on both these factors amounts to an abuse of discretion.

5) Rather than presuming the relocation served the children's best interests, the court appeared biased against the mother.

In a family law context, standards serve the important goal of limiting subjectivity, which, in turn, enhances the consistency and predictability of outcomes. Presumptions serve these interests.

McCormick on Evidence (2013, § 342, p. 676) ("A presumption is a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts.").

For example, the presumption favoring relocation should mean that, most of the time, a parent proposing to relocate will be allowed to do so. That is because proving an actual detriment means more than proving relocation is undesirable, from an idealized perspective, which is the most the father here was able to show. But families exist in a real world, not a perfect one. And the exigencies of this family required the mother to move. Rather than face this fact, the court evaded it, blaming the mother for this reality. In addition to the analysis of the factors above, several examples demonstrate the unfairness of this approach.

Significantly, before the mother's notice of relocation, this family already was headed toward a major disruption. The father, acting before the plan went 50/50, relocated to Brier, Snohomish County, and planned to remarry a woman with children of her own. The court faulted the mother for the timing of her move, but the court gave the father a complete pass, finding his "move did not affect the residential schedule of either party because his move was within the Seattle area." CP 441. In fact, his out of school district move will mean huge changes in the children's lives given Alexa's relocation. While Steve argued that the children will still attend

school in that same district, the evidence showed that if the children were not permitted to relocate with Alexa, she would not be able to reside here 50% of the time (which is precisely why she sought the relocation), and they would not meet the residency requirements for remaining in that school district. RP 1265-66.[5] The court seemed to rely, as Steve did, on a plan for the children that is premised on Alexa not moving.

Indeed, the court seemed to recognize the children could end up in the Brier School District (CP 448), but took no note of the apparent disruption to their lives from this fact, nor did the court address this probability in its weighing of the factors, including when considering the parties' agreement to raise their children in Seattle, a factor the court found weighed against relocation. CP 443-44. Obviously, both parties abandoned that agreement when their life circumstances changed. Even the children recognize the trial court was wrong to think Steve's move to Brier makes no changes in their lives. Ex. 66 at 7, 10. The children had lived all their lives on Capitol Hill and were deeply embedded in that community, from soccer to ballet to neighborhood and school friendships to therapeutic relationships. The idea that this web would be undisturbed by the father's relocation to Snohomish County is untenable. From an objective perspective, the CRA views any move out of school district as a

[5] Rather, they would have to apply for an out-of-district spot, the availability of which is not guaranteed and would not be known until right before school starts. RP 1267-69.

"relocation" for purposes of the statute. Given that both parties were relocating, it makes no sense to hold only Alexa to their agreement.

The court's bias is also evident in its assessment of the factor requiring consideration of "[t]he financial impact and logistics of the relocation or its prevention." RCW 26.09.520(10). Here, because of the financial privileges on both sides of this equation, the financial impact of relocation can be completely mitigated, a factor weighing in favor of relocation. Alexa made plain her ability and willingness to do precisely that. Nevertheless, the court reached the opposite conclusion because the father's "paid time off is limited" and he "is remarrying with commitments to another family." CP 449. In other words, the father cannot be in two places at once. This is the reality relocation requires families to face. Yet, the court handily dismissed the mother's commitments to her job, requiring her presence in California, criticizing her for not continuing a schedule that was bad for her and bad for the children. Here, the court must accept there will be disruption to one parent's contact with the children. This is the law of physics and of Washington. The question is whether there are means to mitigate that disruption, and, here, certainly there are. The parties have financial means and the distance is better managed than in many moves (i.e., the distance

between Seattle and Los Gatos is a two-hour flight). Analyzed properly, with the presumption operating, this factor favors relocation.

6) The court properly focused on the children and the mother when evaluating the "quality of life" factor.

Finally, the CRA requires the court to consider "[t]he quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations." RCW 26.09.520(7). In analyzing this factor, the court compared Los Gatos and Brier (though the father insisted the children would continue their education and activities on Capitol Hill), finding both to offer excellent educational and extracurricular opportunities. The court declared this factor would be "neutral" if focused solely on the children. CP 448. However, in the case of a "tie" such as the court described here, the presumption should operate to place this factor in the pro-relocation column. The factor ended up there in this case only because the court added in some consideration of the effects on Alexa, noting the advantages to her, in that her life would be "easier" and "less complicated." Id. Thus, the court ended up in the right place, but its process indicates the court's failure to fully implement the presumption, applying it only to the burden of production (to the evidence produced by Steve) and not to the burden of persuasion (requiring that evidence to tip the scales against relocation).

D. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT EXCLUDED THE MOTHER'S WITNESS.

In rebuttal, Alexa sought to present the testimony of Howard Behar, former Starbucks executive and an iD Tech board member, to rebut Steve's claim that she was not being asked to move by the Board, arguing that his testimony was "critical" to the good faith factor because he was the only independent third party that could testify about the board's expectations of Alexa. RP 936-39. While Behar was not originally listed as a witness, she explained that she just became aware of his availability (he had been thought to have been travelling in New Zealand), and offered to make him available for an interview or deposition "whenever." RP 938. As an offer of proof, she said Behar would testify about the board's expectation that the entire executive team be in California, the need for Alexa to be there on a daily basis to manage Alexa café and lead the girls' STEM technology initiative, and the impossibility of managing a company of this size remotely. RP 940-941.

Steve objected, and the court excluded Behar's testimony, ruling: "I think that since he was never disclosed and there is clearly substantial prejudice being that we're in the middle of trial, I don't think a lesser sanction of having him be deposed and testifying tomorrow is adequate. . . it's really a little bit trial by ambush." RP 945-46. The court further noted that the testimony was "relatively cumulative but for the fact that he's not

a friend or family member, which frankly only goes to impeachment…" RP 945. The trial court's findings do not satisfy the inquiry required by *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), before a trial court may exclude a witness.

Our Supreme Court has again recently reminded trial courts that *Burnet* and its progeny require "that late-disclosed testimony will be admitted absent a willful violation, substantial prejudice to the nonviolating party, and the insufficiency of sanctions less drastic than exclusion." *Jones v. City of Seattle*, 179 Wn.2d 322, 314 P.3d 380 (2013) (citing *Burnet*, 131 Wn.2d at 494); *see also Teter v. Deck*, 174 Wn.2d 207, 210, 216-17, 274 P.3d 336 (2012). The failure to comply with this requirement is an error of law, which this Court reviews *de novo. Teter,* 174 Wn.2d at 216. As in *Jones*, the court's findings here "fell short of meeting *Burnet*'s requirements" by failing to address all three factors. *Jones*, 179 Wn.2d at 341.

The court only made findings as to prejudice ("trial by ambush," too late in middle of trial, despite Alexa's offer to mitigate by making him readily available for interview or deposition). *See Id.* at 353-54 (findings of "trial by ambush" only establish prejudice). The court did not make findings on willfulness or on the availability of lesser sanctions, such as terms. Rather the court simply noted that Behar was never disclosed,

"we're in the middle of trial," the "lesser sanction of having him be deposed and testifying tomorrow" was not "adequate," and this was "trial by ambush." RP 945-46. As in *Jones*, such findings do not comply with *Burnet*. *Id.* at 345, 354-55 ("*Burnet*'s willfulness prong would serve no purpose 'if willfulness follows necessarily from the violation of a discovery order.' Something more is needed," citing *Blair v. TA-Seattle E. No. 6,* 171 Wn.2d 342, 350 n.3, 254 P.3d 797 (2011); "this court cannot read a proper willfulness finding into the judge's use of the term 'ambush.'"). Nor was the error harmless as in *Jones* where the excluded testimony was cumulative and "largely undisputed," *Id*. at 358. Rather, this error is particularly consequential: at the end of trial, the court itself complained that there was no evidence of a Board mandate that Alexa move to California. CP 446. The trial court's failure to comply with *Burnet* requires reversal. *See Blair II, 171* Wn2d at 350 n.3; 352 n.6 (remanding for the court to make "after-the-fact findings" to support exclusion order "would be inappropriate").

E. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT AWARDED FEES TO THE FATHER.

Steve asked for and received his attorney fees on the basis of RCW 26.09.140, which has as its purpose "to make certain that a person is not deprived of his or her day in court by reason of financial disadvantage." 20 Kenneth W. Weber, Wash. Pract., *Family and Community Property*

Law § 40.2, at 510 (1997). Alexa objected, based on the court's lack of any evidence of Steve's assets, noting he had not filed a financial declaration as required by LFLR 10. RP 1580; CP 207. She also noted the record demonstrated his possession of significant assets. RP 1580 ($1.7 million in assets from the divorce, $270,000 for partial sale of Alta house, $115,000 annual income).

Nevertheless, the court awarded fees to Steve in the amount of $100,000. CP 452. The court denied Steve's post-trial requests that both parties submit financial declarations as "unnecessary," CP 454, finding "there is sufficient information to know that there is a disparity between the parties' net worth," without evidence of detailed financial history/expenses. CP 454-55. The court then concluded that fees should be imposed based on Alexa's greater ability to pay: "There is no question that mother has the financial ability to pay. Although father has more means than many, he clearly has substantially less than the mother." CP 456. The court did not make a finding of the father's need, except to note that "it does not seem equitable that he should pay attorney's fees that are higher than his annual income." CP 456. This was error.

Washington follows the American rule regarding attorney fees in litigation, meaning that "attorney fees are recoverable only when authorized by private agreement of the parties, or statute, unless an

equitable exception exists." *Clausen v. Icicle Seafoods, Inc.,* 174 Wn.2d 70, 79 n.2, 272 P.3d 827, 832 (2012). No such agreement, statute, or exception pertains here. The family law fees provision does not apply, since it requires findings of ability to pay *and* need. *In re Marriage of Coons*, 53 Wn. App. 721, 722, 770 P.2d 653 (1989). This is not a re-distribution statute, where the purpose is to equalize the parties' assets. It is not triggered by disparity in assets. Rather, the statute turns on whether a party cannot pay his or her own fees. *In re Marriage of Griffin*, 114 Wn.2d 772, 780, 791 P.2d 519, 523 (1990). That is not the case here. Steven has lucrative employment, substantial assets, and left the marriage debt-free. He has the ability to pay his own fees. Thus, there was no factual or legal basis for the court's award.

V. CONCLUSION

For the foregoing reasons, Alexa Ingram-Cauchi respectfully asks this Court to vacate the orders described above and remand for entry of an order permitting her relocation and for entry of a new parenting plan.

Respectfully submitted this 9th day of October 2015.

/s Patricia Novotny, WSBA #13604
/s Nancy Zaragoza, WSBA #23281

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