Re: Supreme Court No. 95435-6-In re the Marriage of: Wairimu Kiambuthi and Toll Obuon

Court of Appeal N0. 75563-3-1

(SUPREME COURT OR COURT OF APPEALS, DIVISION I)

OF THE STATE OF WASHINGTON

[*TOLL OBUON*]	)	
Petitioner	)	
	)	No. [No. 95435-6- [75563-3-1]
VS	)	
	)	
[*WAIRIM KIAMBUTHI*]	)	
Defendant	)	

SECOND

AMENDED PETITION FOR REVIEW

1555 Third Avenue
Longview, WA 98632

TOLL OBUON
PROSE

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A. IDENTITY OF PETITIONER

Petitioner Toll Obuon, Petitioner below, asks this Court to review the decision of the court of appeals referred to in section B. Wairimu for Custodial Interference in the First Degree charge against the respondent and remanded for trial

B. COURT OF APPEALS DECISION

The decision of the Court of Appeals is attached to the Petition for Review. Petitioner requests that this court accept review of the published opinion issued by the Court of Appeals, Division I, on November 23, 2017. A copy of that decision is attached hereto as The two parties thoroughly briefed the case to the Court of Appeals; the Petitioner's Opening Brief is 50 pages, and the Reply is 25 pages, and Reconsideration Brief 25.

C.REASONS TO ACCEPT REVIEW

This Court should accept review because the decision conflicts with the decisions of this Court and decisions from the court of appeals holding unambiguous statutory language means what it says, that statutes should be interpreted to give meaning to all the language in

the statute and should render no language meaningless, and in the event there is more than one reasonable interpretation of statutory language in a criminal statute, the version most favorable to the accused applies. RAP 13.4(b)(1)&(2).

D.ISSUES PRESENTED FOR REVIEW

1. The decision of the Court of Appeals is in conflict with a decision of the Supreme Court on Temporary and final court ordered parenting plan

2. The decision of the Court of Appeals is in conflict with a decision of another Decision of the Court of Appeals (RCW 9A.40.060 (2) (RCW 9A.40.060 (3)

3. The decision of the Court of Appeals does involve a significant question of law under the Constitution of The State of Washington or of the United States Under 11 statutory of relocation RCW26.09.520

4. This decision is in conflict with discretionary provision that permits a trial Court to restrict a parent's actions restriction RCW 26.09.191(3) entered in a Parenting plan involve an issue of substantial public interest that should be Determined by the Supreme Court

5. Physical, sexual or a pattern of emotional abuse of a child in and child abuse

E. INTRODUCTION

First, In December 2013, Wairimu filed a dissolution action in king county in (CP pg 137-143). The commissioner at king county entered temporary parenting plan, along with a

Joint legal custody and went in Kenya for one year and half with provision of visitation in (Ex-127) and at (CP pg 55-64) and confirm issues no status confer (Cp 84-87).

Second, In (Ex-123), March 2013 the mother is living in Kenya with child and father reside in Washington State. She informed GAL that the father cut off the child finger for stealing a gum in Safeway. Even though, the entire year she resides in Kenya. See (Ex-130)

Third, March 19, 2014, at (CP pg 36), filed a domestic violence protection order and harassment protection order. Even though, she is living in Nairobi Kenya, See [Ex-130]

Forth, July 9, 2014, even before the father could see the child, she filed to Modify parenting plan under RCW 26.09.260(1) (2) citing cause as children's environment under the custody decree/parenting plan/residential schedule is detrimental to the children's physical, mental or emotional health and the harm likely to be caused by a change in environment is outweighed by the advantage of a change to the children in (CP pg 31-34) (CP pg 145-157)

Fifth, On July 9, 2014, the trial court entered a final parenting plan order findings of fact and conclusions of law in (CP pg 92-101), and continued final parenting plan with Joint legal custody (CP pg 55-64), and a decree of dissolution and continued with visitation provision that all school breaks/ holidays that are larger than three weeks malaika will travel back from Nairobi to the state to visit the father in [Ex-127].

F. STATEMENT OF FACT

In March 23, 2015, filled petition to Amended Joint custody parenting plans. Wairimu asked the court to enter a restraining order against Toll. The GAL concluded the "overriding concern about Toll in (Ex-110) (CP pg 337-352) 2.1 Parental Conduct (RCW

26.09.191(1), (2)) Willful abandonment that [1] continues for an extended period of time or substantial refusal to perform parenting functions (this applies only to parents, not to a person who resides with a parent) in (CP pg 353-356) . [2] Physical, sexual or a pattern of emotional abuse of a child in [RP pg. 269 23-25] through [RP pg. 270 1-3] (CP pg 39).[3] A history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm (Ex-104) [4]2.2 Other Factors (RCW 26.09.191(3)(e)the respondent's involvement or conduct may have an adverse effect on the child's best interests because of the existence of the factors which follow: The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development in (CP pg 39) and [5] (RCW 26.09.191(3)(F) A parent has withheld from the other parent access to the child for a protracted period without good cause and kidnapping a child from grandmothers house for overnight(twelve hours) and court appointed child expert to investigate and all exhibits 101 through 47 were admitted The trial court's ruling on the admission of 404(b) evidence is reviewed for an abuse of discretion. State v. Robinson, 2003 N.C. App. LEXIS 2295 (2003) in [Ex-104], child abuses (CP pg 12-13) In (CP pg 334), (CP 322-354), (1.) In (CP pg 39), (Ex-104) and (CP pg 353-356)

G. Standard for Accepting Review

A petition for review is granted when there is a conflict between the Court of Appeals decision and a decision of this Court, a conflict within the Court of Appeals, a significant constitutional question, or a question of significant public interest. RAP 13 .4(b). Here for crime of Custodial Interference in the First Degree, in violation of RCW 9A.40.060 (3) and RCW 9A.40.060 (2).

There is evidence that Wairimu, Judy and Mathew intended to deny father access to the child, or that she intended to do so permanently or for a protracted period of time, as required by that statute. It is the position of petitioner that there is sufficient evidence to show that Wairimu and conspirators had the intent to deprive the father contact with the child for some period of time, The court of appeals refused to reversed the trial court's ruling, under the circumstances of the case, a one year and half period could qualify as a "protracted period" for purposes of the statute. Instead, The court of appeals change the evident in of respondent or an affidavit under oath in which Wairimu state she was in Kenya from December 31, 2012 through July 9, 2014 evidence of any criminal intent on her part she does not deny violate the statute in (Ex-130) .

The first issue presented for review is a matter of evidence involving statutory interpretation is whether the Court of Appeals committed an error in ruling that a period of one year and half qualify as a not "protracted period" for purposes of RCW 9A.40.060 (3)? The second issue is whether there is any evidence, even when the evidence is construed in the light most favorable to the State, that Wairimu had any unlawful intent to deprive the father of access to the child for any period of time?

WHY REVIEW SHOULD BE ACCEPTED

The petitioner requests that this court accept review of this case, pursuant to RAP 13.4 (b), since it involves a significant question of law regarding the interpretation of a statute of the State of Washington, an issue of first impression regarding the meaning of the term "protracted period" as it is used in RCW 9A.40.060 (2) and RCW 9A.40.060 (3), and

consequently, the case also involves an issue of substantial public interest that should be determined by the Supreme Court.

In State v.Bauer 295 P 3rd 1227 Division II (2013), the court held that in order to prevail on a Knapstad motion, the defendant must show that there are no material facts in dispute and that the undisputed facts do not establish a prima facie case of guilt,_A trial court may dismiss a criminal charge under Knapstad if the State's pleadings and evidence fail to establish prima facie proof of all elements of the charged crime, citing State v. Sullivan 143 WA 2nd 162, 171, 19 P 3rd 1012 (2001). The court indicated that it would uphold a trial courts dismissal of a charge on a Knapstad motion if no rational fact finder could have found the elements of the charged crime beyond a reasonable doubt, citing State v. O'Meara, 143 WAAPP 638,641, 180 P 3rd 196 (2008)

Custodial interference

RCW 9A.40.060 (3) A relative of a child under the age of eighteen or of an incompetent person is guilty of custodial interference in the first degree Intends to hold the child or incompetent person permanently or for a protracted period; or (b) Exposes the child or incompetent person to a substantial risk of illness or physical injury; or (c)Causes the child or incompetent person to be removed from the state of usual residence; or (d) Retains, detains, or conceals the child or incompetent person in another state after expiration of any authorized visitation period with intent to intimidate or harass a parent, guardian, institution, agency, or other person having lawful right to physical custody or to prevent a parent, guardian, institution, agency, or other person with lawful right to physical custody from regaining custody.

RCW 9A.40.060 (2) A parent of a child is guilty of custodial interference in the first degree if the parent takes, entices, retains, detains, or conceals the child, with the intent to deny access, from the other parent having the lawful right to time with the child pursuant to a court order making residential provisions for the child, and:

(a) Intends to hold the child permanently or for a protracted period; or (b) Exposes the child to a substantial risk of illness or physical injury; or (c) Causes the child to be removed from the state of usual residence. (3) A parent or other person acting under the directions of the parent is guilty of custodial interference in the first degree if the parent or other person intentionally takes, entices, retains, or conceals a child, under the age of eighteen years and for whom no lawful custody order or order making residential provisions for the child has been entered by a court of competent jurisdiction, from the other parent with intent to deprive the other parent from access to the child permanently or for a protracted period.(4) Custodial interference in the first degree is a class C felony. The question that court must address is whether proof of the statutory elements of a temporary parenting plan is required to convict a parent charged with custodial interference. Statutory construction is a question of law

II. IS THERE EVIDENCE THAT WAIRIMU HAD ANY INTENTION OF VIOLATING RCW 9A.40.060 (3) RCW 9A.40.060 (2)

SUFFICIENCY OF THE EVIDENCE

"[T]he evidence is sufficient if, when viewed in the light most favorable to the petitioner's position, a rational Trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In State v.Bauer 295 P 3rd 1227 Division II (2013), the

court held that in order to prevail on a Knapstad motion, the defendant must show that there are no material facts in dispute and that the undisputed facts do establish a prima facie case of guilt,

Temporary court-ordered parenting plan 2013 willful violations

[1] **First evidence affidavit under oath** (Ex-130) is to the effect that Wairimu, Judy and Mathew clearly state she left for Nairobi on 12/12/2012 for about a year and a half and I'm trying to resettle in Seattle. I left for Nairobi because I feared for my daughter's safety especially when I wasn't around in home. I have returned and the scare tactics are back. My daughter has stated to me and the school secretary that she wishes. She was dead. I am modifying the parenting plan, which will reflect our residency in Seattle. The initial was only to make sure that we could leave for Nairobi. It is a written statement, sworn to be the truth under penalty of perjury by someone with direct knowledge about the issues in a court case in [CP pg 342] court of appeal determination that the evidence was sufficient to show a willful violation is reviewed for an abuse of discretion. State v. Lucas, 58 N.C. App. 141 (1982_).

Final court-ordered parenting plan July 9, 2014 willful violations

[2] **Second evidence is** parenting plan Evaluator page 5, the mother and the child lived with mother' friend, Judy Piggott and Judy's brother Mathew. Ms. Piggott did not allow the father to visit her home, so there was a period of time in which the father did not see the child. Additionally, she determined the child could not go to see the father's home because Malaika had broken leg and it was difficult for her to get around. The father and

child resumed contact around December of 2014 or January 2015, and she spent some overnights with him at that time. [July 9 2014-January 8 2015]

[3]**Third evidence parenting** plan Evaluator page 6 states so the mother determined that a new plan was necessary. At that time, she also determined that the father should not see the child and suspended the contact. The mother alleged that on one occasion the father decided that he wanted to see the child, so he picked her up from the contact maternal grandmother's home without the mother's knowledge. The mother contacted the police who informed her that they could not force the father to return the child to the mother's care in the absence of parenting plan ordering it as such, but they conducted welfare check at the father's home, which concluded that the child was safe. 2/16/15 through 9/6/2015.

RCW 26.09.520(2) prior agreement of the parties' willful violations

[4]Forth evidence is Parenting plan Evaluator page 18 FCS is also concerned that mother has prevented the father the father and the child from having residential time without warning or apparent cause without warning or apparent cause, and has impeded on their activities by the mother not bringing Malaika to school on the residential time. She has also invited Mathew to mediate matters related to the parenting plan, which is inappropriate as they are married and he is not a neutral third party. Of most significant concern to FCS is that the mother brought the child to Kenya for one month during December and January with very little notice to the father, under the guise that she was attending to her ill father. Infact, the mother represented this previously scheduled trip to FCS during her November interview as an opportunity to introduce Mathew to her relatives. She provided the father minimal notice of the child' RCW 26.09.520(2) violated from 12/10/15 through 1/10/2016

[5] Firth Evidence is Defendant Reaffirm and restates that the Reason why she violated court ordered parenting plan from December 2012 to August 2014. Because there were, no provisions spelled out in the parenting plan for how or when to keep contact. Respondent infact did live in Kenya with her daughter from December 2012 to August 2014 in [trial brief pg. 5-third paragraph line 3-4]

[6] Sixth Evidence is the visitation provision in the court ordered parenting plan In [Ex-127] that states all school breaks/ holidays that are larger than three weeks malaika will travel back from Nairobi to the state to visit the father. However, she denied that there were never provisions spelled out in the parenting plan.

The Decision Is In Conflict With Any Decision Of Another Court Of Appeals Or The Supreme Court. RAP 13.4(b)(l) and (2) The instant case is controlled by firmly established authority from this Supreme Court and the cases from the Court of Appeals; conflicts and Petitioner never really identifies any. The intensive case analysis began with the Division I case of In re Osborne, 119 Wn.App. 133, 79 P.3d 465 (2003). A year later, a relocation issue was heard and decided in the Supreme Court In re Marriage of Horner, 151 Wn.2d 884, 93 P.3d 124 (2004). Osborne and Horner were followed by Division III in re Marriage of Momb, 132 Wn.App. 70, 130 P.3d406 (2006).

Judge Schindler J. assertion of Rewrite evidence that Wairimu returned twice in 2013 is Tampering with physical evidence violate statue RCW 9A.72.150 against respondent evident [Trial brief pg. 5-third paragraph line 3-4] and [Ex-130] on First page of opinion the second paragraph last two lines of unpublished opinion states that kiambuthi and M.O. travelled back to Seattle two times in 2013 to visit Obuon and kiambuthi mother. To justify

statutory of relocation RCW 26.09.520(1) that Wairimu "clearly has the stronger relationship with the child. **In (CP pg 353-354).**

RCW 26.09.520(1) Court of Appeals decision page 6 through 9 Judge Schindler J found that Wairimu "clearly has the stronger relationship with the child. Rational of court of appeal. Is mind bugle. It would make sense if there was absence of a court order of visitation with any minor. Regardless of violation of court ordered parenting plan in (Ex-130), Parenting plan Evaluator page 5, Parenting plan Evaluator page 6, Parenting plan Evaluator page 16, Parenting plan Evaluator page 18, declarative statement ,(CP pg 353-354), [Ex-127] and [trial brief pg. 5-third paragraph line 3-4].

RCW 26.09.520(2) GAL and Court of appeal findings establish "[t]here has been prior agreement of the parties according Parenting plan Evaluator page 18 FCS is also concerned that mother has prevented the father and the child from having residential time without warning or apparent cause without warning or apparent cause, and has impeded on their activities by the mother not bringing Malaika to school on the residential time from 12/1/15 through 1/10/2016.

RCW 26.09.520 **(3)** Parenting plan evaluator page 17-second paragraph last three lines. GAL The request [to relocate] is not one made in good faith if good faith is taken to encompass consideration of factors. Therefore, while no questions regarding relocation are before FCS at this time, the information that was considered does not appear to be in child's best interest, as it cannot realistically accommodate the forthcoming recommended schedule.

RCW 26.09.520(4) frivolous child abuses and Physical, sexual or a pattern of emotional abuse of a child in (CP pg. 39) see In Re Jonathan S., 2012 WL 3112897 (Ct. App. Tenn. July 31, 2012) In this case the trial court found that the best interests of the child were served by being placed with his father because the mother made repeated allegations of sexual abuse that the court determined were unfounded in (CP pg 11 -14), (CP pg 341- 342)

RCW 26.09.520(5 (i)[T]he mother's desire to move to Snohomish reflects her own personal desire and disregard child the best interests. The request to relocate is not one made in good faith. Mother inform Parenting plan Evaluator page 16 first paragraph line four through eight. Also in recent weeks, the mother has verbally informed FCS that she intends to relocate, and accordingly, does not want the father to have residential time with the child during the week due to the distance but acknowledged he is not able to have on the weekends due to his work schedule.

RCW 26.09.520(5) parenting plan page 5, page 6 that she determined that father should have contact with child and the best interests of the child. The request is not one made in good faith if good faith is taken to encompass consideration of those factors

RCW 26.09.520(5) (ii) Mathew informed parenting plan evaluator page 15, second paragraph line seven. He added that it would be difficult to facilitate contact between the fathers and the child during the week if they are able to move, and he acknowledge it would be difficult for the father to have residential time with the child on weekends given his work schedule, but that was not [the child's] fault,''!!!!!??????.....

RCW 26.09.520(5) [iv]. Defendants inform "guardian ad litem" that parenting plan Evaluator page 6 first paragraph. She is determined that a new plan was necessary. At that time, she also determined that the father should not see the child and suspended the contact. The mother alleged that on one occasion the father decided that he wanted to see the child, so he picked her up from the contact maternal grandmother's home without the mother's knowledge. See Swisher v. Swisher, 124 S.W.3d 477, 482 (Mo.App. W.D. 2003), as an example of a Court declining—because it was dicta—to rely on a lengthy discussion of a "good faith" discussion in McDonald v. Burch, 91 S.W.2d 660, 663- 64 (Mo.App. W.D. 2002).

The Decision Does Present A Significant Question Of Law Under The Constitution Of The State Of Washington Or Of The United States RAP13.4 (b) (3)

This decision is in conflict with *Katare v. Katare, supra,* and this Court's decision in *In re LaBelle,* 107 Wash.2d 196, 218-219,728 P.2d 138 (1986), where Court held: In re Marriage of Katare, 175 Wn.2d 23, 35, 283 P.3d 546 (2012). Statutory Provisions under RCW 26.09.191(3), the trial court "may preclude or limit any provisions of the Parenting plan" if at least one of seven listed factors exist. The existence of one of the factors Permits but does not require the trial court to impose limitations. See Katare, 175 Wn.2d at 36. The rationale for imposing limitations on a parenting plan is that "[a] parent's involvement or conduct may have an adverse effect on the child's best interests." RCW 26.09.191(3).

Finding of Fact No. [1] Trial Court Is reply to defendant request, by defining Basis for imposing RCW 26.09.191. Well, it in that sense I was thinking about that at little earlier. You are asking the right to make sole decision-making ability. THE COURT: And that involves, usually,

a basis for that it is what we call "191 restrictions" is the statute that says domestic violence is one of the bases for that. THE COURT: And I cannot think of any other basis in this case; but that is where it would connect in.] [RP pg 271 16-21] - [RP pg 271-2, 22-2] (Ex-109), yet, at the end of trial.

Finding of Fact No.[2] In August 14 2015, the trial court appointed guardian ad litem (GAL) Eli Khosarvi to investigate alleged child abuses and act in the child's best interests of the child and make recommendations as to the parenting plan. Parenting Investigators and Guardians Ad Litem RCW 26.09.220(1) provides: (FCS Eli Khosarvi wrote: Parenting plan evaluation page 17 scope of RCW 9A.16.100 which defines the use of force with children, It does not, however constitutes abuse which would warrant a restriction of parenting plan under RCW 26.09.191 or serve as a basis of for a DVPO in (Ex-110)

Finding of Fact No. [3] Page 17 of parenting plan evaluation last paragraph FCS writers opinion. It is this writer's conclusion that such a request is unreasonable, particularly in consideration of the fact that the father has offered for the mother to accompany him and the child to his village and remain local during their stay for her own assurances. There are no risk issues to indicate that the father's travel to Kenya with the child is other than appropriate and in good faith so that she may know paternal relatives. [B] (Ex-144)

Finding of Fact No. [4]. last paragraph # 8. Parenting plan page 19, international Travel Child expert Recommendation) Each parent should be entitled to travel with the child for up to four weeks at a time in addition to the vacation time described under recommendation #2 the parent should provide proof of travel accommodations, including return tickets, to the other party no less than sixty days prior to the intended travel. The parent should also submit a detailed itinerary I addition to contact information (phone and email) for the residential parent during their travel and at least one additional emergency

contact during the child travel. The father should return the child's passport to the mother upon their return in (Ex-144].

Finding of Fact No[5] Respondent's own email of 9/17/2015 speak for itself she states that ((This poor communication only leads me to be defensive and to me seeing Petitioner as a constant bully which is why she have called the police on you and also chosen to go to court, If we are to avoid the court. I am requesting that you find a more neutral and reasonable approach to us dialoging.))) Extortion or threat In (Ex-109) and (CP pg 11-14) this is extortion

Finding of Fact No [6] Respondent's exhibits 101-147 and in [RP pg. 7 10-21] admitted on July 20 2016, without objection finding fact and the conclusion of the law. The trial court's ruling on the admission of 404(b) evidence is reviewed for an abuse of discretion. State v. Robinson, 2003 N.C. App. LEXIS 2295 (2003).at the designated part [B]

Finding of Fact No. [7] Confirmation of issues at the divorce time 12/31/13 mother checked no to child abuses in[CP pg 11-14] or (CP pg 84-87) and Confirmation of issues at the status conference 8/14/2015 mother checked yes to child abuses in (CP pg183-186).

Finding of Fact No. [8] **South Seattle College preschool** and childcare center Lisa Server Manager Jennie / Lisa Server Manager wrote (Ex-125) 2009. I have attached the letter that Toll Obuon brought into my office today for your file. I have reviewed Malaika obuon's enrolment record and our incident report file for 2009. There are no records in our files that relate to his request regarding an incident report in 2009. If you need additional information, please let me know.

Finding of Fact No. [9] **Shorewood Christian centers** (Ex-124), To Whom It May Concern: There are no incident reports found in Malaika Obuon's school file from the year 2010-2011 when she was enrolled in our pre-kindergarten class. In fact, (Ex-124) the mother informed parenting plan evaluator that she identified her primary concerns regarding the father's care of malaika. She alleged that he uses excessive discipline and gave example of the incident in February of 2011

Finding of Fact No. [10] Schmitz Park Elementary principle Gerrit Kischner (120), On about 5/2012 (CP pg 341), declarative statement to court defendant stated that the plaintiff became impatient with her slow eating and he pushed her down from her chair and then drove off while she was crying and very frightened he would be return to hit her if she did not eat. On Friday 6/1/12 (CP pg 342) respondent reported incident to" Teacher McGregor"." The incident that did not even occurred and she did not move" Teacher wrote Wairimu tells that something has happened at home, but did not give further detail

Finding of Fact No. [12] On the parenting plan, there are I will make the finding of 191(3) limitations. I dealt with the traveling internationally by -- somewhat differently than it was asked for here. Moreover, provided that and I am persuaded that there are difficulties and dangers that the child may face if there is unrestricted travel to Kenya with the father at this time. What I've put in here, in paragraph 3.6 is that the respondent shall not travel internationally with the child unless agreed to in writing by both parents, or by court order. Obviously, that does not continue after age 18; after age, the child is not a child in this sense. [RP 10-24 pg. 355] (2) The Court: basis of restriction involves, usually, a basis for that "191 restrictions" is the statute that says The Court: that says "191." Moreover, domestic violence

is one of the bases for that. The court: And I cannot think of any other basis in this case; but that is where it would connect in [RP pg 271 16-21] - [RP pg 271-2, 22-2] (Ex-109).

Finding of Fact, no [13] In fact that the Court of Appeals did not simply reverse the trial court's imposition of travel restrictions is distressing in this case, when it was obvious after the second child expert stated in Parenting Plan page 17 that There is no risk that Mr. Toll did not pose a serious risk of abducting his child by stating that a parties seeking the review, must designate the decision judgment of the trial court according to RAP 5.3(a) (3) or Discretionary Review. RAP 2.4(a). Seeking review of orders on certain timely post-trial motions will automatically bring up the final judgment for review, even if the final judgment was not designated in the Notice.

RCW 26.27.051 States A court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying Articles 1 and 2.(2) Except as otherwise provided in subsection (3) of this section, a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this chapter must be recognized and enforced under Article 3.(3) A court of this state need not apply this chapter if the child custody law of a foreign country violates fundamental principles of human rights.

RCW 26.27.411(A) states Under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), chapter 26.27, according data available at http://www.icj-cij.org Report that both the United States and Kenya signatory of The Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention). The goals of The Hague Convention are to "secure the prompt return of children wrongfully removed to or

retained in any Contracting State" as well as "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

United States courts of appeals in the (i) Friedrich V Friedrich court held that a "grave risk of harm" Article 13b for the purpose of the convention can exist only in two situations, Grave Risk - Art 13(1) (b) must be proven by clear and convincing evidence and may relate to issues surrounding the national environment or the parent. First, if returning the child would put the child in imminent danger prior to the resolution of the custody dispute- e.g. returning the child to zone of war, famine or disease. Second if there is evidence of serous abuse or neglect, or extraordinary emotional dependence, and if the court in the country of habitual residence is incapable or unwilling to give the child adequate protection. (ii) The basis of the grave risk defense is *Rodriguez v. Rodriguez,* 33 F.Supp.2d 456 (D.C. Md.1999), a case requesting return to Venezuela, in which the court found a detailed history of physical abuse against a child, along with domestic violence against the child's mother. In [RP pg 271 16-21], [TR pg 302 10-19] and [TP pg 355 10-24]

[F] ISSUE PRESENTED FOR REVIEW

The Decision Does Involve an Issue of Substantial Public Interest That Should Be Determined By the Washington Supreme Court RAP 13.4(b) (4) RCW 43.07.210 Filing false statement Carol Trester is charged with falsely reporting an incident in the second degree (Penal Law § 240.55 [3]) (child abuse or maltreatment), concerning her son. She seeks dismissal of the information based on due process grounds, apparently under CPL 170.30 (1) (f). [3] 5.3.7 Stronger Legal Remedies Required Preventing False Allegations. [5] In (CP pg

39), (Ex-104) and (CP pg 353-356) Error in refusing to address false accusation in appropriate sexual contact with minor and child abuses. (child abuse or maltreatment), concerning her son. There are a number of offences that may be committed under the *Criminal Code* by a person who *knowingly* makes a false allegation of sexual abuse, A person who knowingly makes a false statement to a police officer that accuses another person of committing a crime (which would include any situation of child abuse) commits the offence of mischief, contrary to section 140 of the *Code*. If the false allegation resulted in a civil or criminal proceeding in which the person who made the allegation gave evidence, other offences would be committed, including perjury (giving false evidence under oath, section 131) or making a false affidavit (section 138). If the reporter persuaded or misled the child or another person to make a false statement, this would be the offence of obstruction of justice (section 139). In Re Jonathan S., 2012 WL 3112897 (Ct. App. Tenn. July 31, 2012) In this case the trial court found that the best interests of the child were served by being placed with his father because the mother made repeated allegations of sexual abuse that the court determined were unfounded. The court noted that the mother's hostility towards the father was detrimental towards the son

[H]CONCLUSION

The petitioner respectfully requests that this court accept review, and rule that the petitioner's Toll Obuon motion for review should be been granted in its entirety, and that the convict Respondent and associate in conspiracy. In sum, reverse Trial court's Judgments that, notwithstanding the fact that the record was entirely documented, the superior court's ruling is not supported by substantial evidence on the record.

Toll Obuon

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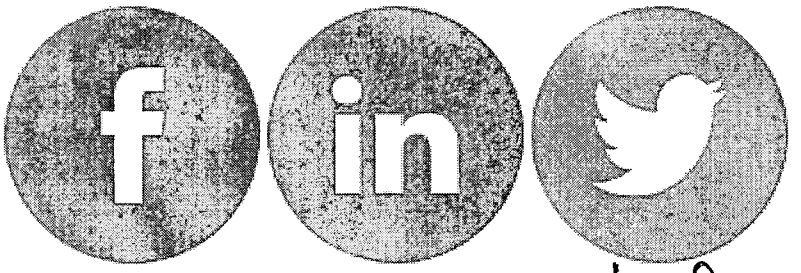
2/20/2018



Custodial Interference
Convicted For taking the child for two weeks
protracted period of time.

STATE v. MUNOZ

No. 27,945.

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129 P.3d 142 (2006)

139 N.M. 106

2006-NMSC-005

STATE of New Mexico, Plaintiff-Respondent, v. Israel Delgado MUNOZ, Defendant-Petitioner.

Supreme Court of New Mexico.

January 31, 2006.

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Attorney(s) appearing for the Case

John A. McCall, Albuquerque, NM, for Petitioner.

Patricia A. Madrid, Attorney General, Ann M. Harvey, Assistant Attorney General, Santa Fe, NM, for Respondent.

OPINION

MAES, Justice.

{1} Defendant Israel Delgado Munoz ("Defendant") was convicted of custodial interference, contrary to NMSA 1978, § 30-4-4(B) (1989), and injuring or tampering with a vehicle, contrary to NMSA 1978, § 66-3-506 (1978). The Court of Appeals affirmed Defendant's convictions in an unpublished memorandum opinion. *State v. Munoz,* No. 23,094 (Ct.App. Feb. 7, 2003). This Court granted Defendant's petition for a writ of certiorari pursuant to Rule 12-502 NMRA 2006. On certiorari review, we consider two issues related to Defendant's conviction for custodial interference: (1) whether the instruction given to the jury defining *good cause* constituted error because it failed to include the concept of *good faith;* and (2) whether the trial court erred in refusing to give the jury Defendant's tendered instruction defining *protracted period of time.* We hold that the trial court's *good cause* instruction did not adequately reflect New Mexico's custodial interference law; however, we find the erroneous definitional instruction did not amount to reversible error. We also hold that the trial court's refusal to give Defendant's requested instruction defining *protracted period of time* was not erroneous because the meaning of the phrase is readily understandable. Accordingly, we affirm Defendant's conviction for custodial interference.

FACTS AND PROCEEDINGS BELOW

{2} The following facts were adduced at Defendant's criminal trial. In 1996, Defendant and his wife, Yolanda Munoz ("Yolanda"), divorced in order to protect several of their business enterprises, which were jeopardized by Defendant's prior felony conviction. Yolanda testified further that she also went along with the divorce because she was unhappy with the marriage. In the divorce decree, Defendant and Yolanda were given joint legal custody of their four children, with Yolanda receiving physical custody of the children and Defendant receiving liberal visitation rights. However, the two continued to live together until 1999, when Yolanda and the children moved to Carlsbad, New Mexico. After Yolanda moved to Carlsbad, Defendant and Yolanda no longer acted as a married couple. Defendant lived in another city and would occasionally visit the children. Sometimes Defendant would ask Yolanda if they could get back together. Defendant wanted the family to move to Arizona. Yolanda, however, did not want to reunite with Defendant.

{3} In July 2000, Defendant went to Yolanda's house to visit. At that time, Defendant was living with his brother in Safford, Arizona. Defendant stayed at the house, ignoring Yolanda's repeated requests to leave. On July 3, Yolanda called Defendant from work and told him to leave her home. Despite this request, Defendant was there when Yolanda came home from work. In order to avoid arguing with Defendant, Yolanda left the house for the evening, leaving the children in Defendant's care.

{4} In the early morning hours of July 4, 2000, Yolanda had not returned home and Defendant left the house to look for her. Defendant observed Yolanda with a male acquaintance. Upon seeing Yolanda with another man, Defendant returned home, woke up his three youngest children and took them to see what their mother was doing. Around dawn, Yolanda attempted to approach her car, however, as she approached she saw Defendant waiting for her in the car. Defendant ran out of the car and chased Yolanda, who fled with her male acquaintance. Defendant and the three children then drove Yolanda's vehicle back to her home.

{5} When Defendant and the three youngest children returned from observing Yolanda, Defendant proceeded to pack up his things. He also packed clothing and toys belonging to the three youngest children. Defendant removed the distributor wire from Yolanda's vehicle, disabling it so that she could not follow him. He then took the three youngest children to Arizona.

{6} When Yolanda finally returned to her home, she saw her oldest child standing outside on the road. Upon hearing that Defendant had left with the three other children, Yolanda went to the police station to report the incident. Yolanda returned home to find the contents of her purse strewn about the grass and her car parked in an unusual place behind the home. She could not start her car because of the missing distributor wire. When Defendant took the three youngest children, he also took some of Yolanda's personal items, including her money.

{7} Defendant and the children called Yolanda after arriving in Arizona and stayed in almost daily contact while they were away. Each time Yolanda spoke to Defendant, she demanded that he return the children, but Defendant said he would not return the children until she moved to Arizona. At one point Defendant offered to meet Yolanda in El Paso, Texas with the children, on the condition that she go alone. Yolanda declined Defendant's offer because she was unwilling to go by herself. The children were eventually returned to Yolanda sixteen days after they were taken, following Defendant's arrest at a social services agency in Arizona on July 19, 2000.

{8} As a result of these events, Defendant was charged with custodial interference, contrary to Section 30-4-4(B), injuring or tampering with a vehicle, contrary to Section 66-3-506, unlawful taking of a motor vehicle, contrary to NMSA 1978, § 66-3-504 (1998), and larceny, contrary to NMSA 1978, § 30-16-1 (1987). During Defendant's trial, two definitional jury instructions related to custodial interference became an issue. The jury was given the following instruction outlining the elements of custodial interference:

For you to find the defendant guilty of Custodial Interference ... the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:1. The defendant had a right to custody of [the children];2. The defendant maliciously took [the children], *and* failed to return them without *good cause;*3. At the time defendant took [the children], each of them was under the age of eighteen (18);4. The defendant intended to deprive permanently or for a *protracted period of time* another person also having a right to custody of these children....

(Emphasis added.) Neither party objected to this instruction outlining the elements of custodial interference. However, Defendant and the State disagreed about related instructions defining the terms *good cause* and *protracted period of time.*

{9} Both Defendant and the State tendered definitional jury instructions for the term *good cause.* Defendant's proposed definition for *good cause* was taken from *State v. Luckie,* which defined *good cause* as "`a good faith and reasonable belief that the taking, detaining, concealing, or enticing away of the child is necessary to protect the child from immediate bodily injury or emotional harm.'" 120 N.M. 274, 278, 901 P.2d 205, 209 (Ct.App.1995) (*quoting* CAL.PENAL CODE § 277 (Cum.Supp.1995)). The State's submitted definition was also taken from *Luckie,* but based on employment law, and stated that "`[g]ood cause is established when an individual faces compelling and necessitous circumstances of such magnitude that there is no [other] alternative.'" *Id.* at 277-78, 901 P.2d at 208-09 (*quoting Molenda v. Thomsen,* 108 N.M. 380, 381, 772 P.2d 1303, 1304 (1989)). After argument by counsel, the trial court chose the State's instruction based on the Court of Appeal's statement in *Luckie* that the employment law definition "can readily be applied to varying fact patterns in the context of our custodial interference statute." *Id.* at 278, 901 P.2d at 209. The trial court interpreted the appellate court's comment as instructing lower courts to use the employment law definition in custodial

interference cases. Consequently, the jury was given the employment context instruction over Defendant's alternative request that no instruction be given.

{10} The trial court declined Defendant's request to provide the jury with a definitional instruction for the phrase *protracted period of time.* The court determined that the phrase was readily understandable and an instruction would not aid the jury.

{11} The jury convicted Defendant of custodial interference and injuring or tampering with a motor vehicle and acquitted him of unlawful taking of a motor vehicle and larceny. The Court of Appeals held that the jury instruction given adequately defined *good cause* and that it was not necessary to define *protracted period of time* for the jury. We granted certiorari to review the *good cause* definitional instruction and the trial court's decision not to instruct the jury on the definition of *protracted period of time.*

DISCUSSION

Good Cause Instruction

{12} "The standard of review we apply to [the *good cause* instruction] depends on whether the issue has been preserved." *State v. Benally,* 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134. If Defendant preserved the error, we review the given instructions under a reversible error standard. *Id.* If Defendant failed to preserve the issue for review, we review for fundamental error. *Id.* Thus, we must first address the State's claim that the *good cause* instruction should be reviewed only for fundamental error.

{13} The State maintains that the jury instruction error now identified by Defendant was not preserved because after the State submitted the instruction drawn from *Molenda,* the defense maintained a general objection to the instruction but did not point to any fault in the instruction's failure to expressly address *good faith.* Defendant, however, took two significant steps which constituted adequate preservation. First, Defendant submitted the *good cause* definition found in the California custodial interference statute cited in *Luckie* that specifically states *good faith* is an element of *good cause.* Second, when Defendant's tendered instruction was refused, Defendant objected and argued alternatively that no instruction defining *good cause* should be given. By taking these two steps, Defendant fairly invoked a ruling by the trial court. *Benally,* 2001-NMSC-033, ¶ 26, 131 N.M. 258, 34 P.3d 1134 (Baca J., dissenting) ("With respect to jury instructions, a ruling or decision by the district court may be fairly invoked by either a formal objection to the instruction that is to be given to the jury by the court, or by tendering a correct instruction."). Therefore, we review the given instruction for reversible error.

{14} In order to determine whether the *good cause* instruction given to the jury constitutes reversible error, it is first necessary to clarify both types of action prohibited by the custodial interference statute and the mental state a defendant must have to be subject to conviction for custodial interference. The custodial interference statute states:

> Custodial interference consists of any person, having a right to custody of a child, maliciously taking, detaining, concealing or enticing away *or* failing to return that child without good cause and with the intent to deprive permanently or for a protracted time another person also having a right to custody of that child of his right to custody. Whoever commits custodial interference is guilty of a fourth degree felony.

Section 30-4-4(B) (emphasis added). The statute clearly sets forth two distinct ways that a person, having a right to custody of a child, can commit custodial interference: (1) maliciously taking, detaining, concealing or enticing away a child with the intent to deprive permanently or for a protracted period of time another person also having a right to custody; or (2) failing to return that child without good cause and with the intent to deprive permanently or for a protracted time another person also having a right to custody of that child of his right to custody. The first act constitutes "taking" interference, and the second, "failing to return" interference. To be guilty of custodial interference, a defendant need only engage in one of the acts prohibited by the statute, either "taking" interference or "failing to return" interference.

{15} Both types of custodial interference require malice and the intent to deprive permanently or for a protracted time another person of his or her custodial rights. *Luckie,* 120 N.M. at 278, 901 P.2d at 209 ("[W]e think it is clear that the term *`maliciously'* modifies all of the proscribed conduct in Section 30-4-4(B), and is an essential element of the alleged offense."). Only the second type, "failing to return" interference, requires a showing that a defendant acted without *good cause.* Thus, the *good cause* instruction in this case only pertains to the jury's finding with regard to "failing to return" interference. Having clarified the type of harm that is prohibited by the custodial interference statute and a defendant's requisite mental state, we now turn to the meaning of *good cause* in custodial interference cases in New Mexico. Defendant argues that a *good cause* instruction in custodial interference cases should include the concept of *good faith.* We agree.

{16} Currently there is no uniform jury instruction defining *good cause* and no New Mexico case has defined *good cause* within the context of custodial interference. *Cf. Luckie,* 120 N.M. 274, 901 P.2d 205 (discussion of *good cause* limited to determining whether the term rendered our custodial interference statute unconstitutionally vague). Therefore, to determine what constitutes *good cause* in custodial interference cases, we must consider the objective of the custodial interference statute. The custodial interference statute is intended to prevent persons with custodial rights from disrupting another person's right to custody. Section 30-4-4(B). However, recognizing that there may be situations in which custodial interference is warranted, the legislature modified the custodial interference statute to include the requirement that the custodial interference must be perpetrated "without good cause." *Compare* NMSA 1978, § 30-4-4 (prior to 1989 amendments), *with* NMSA 1978, § 30-4-4(B) (1989). Thus the statute punishes conduct effected without *good cause* and excuses conduct justified by *good cause.*

{17} The Model Penal Code offers guidance as to what constitutes *good cause* in custodial interference cases. In the section on interference with custody, the Model Penal Code provides an affirmative defense when "the actor believed that his action was necessary to preserve the child from danger to its welfare." MODEL PENAL CODE § 212.4(1)(a) (Official Draft and Revised Comments 1962). To prevent the willful defiance of a custody order, however, the Model Penal Code requires a defendant's belief to be a *good faith* belief. *Id.* at § 212.4 cmt. 3 (the Model Penal Code requires "an honest belief that the actor's conduct was `necessary to preserve the child from danger to its welfare.'"). Several other jurisdictions also excuse a defendant's conduct when his or her action is taken to protect a child from harm, so long as the action is based on a *good faith* belief, a reasonable belief, or both.1

{18} We believe that the term *good cause* in our custodial interference statute similarly encompasses the concepts of subjective *good faith* and objective reasonableness. To avoid criminal sanctions for custodial interference, a defendant must have an honest belief that his actions are necessary to protect a child from harm and that honest belief must be reasonable. A defendant's unreasonable belief that custodial interference is necessary to protect children from harm will not satisfy the *good cause* requirement.

{19} In custodial interference cases, an instruction defining *good cause* should communicate that a defendant's belief must be both reasonable and in *good faith.* Therefore, when a defendant requests an instruction defining *good cause, good cause* should be defined. A suggested definition is as follows: "a good faith and reasonable belief that the defendant's actions were necessary to protect a child from physical or significant emotional harm."2 We believe this suggested definition adequately describes our state's custodial interference law which excuses a defendant's actions when they are motivated by an honest and reasonable belief that custodial interference is necessary to prevent physical harm or significant emotional harm. Our uniform jury instructions committee should review this instruction and make a further recommendation.

{20} We acknowledge that the *good cause* instruction given to the jury in this case did not accurately reflect New Mexico's custodial interference law because it failed to address the concept of *good faith.* When reviewing an erroneous jury instruction for reversible error, "[w]e consider jury instructions as a whole, not singly," *State v. Montoya,* 2003-NMSC-004, ¶ 23, 133 N.M. 84, 61 P.3d 793, and we look to see "whether a reasonable juror would have been confused or misdirected by the jury instructions." *Id.*

{21} When the given jury instructions are examined as a whole, it becomes clear that the jury in this case could not have been confused or misdirected by the erroneous *good cause* instruction. The jury was instructed that to

find the defendant guilty of custodial interference, "[t]he State must prove to your satisfaction beyond a reasonable doubt that ... the defendant maliciously took [the children], *and* failed to return them without good cause." (Emphasis added.) As previously discussed, either "taking" interference or "failing to return" interference alone constitutes illegal custodial interference, however, the instruction in this case required the jury to find beyond a reasonable doubt that Defendant both maliciously took the children *and* failed to return them without *good cause.* In light of this instruction, Defendant's conviction for custodial interference meant that the jury found Defendant guilty of both "taking" interference and "failure to return" interference.

{22} The erroneous *good cause* instruction only affected "failure to return" interference because *good cause* only modifies "failure to return" interference. Section 30-4-4(B) ("failing to return that child without good cause"). Thus, the incorrect definitional instruction had no bearing on the jury's finding that Defendant engaged in "taking" interference. Because the jury found Defendant guilty of "taking" interference, an error with regard to "failure to return" interference should not invalidate the jury's verdict that Defendant was guilty of custodial interference based on "taking" interference. Therefore, when the jury instructions are considered as a whole, the jury was not confused or misled as to "taking" interference and the *good cause* instruction error did not amount to reversible error.

***Protracted Period of Time* Instruction**

{23} Defendant contends that the trial court erred when it refused to give the jury his tendered instruction defining the phrase *protracted period of time.* Defendant's proposed instruction read: "protracted period of time means a lengthy or unusually long time under the circumstances." Relying on *State v. Mascareñas,* 2000-NMSC-017, 129 N.M. 230, 4 P.3d 1221, Defendant asserts that the trial court was required to give his tendered instruction. Defendant appears to argue that once a court has determined the meaning of a term, the jury should be instructed on that meaning. However, Defendant told the trial court when he submitted his definitional instruction that the definition might be helpful to the jury but that it was not required. Defendant asserts that because it is uncertain whether the jury considered the circumstances in determining whether he had kept the children for a *protracted period of time,* this error rose to the level of fundamental error.

{24} We conclude that the trial court did not err in refusing to give Defendant's requested instruction. "Where the issue is the failure to instruct on a term or word having a common meaning, there is no error in refusing an instruction defining the word or term." *State v. Carnes,* 97 N.M. 76, 79, 636 P.2d 895, 898 (Ct.App.1981). Since the phrase *protracted period of time* is self-explanatory and has an understandable and common meaning, there was no need for further definition. *See Trujeque v. Serv. Merch. Co.,* 117 N.M. 388, 390, 872 P.2d 361, 363 (1994) (concluding that the phrase "exclusive control and management" was self-explanatory and thus required no further definition for the jury); *Luckie,* 120 N.M. at 279, 901 P.2d at 210 (concluding that the phrase *protracted time* does not require "enactment of a further statutory definition" because "any reasonable person would interpret the meaning of the phrase `protracted period' to mean a `lengthy or unusually long time under the circumstances'" (*quoting People v. Obertance,* 105 Misc.2d 558, 432 N.Y.S.2d 475, 476 (1980))). Indeed, Defendant admits that this phrase has a common meaning.

{25} Additionally, Defendant's reliance on *Mascareñas* is misplaced. In *Mascareñas,* 2000-NMSC-017, ¶ 21, 129 N.M. 230, 4 P.3d 1221, we held that the trial court committed fundamental error when it failed to properly instruct the jury on the *mens rea* element of the crime at issue. We determined that "the trial court's failure to provide the instruction was a critical determination akin to a missing elements instruction." *Id.* ¶ 20. That is not the situation here because the jury was properly instructed on all the elements of the crime. Thus, *Mascareñas* is not applicable to the facts of this case.

{26} Further, Defendant was able to argue his interpretation of the meaning of *protracted period of time* to the jury. Defendant argued that he did not intend to keep the children for a *protracted period of time,* unlike situations where a child is taken and never heard from again until several years later when the child is found. Defendant said that he never intended to deprive Yolanda of the children; she knew where they were and he told her that she could come and get them. He argued that the two-week time period in this case did not qualify as a *protracted period of time.* We believe that a reasonable juror could glean from Defendant's closing argument that

a *protracted period of time* meant an unusually lengthy amount of time and that, according to Defendant, the two-week period was not unusually long under the circumstances of this case. Thus, we conclude that no error resulted from the trial court's refusal to give the jury Defendant's tendered definitional instruction on the phrase *protracted period of time. Cf. Benally,* 2001-NMSC-033, ¶ 21, 131 N.M. 258, 34 P.3d 1134 (holding that closing argument was not sufficient to correct fundamental error arising from an erroneous jury instruction).

CONCLUSION

{27} For the reasons stated, we affirm Defendant's conviction for custodial interference.

{28} IT IS SO ORDERED.

WE CONCUR: RICHARD C. BOSSON, Chief Justice, PAMELA B. MINZNER, PATRICIO M. SERNA, and EDWARD L. CHÁVEZ, Justices.

FootNotes

1. The Model Penal Code and most of the jurisdictions that provide a defense for actions taken to protect a child from harm limit the defense to actions based on a good faith belief, a reasonable belief, or both. *See, e.g.,* ARIZ.REV.STAT. § 13-1302(C)(2)(a) (2001) (requiring a good faith and reasonable belief); CAL.PENAL CODE § 278.7(a) (1999) (requiring a good faith and reasonable belief); COLO.REV.STAT. § 18-3-304(3) (2005) (requiring a reasonable belief); FLA. STAT. § 787.03(4) (2005) (requiring a reasonable belief); HAW.REV.STAT. § 707-726(2) (1993) (requiring a good faith and reasonable belief); LA.REV. STAT. ANN. § 14:45.1(A) (1997) (requiring a reasonable belief); MINN.STAT. § 609.26(2)(1) (2004) (requiring a reasonable belief); N.J. STAT. ANN. § 2C:13-4(c)(1) (2005) (requiring a reasonable belief); OHIO REV.CODE ANN. § 2919.23(c) (1997) (requiring a good faith and reasonable belief); VT. STAT. ANN. tit. 13, § 2451 (1998) (requiring a good faith belief); WASH. REV.CODE § 9A.40.080(2)(a) (2004) (requiring a reasonable belief); W. VA.CODE § 61-2-14(d)(c) (2005) (requiring a reasonable belief); WIS. STAT. § 948.31(4)(a)(1) (2005) (requiring a reasonable belief); *see also* N.H. REV. STAT. ANN. § 633:4(III) (1996) (requiring a good faith act).

2. This suggested definition takes into account California's custodial interference statute, CAL.PENAL CODE § 277 (Cum.Supp.1995), on which the Court of Appeals apparently relied in *State v. Luckie,* 120 N.M. 274, 901 P.2d 205 (Ct.App. 1995), and the version of the California statute in effect at the time of Defendant's conduct, CAL.PENAL CODE § 278.7(a) (1999). Our suggested instruction identifies the types of harm that are relevant in New Mexico. We believe that a defendant should be permitted to protect a child from both physical harm and significant emotional harm without being subjected to criminal penalty.

International Travel
Washington State MUST Treat Kenya like a sister state

Commentary: Appellate Court Cases

Friedrich v. Friedrich (*Friedrich I*), 983 F.2d 1396 (6th Cir. 1993)
Friedrich v. Friedrich (*Friedrich II*), 78 F.3d 1060 (6th Cir. 1996)

Other Sixth Circuit Cases

Ahmed v. Ahmed,
867 F.3d 682 (6th Cir. 2017)

Pliego v. Hayes,
843 F.3d 226 (6th Cir. 2016)

Jenkins v. Jenkins,
569 F.3d 549 (6th Cir. 2009)

Simcox v. Simcox,
511 F.3d 594 (6th Cir. 2007)

Robert v. Tesson,
507 F.3d 981 (6th Cir. 2007)

Taveras v. Taveraz,
477 F.3d 767 (6th Cir. 2007)

March v. Levine,
249 F.3d 462 (6th Cir. 2001)

Sinclair v. Sinclair,
121 F.3d 709 (6th Cir. 1997)

***In re* Prevot,**
59 F.3d 556 (6th Cir. 1995)

Habitual Residence | Rights of Custody | Grave Risk | Consent and Acquiescence

Friedrich I was the first Federal Circuit case to deal with the 1980 Hague Convention. At the time of its publication, the Hague Convention had only been in force in the United States for three-and-one-half years. No other federal appellate cases had yet been decided.

Friedrich I

Habitual Residence. The case dealt primarily with the concept of habitual residence and the defense of consent. The court enunciated what would later become the seminal language for the Sixth Circuit's test for habitual residence: "To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions."[1]

The Sixth Circuit later modified the *Friedrich I* test in *Robert v. Tesson*[2] by adopting part of the Third Circuit's approach in *Feder v. Evans-Feder*[3] that

> a child's habitual residence is the nation where, at the time of their removal, the child has been present long enough to allow acclimatization, and where this presence has a "degree of settled purpose from the child's perspective." *Feder,* 63 F.3d at 224. Such a holding is not only consistent with the collective wisdom of many of our sister Circuits, but it is also consistent with *Friedrich I*'s holding that a habitual residence inquiry must "focus on the child, not the parents, and examine past experience, not future intentions."[4]

This approach to determining habitual residence set up the split with other circuits that focus on parental intent in deciding habitual residence—primarily those circuits that follow the Ninth Circuit's decision in *Mozes v. Mozes*.[5]

1. Friedrich v. Friedrich (*Friedrich I*), 983 F.2d 1396, 1401 (6th Cir. 1993).
2. 507 F.3d 981 (6th Cir. 2007).
3. 63 F.3d 217, 224 (3d Cir. 1995).
4. *Robert*, 507 F.3d at 993.
5. 239 F.3d 1067 (9th Cir. 2001).

Friedrich I reversed the district court's finding that the United States was the child's habitual residence and the matter was remanded to consider the issue of custody rights and for consideration of any defenses.

Friedrich II

After the decision on remand, the case was again appealed. The subsequent case, *Friedrich II*, dealt with a broader range of issues and became one of the seminal cases for determining issues relating to the exercise of custody rights, grave risk of harm, consent, and acquiescence.

Exercise of Custody Rights. In *Friedrich II*, the court recognized that up until one week before mother removed the child from the family home in Germany, the family was intact, and that under German law, father had de jure rights of custody. The court defined the test for exercise of custody rights under Article 3(b) as follows:

> If a person has valid custody rights to a child under the law of the country of the child's habitual residence, that person cannot fail to "exercise" those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child.[6]

Article 13(b) Grave Risk. The court summarily refused to sustain mother's arguments that the child would suffer psychological problems if ordered to return to Germany as a result of being uprooted from his new home in the United States and separated from his mother. In dicta, the court reasoned in language that has been oft-quoted:

> [W]e believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger *prior* to the resolution of the custody dispute—*e.g.*, returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.[7]

Acquiescence. Mother conceded that father had acquiesced in the removal of the child, based upon statements made to a third party at a cocktail party that he lacked the means to take care of the child and was not seeking custody. The court ruled,

> [W]e believe that acquiescence under the Convention requires either: an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written renunciation of rights; or a consistent attitude of acquiescence over a significant period of time.[8]

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6. Friedrich v. Friedrich (*Friedrich II*), 78 F.3d 1060, 1066 (6th Cir. 1996).
7. *Id.* at 1069.
8. *Id.* at 1070 (footnotes omitted).

175 Wn.2d 23, IN RE MARRIAGE OF KATARE International Travel

[No. 85591-9. November 15, 2011, Argued . August 16, 2012. En Banc.]

In the Matter of the Marriage of LYNETTE KATARE, *Respondent*, and BRAJESH KATARE, *Petitioner*.

J.M. JOHNSON, J., delivered the opinion of the court, in which OWENS, FAIRHURST, and STEPHENS, JJ., and ALEXANDER, J. PRO TEM., concurred. CHAMBERS, J., filed a concurring opinion. MADSEN, C.J., filed a dissenting opinion, in which C. JOHNSON and WIGGINS, JJ., concurred. GONZàLEZ, J., did not participate in the disposition of this case.

Gregory M. Miller and *James E. Lobsenz* (of *Carney Badley Spellman PS*), for petitioner.

Gordon W. Wilcox (of *Gordon W. Wilcox, Inc., PS*) and *Catherine Wright Smith* and *Valerie A. Villacin* (of *Smith Goodfriend PS*), for respondent.

Lorraine K. Bannai, Huyen-lam Q Nguyen-Bull, Keith A. Talbot, and *David A. Perez* on behalf of Asian Bar Association, Fred T. Korematsu Center for Law and Equality, Vietnamese-American Bar Association of Washington, and Pacific Northwest District of the Japanese American Citizens League, amici curiae.

Nancy L. Talner and *Arnold R. Jin* on behalf of American Civil Liberties Union of Washington State, amicus curiae.

Author: Justice James M. Johnson.

We concur: Justice Susan Owens, Justice Mary E. Fairhurst, Justice Debra L. Stephens, Gerry L. Alexander, Justice Pro Tem.

AUTHOR: Justice Tom Chambers.

AUTHOR: Chief Justice Barbara A. Madsen.

We concur: Justice Charles W. Johnson, Justice Charles K. Wiggins.James M. Johnson

En Banc

¶1 J.M. JOHNSON, J. -- This case concerns a marriage dissolution and foreign travel restrictions imposed as part of a parenting plan under RCW 26.09.191(3). The restrictions were imposed by the trial court based on evidence that the father made threats to abscond with his children to India. *«1»* The father denies making such threats and claims the restrictions are not supported by the trial court's findings. He further argues the court committed prejudicial error by allowing improper expert testimony regarding "risk factors" for child abduction. The Court of Appeals affirmed the trial court's parenting plan and travel restrictions, concluding the admission of risk factor evidence was improper but not prejudicial. We affirm the Court of Appeals except for its conclusion that the trial court erred by admitting the expert testimony. We uphold the travel restrictions because the trial court's findings are supported by substantial evidence and admission of the expert testimony was not an abuse of discretion.

«1» India is not a signatory to the Hague Convention on the Civil Aspects of International Parental Abduction--a multilateral treaty that provides for summary proceedings in cases of international child abduction. *International Parental Child Abduction India*, U.S. Dep't of State (Dec. 2011), http://travel.state.gov/abduction/country/country_4441.html (last visited July 27, 2012).

FACTS

¶2 Petitioner Brajesh Katare was born and raised in India. In 1989, he moved to Florida where he met respondent Lynette. The two were married in November 1995. Brajesh and Lynette relocated to Washington

State in 1999 when Brajesh was hired by Microsoft. While in Washington, Brajesh and Lynette had two children: A.K. (born May 27, 2000) and R.K. (born Sept. 20, 2001).

¶3 In May 2002, Brajesh was offered employment in India for two years. Lynette strongly objected to moving to India with the children, fearing isolation and deleterious effects on the children's health. Lynette claims Brajesh threatened to take the children to India without her, but Brajesh denies making such threats.

¶4 In July 2002, Brajesh traveled to India to make arrangements to move. While he was gone, Lynette filed for dissolution. Brajesh and Lynette eventually agreed to a temporary parenting plan allowing Brajesh biweekly supervised visits with the children. They also agreed to appoint Margo Waldroup, a parenting evaluator, to conduct an assessment and make a parenting plan recommendation to the court.

¶5 Waldroup recommended the children remain in Lynette's custody. She noted that two witnesses corroborated the allegation that Brajesh had threatened to take the children to India. However, Waldroup could not predict with certainty whether Brajesh would actually attempt to abduct the children. Waldroup recommended that Brajesh have three days of visitation with the children each month. She recommended supervised visitations until the children's passports were secured. She also suggested Brajesh's passport, as well as those belonging to the children, be placed on a watch list. Based on Waldroup's report, Brajesh moved to modify the temporary parenting plan to allow him unsupervised visitation. The court granted his motion subject to the requirement his attorney hold his passport during visitations.

PROCEDURAL HISTORY

1. Katare I

¶6 A five-day dissolution hearing was held in June 2003. Lynette asked the court to impose restrictions on Brajesh's visitation time. Lynette testified that Brajesh on multiple occasions threatened to take the children to India without her. Brajesh allegedly told her she would have no recourse if he took the children to India and she would not "stand a chance" in the Indian court system. Verbatim Report of Proceedings (VRP) (June 16, 2003) at 36. During discovery, Brajesh requested copies of the children's passports, Indian tourist visas, and immunization records, which Lynette claimed showed his intent to take the children to India. Lynette was especially concerned because India is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention), which provides for mandatory summary proceedings in cases of international child abduction. The treaty provides a remedy only if both countries are signatories. Therefore, it would be especially difficult for Lynette to get the children back to the United States if they were taken to India.

¶7 Waldroup testified that although Lynette's concerns were "justified" and "not out of proportion to the situation," it was difficult to predict whether Brajesh would abduct the children. VRP (June 17, 2003) at 103. She testified that the court would have to decide whether the risk justified imposing restrictions.

¶8 Brajesh categorically denied making any threats. He represented he did not want to return to India and would never take the children away from their mother.

¶9 The trial court imposed restrictions in the parenting plan even though it found RCW 26.09.191(3) inapplicable. «2» In its oral decision, the court stated:

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

VRP (July 7, 2003) at 10.

«2» RCW 26.09.191(3) provides, in pertinent part:

> A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist:
>
> . . . .
>
> (g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

¶10 The court's parenting plan allowed Brajesh three days with the children each month. Brajesh was prohibited from taking the children out of the country until they turned 18. Brajesh was also denied access to the children's passports or birth certificates and was required to surrender his passport to a neutral party during visitation periods.

¶11 Brajesh filed a motion for reconsideration challenging the visitation restrictions and passport controls. The court denied his motion. Brajesh appealed. He argued the trial court erred when it imposed restrictions without expressly finding factors justifying the restrictions under RCW 26.09.191(3).

¶12 The Court of Appeals held restrictions entered in a parenting plan pursuant to RCW 26.09.191(3) must be supported by an express finding that the parent's conduct is adverse to the best interest of the child. *In re Marriage of Katare*, 125 Wn. App. 813, 826, 105 P.3d 44 (2004) (*Katare* I). While most of the restrictions imposed by the trial court were supported by the court's findings, the court's order stating that RCW 26.09.191(3) "'does not apply'" created an ambiguity. *Id.* at 831 (quoting trial court clerk's papers at 615). For that reason, the Court of Appeals remanded to clarify the legal basis for the foreign travel restrictions. *Id.*

2. Katare II

¶13 On remand, the trial court amended the parenting plan to list factors justifying the restrictions under RCW 26.09.191(3)(g). The amended parenting plan provided:

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

In re Marriage of Katare, noted at 140 Wn. App. 1041, 2007 WL 2823311, at *2-3, 2007 Wash. App. LEXIS 2755, at *9-10 (*Katare* II) ("By basically restating its earlier findings as the justification for imposing limitations on Brajesh's residential time with the children under RCW 26.09.191(3)(g), the trial court does not resolve the ambiguity and does not expressly address whether the evidence supports the limitations under RCW 26.09.191(3).").

¶14 The Court of Appeals found this recitation deficient as it still contained the phrase "'the husband appears to present no serious threat of abducting the children.'" 2007 WL 2823311, at *3, 2007 Wash. App. LEXIS 2755, at *10 (quoting parenting plan). The appellate court remanded a second time for clarification. 2007 WL 2823311, at *3, 2007 Wash. App. LEXIS 2755, at *10.

3. Katare III

¶15 In January 2009, the trial court conducted a two-day hearing to address whether the evidence supported the foreign travel restrictions and passport controls. The court heard testimony from Brajesh and Lynette and considered a number of hostile e-mail exchanges between the two.

¶16 Lynette also identified an expert witness, Michael C. Berry, an attorney with 17 years of experience with child abduction cases, to testify regarding risk factors for child abduction and the consequences of abduction to

India. Brajesh filed a motion in limine to exclude Berry's testimony. He argued Berry was not qualified as an expert and that risk factor evidence was inadmissible under *Frye*. «3» The court allowed Berry to testify, noting his testimony would "assist [the court] in understanding the status of the literature on these topics." VRP (Jan. 14, 2009) at 81.

«3» *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923).

¶17 Through Berry's testimony, Lynette introduced literature citing "risk factors" for child abduction. «4» *Id.* Berry observed that several of the risk factors applied to Brajesh, specifically: Brajesh had previously threatened to abscond with the children to India. He had strong ties to India and no family in the United States other than the children. Brajesh engaged in planning activities evidencing his intent to move to India, including selling a car and attempting to obtain the children's passports and immunization records. He accused Lynette of lying and abuse. He plainly felt disenfranchised by what he called the "biased" legal system. Finally, there was a clear lack of cooperation between the parents.

«4» The risk factors included, inter alia, (1) whether the parent has threatened to abduct or has abducted previously; (2) whether the parent has engaged in planning activities that could facilitate removal of the child from the jurisdiction; (3) whether the parent has engaged in domestic violence or abuse; (4) whether the parent has refused to cooperate with the other parent or the court; (5) whether the parent has strong familial, financial, or cultural ties to another country that is not a party to or compliant with the Hague Convention; (6) whether the parent lacks strong ties to the United States; (7) whether the parent is paranoid delusional or sociopathic; (8) whether the parent believes abuse has occurred; and (9) whether the parent feels alienated from the legal system. *See* Janet R. Johnston et al., *Developing Profiles of Risk for Parental Abduction of Children from a Comparison of Families Victimized by Abduction with Families Litigating Custody*, 17 BEHAV. SCI. & L. 305 (1999); *see also* Unif. Child Abduction Prevention Act $ 7, 9 pt. 1A U.L.A. 50 (Supp. 2011).

¶18 The trial court entered detailed findings of fact and conclusions of law on second remand. «5» The court eliminated its earlier finding that Brajesh appeared to pose no serious threat of abducting the children. Instead, the "extreme anger, abuse, unreasonableness, and poor judgment" that Brajesh demonstrated convinced the court "[t]he risk of abduction ha[d] not abated," but had perhaps increased. Clerk's Papers (CP) at 154. Accordingly, the court concluded it was in the best interest of the children to maintain the travel restrictions.

«5» The trial court found, in part, "[T]he father threatened to take the children to India without the mother[;] . . . [T]he mother's testimony that the father made threats was credible, when viewed in conjunction with the testimony of others[;] . . . The father sought information for the children in discovery, . . . which would assist in removing the children from the country[;] . . . The children were too young to seek help if the father improperly retained them in India[;] . . . The father's emails demonstrate extreme anger, abuse, unreasonableness, and poor judgment[;] . . . The father demonstrated his willingness to punish the children in response to the parenting plan[;] . . . India is not a signator to the Hague Convention[;] . . . [and] [T]here is no guarantee of enforcing a U.S. parenting order in India." Clerk's Papers at 152-57.

¶19 Brajesh appealed, arguing the trial court erred by maintaining the travel restrictions and denying his motion to exclude Berry's expert testimony. The Court of Appeals found the restrictions were supported by substantial evidence. *In re Marriage of Katare*, noted at 159 Wn. App. 1017, 2011 WL 61847, at *10, 2011 Wash. App. LEXIS 65, at *28 (*Katare* III). It held the trial court abused its discretion by admitting Berry's testimony because there was not an adequate foundation and Lynette did not establish that the risk factor evidence met the *Frye* standard. 2011 WL 61847, at *12, 2011 Wash. App. LEXIS 65, at *35. The Court of Appeals nonetheless found the error harmless because the trial court did not adopt Berry's risk factor analysis as its own. 2011 WL 61847, at *12, 2011 Wash. App. LEXIS 65, at *35. Instead, the trial court had noted the restrictions were supported by Brajesh's "testimony and conduct alone." 2011 WL 61847, at *9, 2011 Wash. App. LEXIS 65, at *28.

¶20 Brajesh petitioned this court for review, which was granted. *In re Marriage of Katare*, 171 Wn.2d 1021, 257 P.3d 662 (2011).

ANALYSIS

1. Standard of Review

[1, 2] ¶21 A trial court's parenting plan is reviewed for an abuse of discretion. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). An abuse of discretion occurs when a decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Id.* at 46-47. The trial court's findings of fact will be accepted as verities by the reviewing court so long as they are supported by substantial evidence. *Ferree v. Doric Co.*, 62 Wn.2d 561, 568, 383 P.2d 900 (1963). Substantial evidence is that which is sufficient to persuade a fair-minded person of the truth of the matter asserted. *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 142 Wn.2d 543, 561, 14 P.3d 133 (2000).

2. The Foreign Travel Restrictions Imposed by the Trial Court Are Supported by Substantial Evidence

[3, 4] ¶22 A trial court wields broad discretion when fashioning a permanent parenting plan. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). The court's discretion must be guided by several provisions of the Parenting Act of 1987, namely RCW 26.09.187(3) (enumerating factors to be considered when constructing a parenting plan), RCW 26.09.184 (setting forth the objectives of the permanent parenting plan and the required provisions), RCW 26.09.002 (declaring the policy of the Parenting Act of 1987), and RCW 26.09.191 (setting forth factors which require or permit limitations upon a parent's involvement with the child). *Id.* Relevant to this case, RCW 26.09.191(3)(g) allows the trial court to limit the terms of the parenting plan if it finds a parent's conduct is "adverse to the best interests of the child." Imposing such restrictions "require[s] more than the normal . . . hardships which predictably result from a dissolution of marriage." *Littlefield*, 133 Wn.2d at 55.

[5] ¶23 Brajesh first contends foreign travel restrictions were improperly imposed because the trial court only found a "risk" of abduction. According to Brajesh, absent actual harmful conduct toward the child, restrictions cannot be levied. However, the trial court need not wait for actual harm to accrue before imposing restrictions on visitation. *In re Marriage of Burrill*, 113 Wn. App. 863, 872, 56 P.3d 993 (2002) ("evidence of actual damage is not required"). "Rather, the required showing is that a danger of . . . damage exists." *Id.* Because the trial court found a danger of serious damage (abduction) here, restrictions were appropriate even though Brajesh had not yet attempted abduction. *See also Lee v. Lee*, 49 So. 3d 211, 215 (Ala. Civ. App. 2010) ("[A] number of cases in American jurisdictions recognize the propriety of [limited] visitation when the noncustodial parent is shown to pose a risk of abduction." (citing *Shady v. Shady*, 858 N.E.2d 128, 143 (Ind. Ct. App. 2006); *Moon v. Moon*, 277 Ga. 375, 377, 589 S.E.2d 76, 79-80 (2003); *Monette v. Hoff*, 958 P.2d 434, 436 (Alaska 1998))). *«6»*

«6» The dissent analogizes this case to *Abouzahr v. Matera-Abouzahr*, 361 N.J. Super. 135, 824 A.2d 268 (2003), to support its position that travel restrictions were improper. The two cases are factually different, however. In *Abouzahr*, the mother repeatedly stated she trusted her ex-husband: "[The mother] said she did not believe [the father] would retain [their child] in Lebanon beyond the agreed time." *Id.* at 140. The mother became concerned only when she learned that Lebanon is not a signatory to the Hague Convention and that the status of Lebanese law on child abduction was unfavorable. *Id.* at 143. Unlike Brajesh, the father in *Abouzahr* made no specific threats to abduct his child. Instead, the trial court "found credible [the father's] testimony that he had no intention of abducting [his daughter] or refusing to return her." *Id.* at 149. The court declined to impose travel restrictions while noting the difficulty of retrieving an abducted child from a nonsignatory country "is a major factor for the court to weigh . . . [b]ut it is not the only factor." *Id.* at 156.

¶24 Brajesh next contends the Court of Appeals' decision in this matter conflicts with *In re Marriage of Wicklund*, 84 Wn. App. 763, 932 P.2d 652 (1996), and *In re Marriage of Watson*, 132 Wn. App. 222, 130 P.3d 915 (2006). According to Brajesh, these cases establish that abduction must be *likely* before his visitation time may be limited. But *Wicklund* and *Watson* simply indicate that restrictions cannot be imposed for unfounded reasons.

¶25 In *Wicklund*, 84 Wn. App. at 769, the trial court restricted a father's ability to display affection with his partner in front of his children because the children were having difficulty adjusting to his homosexuality. The Court of Appeals held the restrictions were an abuse of discretion because "[p]roblems with adjustment are the normal response to any breakup of a family. . . . If the problem is adjustment, the remedy is counseling." *Id.* at

771. Unlike adjustment issues, the threat of abduction goes well beyond "the normal response to any breakup of a family." Therefore, *Wicklund* does not support Brajesh's position.

¶26 In *Watson*, 132 Wn. App. at 227-28, the trial court imposed restrictions on a father's visitation time based solely on the mother's unfounded allegation that he had abused their daughter. The Court of Appeals reversed because "the unproven allegation of sexual abuse [did] not provide substantial evidence in support of the visitation restrictions" and the remaining evidence weighed in favor of the father. *Id.* at 233. In contrast, Lynette's allegations have been corroborated. Two witnesses heard Brajesh's threats and submitted sworn statements to that effect. The parenting evaluator found Lynette's fears "justified." Moreover, the trial court considered additional evidence of Brajesh's conduct, including eyewitness testimony and e-mail exchanges. After weighing all the available evidence, the court found Brajesh's "pattern of abusive, controlling, punishing behavior put[ ] the children at risk of being used as the tools to continue this conduct." CP at 156. Thus, substantial evidence--evidence sufficient to persuade a fair-minded person that Brajesh posed a risk of abduction--justified the passport restrictions under *Watson*.«7»

«7» The dissent concludes the foreign travel restrictions are not supported by substantial evidence by deconstructing each piece of evidence. Certainly no one piece of evidence alone supports the restrictions. But in the *aggregate*, and combined with corroborated evidence of Brajesh's repeated threats to abduct the children, it was not an abuse of discretion for the trial court to conclude Brajesh posed a risk of abduction.

3. *The Trial Court Did Not Abuse Its Discretion by Admitting Berry's Expert Testimony Regarding Risk Factors for Parental Child Abduction*

[6, 7] ¶27 Generally, a party may introduce expert testimony as long as the expert is qualified, relies on generally accepted theories, and assists the trier of fact. ER 702. Determining the admissibility of expert evidence is largely within a trial court's discretion. *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). "'[T]he exercise of [such discretion] will not be disturbed by an appellate court except for a very plain abuse thereof.'" *Hill v. C&E Constr. Co.*, 59 Wn.2d 743, 746, 370 P.2d 255 (1962) (quoting *Wilkins v. Knox*, 142 Wash. 571, 577, 253 P. 797 (1927)).

[8-10] ¶28 Brajesh alleges Berry, the expert called by Lynette at the second remand hearing, was not qualified to testify as an expert on risk factors for child abduction or to attest to the consequences of abduction to India. An expert may not testify about information outside his area of expertise. *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 104, 882 P.2d 703, 891 P.2d 718 (1994). While Berry's formal education was not related to child abduction, an expert may be qualified by experience alone. ER 702. Berry had 17 years of experience in the field of child abduction, during which he participated in related organizations, attended numerous conferences, consulted with governmental entities, and testified as an expert in other abduction cases. Given the length and range of Berry's experience, it was not an abuse of discretion for the court to have concluded that his testimony would be helpful.

[11, 12] ¶29 Brajesh also argues Berry's testimony lacked an adequate foundation because Berry had never been to India and had never interacted with Brajesh personally. Expert opinions lacking an adequate foundation should be excluded. *Walker v. State*, 121 Wn.2d 214, 218, 848 P.2d 721 (1993). But, an expert is not always required to personally perceive the subject of his or her analysis. ER 703 ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by *or made known to* the expert at or before the hearing." (emphasis added)). That an expert's testimony is not based on a personal evaluation of the subject goes to the testimony's weight, not its admissibility. Since Berry's testimony was based on information made known to him before the hearing, the court did not abuse its discretion by admitting his testimony without establishing his personal familiarity with Brajesh or India.

[13, 14] ¶30 The Court of Appeals held the risk factor evidence was improperly admitted, analogizing the risk factors to propensity evidence. *Katare* III, 2011 WL 61847, at *12, 2011 Wash. App. LEXIS 65, at *33-35. But, deciding whether to impose restrictions based on a threat of future harm necessarily involves consideration of the parties' past actions. By its terms, RCW 26.09.191(3) obligates a trial court to consider whether "[a] parent's

involvement or conduct *may* have an adverse effect on the child[ren]'s best interests." (Emphasis added.) To make this determination, the court must engage in a form of risk assessment.

¶31 This court approved the use of risk assessments to predict the future dangerousness of sexually violent predators in *In re Detention of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003). While recognizing that predictions of future dangerousness are necessarily prejudicial, we nonetheless held such testimony is admissible because the probative value is "high and directly relevant" to whether an offender should be civilly committed. *Id.* at 758. We explicitly stated such assessments are "not profile evidence." *Id.* Similarly, the risk factor evidence at issue here was "directly relevant" to whether visitation restrictions were necessary--a determination that unavoidably involved prediction. Therefore, as in *Thorell*, the risk factor evidence in this case was not inadmissible "profile evidence," but was properly admitted and utilized. *«8»*

«8» The dissent asserts that the risk factor evidence was improper "because there was no individualization of the risk factors to Mr. Katare." Dissent at 67. But the factors considered by the trial court *were* individualized to Mr. Katare. The trial court acknowledged that several risk factors applied specifically to Brajesh but others did not. CP at 156. The dissent fails to offer any insight into what a "proper" method of individualization would look like. Furthermore, even if some of the evidence presented by Mr. Berry was inadmissible--as the dissent posits--in a bench trial, the court is presumed to disregard improper evidence when making its findings. *See State v. Miles*, 77 Wn.2d 593, 601, 464 P.2d 723 (1970) (noting that in a bench trial there is "a presumption on appeal that the trial judge, knowing the applicable rules of evidence, will not consider matters which are inadmissible when making his findings").

4. *The Trial Court Did Not Commit a Constitutional Violation by Considering the Risk Factor Evidence or by Imposing Reasonable Foreign Travel Restrictions as Part of a Parenting Plan*

[15] ¶32 Brajesh's principal arguments over the life of this case have shifted to take on constitutional overtones. In his petition for review, Brajesh cites no authority for his assertion that "this Court should . . . declare that, whenever a Washington trial court relies on racial profiling evidence to impose restrictions, the usual deference to the trial court's decisions will be subject to the strictest scrutiny. . . ." Pet. for Review at 20. But, "'naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'" *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988) (internal quotation marks omitted) (quoting *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)). Brajesh's quasi-constitutional arguments do not warrant an extensive discussion.

[16] ¶33 Firstly, the risk factors considered by the trial court cannot conceivably be regarded as "racial profiling evidence." The vast majority of the factors considered had nothing to do with race or national origin, including (1) whether there has been a prior threat of abduction; (2) whether the parent has engaged in planning activities that could facilitate removal of the child from the jurisdiction; (3) whether the parent has engaged in domestic violence or abuse; (4) whether the parent has refused to cooperate with the other parent or the court; (5) whether the parent is paranoid, delusional, or sociopathic; (6) whether the parent believes abuse has occurred; (7) whether the parent feels alienated from the legal system; and (8) whether the parent has a financial reason to stay in the area. The only factor that could arguably implicate race or national origin is whether the parent has strong ties to another country. Yet, even this factor does not necessarily hinge on ethnicity and could apply to a range of circumstances. The factor is relevant merely to determine whether the parent in question could easily relocate.

[17, 18] ¶34 Brajesh next asserts the trial court interfered with his "fundamental right to travel abroad with his child." Pet. for Review at 2. There is no such fundamental right. The "fundamental" right to travel extends only to *interstate* travel. The United States Supreme Court has explicitly stated foreign travel can be constitutionally limited. *Califano v. Aznavorian*, 439 U.S. 170, 176, 99 S. Ct. 471, 58 L. Ed. 2d 435 (1978).

[19] ¶35 Lastly, Brajesh argues the restrictions interfere with his "fundamental constitutional right to parent his children without state interference" because he is unable to "take his children to India so they can learn about their Indian heritage." Suppl. Br. of Pet'r at 6. For support, he relies on *In re Custody of Smith*, 137 Wn.2d 1, 18, 969 P.2d 21 (1998), in which we held state interference with the right to rear one's child requires proof of "some harm [that] threatens the child's welfare." As discussed at length above, the trial court explicitly identified the

harm involved in this case on the second remand: Brajesh's credible threats to abscond with the children and his pattern of abusive behavior.

[20] ¶36 Furthermore, *Smith* involved the due process right of a parent against a court's award of visitation to a *nonparent*. *Id.* We have long recognized a parent's right to raise his or her children may be limited in dissolution proceedings because the competing fundamental rights of both parents and the best interests of the child must also be considered. *In re Marriage of King*, 162 Wn.2d 378, 388, 174 P.3d 659 (2007) ("[F]undamental constitutional rights are not implicated in a dissolution proceeding."); *Momb v. Ragone*, 132 Wn. App. 70, 77, 130 P.3d 406 (2006) ("[N]o case has applied a strict scrutiny standard when weighing the interests of two parents."). As the Court of Appeals aptly stated below, a parenting plan that "complies with the statutory requirements to promote the best interests of the children" does not violate a parent's constitutional rights. *Katare* I, 125 Wn. App. at 823. Because the restrictions imposed by the trial court ultimately complied with RCW 26.09.191(3) and served the best interests of the children, and because the trial court had to balance the constitutional rights of both parents, Brajesh's constitutional rights as a parent were not violated.

5. *Attorney Fees*

[21] ¶37 Lynette requests attorney fees under *In re Marriage of Greenlee*, 65 Wn. App. 703, 829 P.2d 1120 (1992), due to Brajesh's intransigence. "Awards of attorney fees based upon the intransigence of one party have been granted when the party engaged in 'foot-dragging' and 'obstruction' . . . or simply when one party made the trial unduly difficult and increased legal costs by his or her actions." *Id.* at 708 (citation omitted) (quoting *Eide v. Eide*, 1 Wn. App. 440, 445, 462 P.2d 562 (1969)). Lynette argues fees are justified because this is the third appeal in this case and Brajesh has raised variations of the same arguments on every appeal. While we in no way condone Brajesh's obstinacy, Lynette has not shown his conduct crossed the line to intransigence. We decline to award fees.

CONCLUSION

¶38 We uphold the travel restrictions imposed by the trial court as they are supported by substantial evidence. Furthermore, the trial court did not abuse its discretion by admitting Berry's expert testimony regarding risk factors for child abduction. We therefore affirm the Court of Appeals insofar as it upheld the trial court's parenting plan.

OWENS, FAIRHURST, and STEPHENS, JJ., and ALEXANDER, J. PRO TEM., concur.

Tom Chambers, concurs

¶39 CHAMBERS, J. (concurring) -- I substantially concur with the majority. However, I respectfully disagree with its conclusion that Brajesh Katare's conduct has not crossed the line to intransigence. Because I conclude it has crossed that line, I would grant Lynette Katare's request for attorney fees. *See In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992) (citing *Eide v. Eide*, 1 Wn. App. 440, 445, 462 P.2d 562 (1969)).

¶40 Like something out of a Charles Dickens novel, this case has dragged on for years and years. We are currently hearing the third appeal. In the first appeal, the Court of Appeals noted that the trial court's travel restrictions were supported by the evidence. *In re Marriage of Katare*, 125 Wn. App. 813, 830-31, 105 P.3d 44 (2004). It remanded merely for clarification in light of an ambiguity in the trial court's findings. *Id.* at 831. Since that time, petitioner Brajesh Katare has repeatedly reasserted arguments that had been rejected and has escalated the costs by raising new and increasingly extreme arguments. While the trial court found the father's conduct did not support an award of attorney fees two years ago, the court predicted that it "could support a finding of intransigence in the future." Clerk's Papers (CP) at 181. In my view that time has come.

¶41 I certainly agree with many of the sentiments expressed in the chief justice's dissent. Our courts should not admit evidence based on racial profiling, and we judges absolutely should not make our decisions based on racial animus. "[T]heories and arguments based upon racial, ethnic and most other stereotypes are antithetical to and impermissible in a fair and impartial trial." *State v. Dhaliwal*, 150 Wn.2d 559, 583, 79 P.3d 432 (2003)

(Chambers, J., concurring); *see also State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 551 (2011) (reversing conviction based on prosecutor's racially charged misconduct); *cf. State v. Ladson*, 138 Wn.2d 343, 351, 979 P.2d 833 (1999) (excluding evidence seized on pretextual exercises of authority). Some of the expert testimony submitted in this case does not meet these standards. Judges should be quick to sustain objections to testimony that cast cultural and ethnic aspersions, if not take bolder steps. But I am in no way persuaded that Judge Mary E. Roberts based her decision on racially charged factors. Judge Roberts listened to the testimony and concluded that "[t]he risk of abduction by the father and the best interests of the children justify limitations" on foreign travel. CP at 153, 156. Based on that evidence, the judge took steps to prevent Brajesh Katare from taking the children out of the country without their mother's consent. It is not our role to reweigh the evidence, and I cannot say Judge Roberts abused her discretion.Barbara A. Madsen

¶42 MADSEN, C.J. (dissenting) -- The majority sets an unfortunate precedent by permitting improper profile evidence to be admitted on the question of whether a parent may travel with his children to his country of origin without an individualized showing that the evidence applies to him. The majority also concludes that sufficient evidence supports the travel restrictions imposed in the parenting plan in this case. I strongly disagree. Based on the record, I believe Mr. Brajesh Katare has been denied important opportunities to share his family and his culture with his children because of Indian roots.

Procedural History

¶43 This case went through multiple appeals and remands. On Mr. Katare's third appeal, the Court of Appeals affirmed the trial court's third try at restricting Mr. Katare's international travel with his children.

¶44 I find both the reasoning of the trial court and the procedure followed by the Court of Appeals very disturbing. The first obvious problem is that the trial court's decision to restrict Mr. Katare's travel with his children started at the wrong end; it started by focusing on the consequences of an abduction and not with the primary question of whether Mr. Katare was likely to abduct his children. At least by the time the trial court found for the *second* time that Mr. Katare did not pose a serious risk of abduction, the trial court should have concluded that travel restrictions were not necessary. Instead, in each of the three hearings on the matter, the trial court continued to focus on whether adequate remedies existed should Mr. Katare abduct his children rather than the threshold question.

¶45 Similarly, after the trial court's second finding that Mr. Katare did not pose a serious threat of abducting his children, the Court of Appeals should have reversed the trial court and directed that the travel restriction be removed from the parenting plan because imposing restrictions on a parent who does not present a likely threat of abduction is an abuse of discretion even if obtaining the return of a child from the parent's country of origin may pose a challenge (also highly debatable here).

¶46 In addition to the central question of whether Mr. Katare ever posed a serious risk of abducting the children is the matter of the profile evidence admitted at the third hearing. The Court of Appeals determined that ultimately the trial court did not rely on this profile evidence, and thus its admission was harmless. But the trial court's written decision shows that it did rely on the improper profile evidence.

¶47 Mr. Katare challenges the trial court's consideration of the profile evidence as unconstitutional racial profiling. Unlike the Court of Appeals, which concluded this evidence was inadmissible, the majority says it is admissible. The majority fails to properly define the contours of admissibility, however, leaving in place far too broad a rule. The majority also concludes that even to the extent that the profiling evidence might involve racial profiling, sufficient risk factors not concerning race or national origin are established that justify the travel restrictions in this case, and accordingly affirms the Court of Appeals. A close examination of the factual findings of the trial court shows that this is not true.

¶48 In the end, the profile evidence has no place in this litigation because it was never individualized to Mr. Katare himself. The travel restrictions should be stricken because the findings are inadequate to support the conclusion that he poses a serious risk of abduction. Finally, although the trial court entered findings that the law of India does not provide an expeditious, available legal remedy for children improperly abducted under our

nation's laws, the trial court's findings on this point are contradicted by the very sources on which the court relied. For these reasons, I respectfully dissent.

Analysis

¶49 I agree with the Court of Appeals determination in *In re Marriage of Katare*, 125 Wn. App. 813, 105 P.3d 44 (2004) (*Katare* I) that under RCW 26.09.191 a trial court may impose travel restrictions as a component of a parenting plan if the court makes explicit findings that *a parent's conduct* justifies the imposition of the restrictions and that the restrictions are "reasonably calculated to address the identified harm." *Id.* at 826. The abuse of discretion standard applies, and a trial court's parenting plan, or a travel restriction included therein, will not be upheld if it is manifestly unreasonable or based on untenable grounds or reasoning. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

¶50 The starting point for inquiring into the propriety of the travel restrictions is RCW 26.09.191, which lists factors that may justify limitations on parenting plans:

> (3) A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist:
>
> (a) A parent's neglect or substantial nonperformance of parenting functions;
>
> (b) A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in RCW 26.09.004;
>
> (c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;
>
> (d) The absence or substantial impairment of emotional ties between the parent and the child;
>
> (e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;
>
> (f) A parent has withheld from the other parent access to the child for a protracted period without good cause; or
>
> (g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

¶51 The only relevant subsection is (3)(g). Both RCW 26.09.191(3)'s first sentence and RCW 26.09.191(3)(g) expressly provide that the best interests of the child control whether restrictions may be placed on a parent's residential time with his children. Importantly, the statute also provides that the particular factor or condition that justifies the restriction must be *adverse* to the *children's* interests. And when a limitation is placed in a parenting plan, the trial court must find a nexus between the parental conduct that is found to support the limitation and an actual or likely adverse impact of the conduct on the children that justifies the restriction. *In re Marriage of Watson*, 132 Wn. App. 222, 233-34, 130 P.3d 915 (1996).

¶52 Specific to the circumstances here, if the ground for restrictions relates to possible abduction of the child, then, as a Wisconsin court has stated, the best interests of the child standard, because of its breadth, "permits a full consideration of concerns both about a parent's intention in abducting a child and about the lack of a remedy should that occur." *Long v. Ardestani*, 2001 WI App 46, 241 Wis. 2d 498, 528, 624 N.W.2d 405.

¶53 In light of these governing principles, and following a close examination of the findings and evidence regarding the likelihood of abduction, the only possible conclusion in this case is that the trial court's determination that Mr. Katare poses a serious threat of abduction constitutes an abuse of discretion. In addition, the findings about the adequacy of remedies under the law of India also constitute an abuse of discretion. Finally, admission of the profile evidence in this case constitutes an abuse of discretion and its admission was not harmless because, contrary to the majority, the trial court's decision is not justified by other findings.

Likelihood of Abduction

¶54 It is important to bear in mind throughout this review that when the original findings were entered in this case the trial court twice expressly found they were insufficient to establish that Mr. Katare posed any serious risk of abducting his children.

¶55 Turning to the third hearing, the findings that purportedly justify the imposition of a travel restriction are divided into two categories in the trial court's final order: the facts that were "brought forth during the June 2003 dissolution trial" and "additional findings based on the evidence presented on remand" in 2009. Clerk's Papers (CP) at 153-54. Turning to the first of these, the trial court found that Mr. Katare maintains ties to India because he "was born and raised in India," he has family that lives in India, and "[h]e is now engaged to marry an Indian woman who lives and works in the Seattle area and has applied for a green card." CP at 153.

¶56 Reliance on a person's place of birth to support a finding that the parent is likely to abduct his child is improper. A person's place of birth and family ties do not show whether a parent is likely to abduct his child. Some individuals born in this country and having ties only to this country abduct their children. Conversely, many individuals who have significant ties to a foreign country have no intention of absconding with their children to that country.

¶57 Where a person was born, where their family resides, and who they have chosen to marry are factors that should not be considered unless there is an explicit showing that these factors represent harm to "the children's physical, mental, or emotional health." *See Watson*, 132 Wn. App. at 233-34 (nexus requirement); *In re Marriage of Wicklund*, 84 Wn. App. 763, 770, 771-72, 932 P.2d 652 (1996) (same; "parental conduct may only be restricted if the conduct 'would endanger the child's physical, mental, or emotional health'" (internal quotation marks omitted) (quoting *In re Marriage of Cabalquinto*, 43 Wn. App. 518, 519, 718 P.2d 7 (1986))). Absent a showing of this necessary nexus between factors said to support a restriction in a parenting plan and the children's best interests, such findings are irrelevant. There is no such showing here, and these first findings are irrelevant to a determination of whether Mr. Katare is likely to abduct his children.

¶58 To the contrary, evidence presented to the trial court demonstrated that the Katare children have a deep need to understand their Indian family, culture, and heritage during their childhood after age six, as their identities and self-concepts are forming, and visits to India will serve this need. By ignoring such considerations, the trial court failed to properly consider the best interests of the children as required. "Visitation rights must be determined with reference to the needs of the child rather than the . . . preferences of the parent." *In re Marriage of Cabalquinto*, 100 Wn.2d 325, 329, 669 P.2d 886 (1983). Similarly, when considering travel restrictions, a court must have in mind the needs of the child. But here the trial court was so focused on the possibility of abduction that it failed to make the proper assessment of the children's best interests.

¶59 The trial court also found that "in the months leading up to the mother filing a petition for dissolution . . . the father threatened to take the children to India without the mother" and the "mother found an application for an Indian PIO [(person of Indian origin)] card . . . on the father's computer." CP at 153-54. Mr. Katare did consider relocating his family to India in 2002 in order to take advantage of a one-to-two-year long job opportunity with his United States employer and, as a part of that attempt to relocate his family, he sought PIO cards for his children.

¶60 Ms. Lynette Katare, however, strenuously objected to the relocation because she felt that she would have no life or opportunities if she were to move to India. Thus began a long, difficult disagreement between Mr. and Ms. Katare in which, it is asserted, Mr. Katare threatened that he and the children would relocate to India while his wife stayed in the United States. However, this dispute, which ensued months *before* the initiation of divorce proceedings, does not indicate that Mr. Katare is now likely to abduct his children. Indeed, Mr. Katare has complied with all court ordered requirements, and there is simply no ground to assume that he would not do so in the future based on statements made before the dissolution proceedings even commenced.

¶61 In fact, Mr. Katare did not move his children to India without their mother. Instead, he proposed a one-to-two-year living arrangement in which Ms. Katare could stay in the United States due to her objections to

relocation while he and the children lived in India. Moreover, since their predissolution dispute, Mr. Katare has not made any similar threats or suggestions of relocation. Thus, to the extent that his threat to relocate to India prior to his divorce was considered by the court to be an indicator of future attempts to abscond with his children, Mr. Katare has disproved its prediction through his actions and strict adherence to the trial court's orders.

¶62 The trial court found that during the course of discovery Mr. Katare sought copies of his children's visas, passport applications, and immunization records--documents that, the court speculates, might assist him in seeking an Indian PIO for his children. CP at 153-54. However, at the time Mr. Katare made these requests, there were no travel restrictions in place. The requested documents could legitimately be requested by Mr. Katare simply for the purposes of traveling with his children to visit their grandparents and extended family in India prior to inclusion of the travel restriction in the parenting plan. Therefore, Mr. Katare's discovery request is not a tenable basis upon which to impose travel restrictions.

¶63 The trial court also made note of the fact that Mr. Katare has the "means and potential to relocate to India for employment." CP at 154. This finding, however, sheds no light on whether Mr. Katare will abduct his children. Unless there is evidence that Mr. Katare formed an intention to abduct his children and relocate to India, it makes no difference whether it would be financially possible for him to do so, i.e., his ability to do so is irrelevant to the determinative factor of whether he has such an intention in the first place.

¶64 The trial court also found, at the time of the original hearing, that because the Katare children were too young to seek help should abduction take place, the consequences of abduction to India are grave and irreversible. Whatever relevance that finding may have had in 2003, by the time of the third hearing in 2009 the Katare children were old enough that they had the ability to use a telephone or access the Internet to let authorities or their mother know if they have been abducted. The trial court's finding at the latter time that they were still too young is completely undercut by its additional finding that the court did not "place weight on the mother's attempts to paint her children, who are in gifted programs at school, as incapable of making phone calls or dealing with money." CP at 155. The court continued, "Her portrayal of the vulnerability of the children was unconvincing to the court." *Id.*

¶65 The next set of findings relating to likelihood of abduction are based on the court's receipt of additional evidence presented on the second remand (the third hearing). CP at 154. They are as follows: a finding that "emails [sent] between the parties after the first trial" indicate that "the father . . . harbors resentment against the mother" and show "anger, abuse, unreasonableness, and poor judgment"; a finding that the facts demonstrate Mr. Katare's willingness to punish his children, with one e-mail given as an example; a finding that Mr. Katare expressed his contempt for the legal system in his correspondence; and a finding that Mr. Katare spent significant time in India since 2003. CP at 154-55.

¶66 The trial court's finding that Mr. Katare harbors resentment toward Ms. Katare that could manifest itself in abduction is pure speculation. The trial court's findings establish no basis for concluding that because Mr. Katare resents Ms. Katare, he is likely to abduct the children. The court also found that Mr. Katare addressed Ms. Katare in a condescending and humiliating manner, and doing so while the court is involved shows heightened risk to the children. Again, missing from this finding is any relation to the likelihood of abduction. The e-mails Mr. Katare sent were sent to Ms. Katare, and not the children, and we are not concerned in this case with how Mr. Katare deals with his former wife except insofar as how it relates to whether the bests interests of the children are served or disserved by the travel restrictions. RCW 26.09.191(3)(g); *Watson*, 132 Wn. App. at 233-34. The trial court may be right that Mr. Katare did not behave in a civil manner at all times, but there must be evidence and findings tying his behavior to a risk of abduction, and this tie is absent.

¶67 The trial court's findings that Mr. Katare is willing to punish his children is evidenced by one e-mail sent from Mr. Katare to Ms. Katare on November 1, 2005, which the trial court included to support its finding. The e-mail reads as follows:

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

will explain what diwali and its significance is [sic] when they grow up.

CP at 154-55. Mr. Katare's e-mail expresses a desire to be with his children and to teach them about their cultural heritage--something that is in the best interests of children raised in multicultural families. Evidently, however, the court interpreted this e-mail as a father's withholding of gifts that should have been made available to the children immediately, and delaying of an explanation out of spite or manipulative design. Apparently, Ms. Katare did not view it this way because her e-mail response was to say she would pass the message on to the children, to thank him for sharing, and to wish him "Happy Diwali." Ex. 37.

¶68 In general, it is not uncommon for a parent of a child to provide a room, furnishings, and toys or other possessions at the parent's home and not to send everything to other parent's residence. There is nothing improper about a parent who shares a cultural heritage with the child to want to teach the child about that heritage. More specifically, here Mr. Katare explains that Diwali is a five-day holiday celebrated in the home with traditional activities and special food and clothing, and a hotel room while exercising visitation rights is not the same. This e-mail may not exemplify what the trial court believes is the best way to share an important holiday with one's children, but it does not exemplify an improper one and it most certainly does not support the weight given it by the trial court. And again, this finding is not tied to the question whether abduction is likely, as is necessary.

¶69 The trial court's finding that Mr. Katare harbors contempt for the legal system is based on an e-mail message in which Mr. Katare tells Ms. Katare that if she had not taken the children to Florida, "[I] mean," he says, "legally abducted" them, then they would not be going through what they were going through. Ex. 15. Mr. Katare obviously disagreed with the decision made by the court to allow Ms. Katare to travel with their children to live in Florida. However, as Mr. Katare has explained in a host of other e-mails, decisions of the court that he might disagree with have not shaken his faith in the system as a whole. Mr. Katare made this particularly clear in an e-mail to Ms. Katare explaining that although he disagreed with particular rulings, "I am sure [the] legal system [will] realize . . . mistakes of reqwarding [sic] your bad behavior. It is only a matter of time." *Id.* Further, in a number of e-mails, Mr. Katare has defended the legal system, saying that it is not to be "ma[d]e a joke of" and pledging "[he] will not violate any court order ever." *Id.*

¶70 Much more importantly, Mr. Katare's actual conduct has reflected the commitment to the law that he has expressed in his correspondence with Ms. Katare. He has, as promised, never violated any order issued by the court during the course of his divorce proceedings. In the face of this contravening evidence, the trial court's finding concerning Mr. Katare's contempt for the law, which is premised upon an extrapolation from a single, one-line e-mail, does not support the trial court's restrictions.

¶71 Finally, the trial court's finding that Mr. Katare "has spent significant time in India" since the 2003 proceedings, CP at 155, does not reasonably indicate that Mr. Katare presents any risk of abduction. As acknowledged by the trial court, even while in India Mr. Katare "kept to the visitation schedule with his children." *Id.* That Mr. Katare returned to the United States while in India in order to comply with a court-ordered visitation schedule not only weighs against the trial court's speculative fear that he will permanently abscond to India, but also shows the lengths to which Mr. Katare will go to see his children while respecting the rulings of the court. Once again, any nexus between Mr. Katare's conduct of spending significant time in India and any likelihood of abduction is utterly lacking.

¶72 As can be seen, the findings of fact that purportedly address the appropriate question of whether or not Mr. Katare is likely to abduct his children are not supported by substantial evidence and therefore do not justify the trial court's travel restrictions, or they address matters that are irrelevant or have no apparent nexus to the need for the travel restrictions as required under RCW 26.09.191(3). Accordingly, using these factual findings to support the restrictions constitutes an abuse of discretion. *See Wicklund*, 84 Wn. App. at 770 n.1; *Littlefield*, 139 Wn.2d at 47.

¶73 Not only do the specific findings in this case not support the determination that Mr. Katare is likely to abduct his children, the same is true when measured against factors that other courts have considered when assessing the likelihood of abduction. In general, if the likelihood of abduction is high, courts generally impose restrictions to prevent abduction, but when abduction is unlikely, then courts decline to impose preventive

measures. *Compare Soltanieh v. King*, 826 P.2d 1076 (Utah 1992) (where evidence showed that noncustodial parent had no respect for United States laws; did not want his daughter raised under United States standards of education, dress, social relations, political philosophy, and religion; and viewed his daughter and her mother as his property and believed himself justified in doing anything necessary to remove his daughter to Iran; made threats; and had had no contact with his daughter for many years, the chance of abduction was high and warranted restrictions), *with Abouzahr v. Matera-Abouzahr*, 361 N.J. Super. 135, 824 A.2d 268 (2003) (where noncustodial Muslim parent from Lebanon came to the United States for superior medical education and training; married an American Catholic; became a United States citizen; permitted his daughter to be raised in a secular household and to attend Catholic CCD (Cofraternity of Christian Doctrine) classes; lived in the United States for 16 years practicing a medical specialty and teaching at medical schools; brought his mother to live with his wife and child; and no evidence showed any disrespect of the United States or its culture, values, and laws; and nothing indicated he thought his daughter would have greater values, opportunities, or happiness in Lebanon and instead his words and deeds showed the opposite; and he made no effort after the divorce to sneak his daughter out of the country despite opportunities to do so; the record did not support restriction despite the fact that Lebanon was not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction *«9»*).

«9» *Hague Convention on the Civil Aspects of International Child Abduction*, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89.

¶74 The cases are extremely fact specific, of course, and therefore no case from any jurisdiction even hints at a rule for determining the likelihood that a parent will abduct a child. *Long*, 241 Wis. 2d at 526. However, other jurisdictions have suggested the following factors as relevant considerations when imposing travel restrictions: (1) whether a parent has expressed an intention to abduct his or her own children; (2) whether a parent has had the opportunity to abduct his or her children and whether they attempted to take advantage of that opportunity; (3) whether a parent expresses a disregard for the safety of his or her children; (4) whether a parent has cooperated with the trial court's prior orders; (5) and whether a parent shows marked disapproval of or hostility toward United States cultural, education, political system, values, and religions as they apply to the child. *Larisa F. v. Michael S.*, 120 Misc. 2d 907, 466 N.Y.S.2d 899 (N.Y. Fam. Ct. 1983); *Long*, 241 Wis. 2d 498; *Al-Silham v. Al-Silham*, No. 94-A-0048, 1995 Ohio App. LEXIS 5159, 1995 WL 803808 (Ohio Ct. App. Nov. 24, 1995 (unpublished)); *Al-Zouhayli v. Al-Zouhayli*, 486 N.W.2d 10 (Minn. Ct. App. 1992); *Abouzahr*, 361 N.J. Super. 135.

¶75 Each of these factors weigh against the trial court's determination following the third hearing that Mr. Katare is likely to abduct his children. As explained, any statements that could possibly be construed as threats of abduction occurred long ago and have not been made in any recent years. Mr. Katare has also had custody of the children on many occasions and has never, despite having the opportunity to do so, attempted to abduct his children or relocate them to India. He has complied with every court order and has not shown any disregard for the safety of his children. He has exhibited no hostility toward the United States or to his children being raised in this country. To the contrary, he obtained his masters degree here, obtained United States citizenship, has lived and worked in the United States for many years, and continues to maintain residence in the United States while being successfully employed at a company where he has advanced his career over many years. His case is far more like *Abouzahr*, 361 N.J. Super. 135, than *Soltanieh*, 826 P.2d 1076. *«10»*

«10» The majority believes that I mistakenly compare this case to *Abouzahr*. The majority says that the cases are factually different because unlike Mr. Katare, the father in *Abouzahr* made no specific threats to abduct his child. Majority at 36 n.6. I disagree.

The only reference to "threats" in the trial court's findings in this case is in the following finding of fact:

> In the months leading up to the mother filing a petition for dissolution of their marriage, the father threatened to take the children to India without the mother. Third parties interviewed by the parenting evaluator stated that they heard the father make similar threats.

CP at 153. Thus, the findings say only that before the divorce proceedings began, the father "threatened" to "take the children" to India. Notably, at that time he and the mother disagreed about his taking a temporary job assignment in India. In addition, in the findings of fact in both the first and second proceedings, the trial court found that Mr. Katare was unlikely to abduct his children. The record does not support the trial court's alteration of its earlier findings that he was not likely to abduct his children.

There are no other findings about threats of abduction or that show that Mr. Katare intended to abduct the children. Thus, contrary to the majority, this case is factually similar to *Abouzahr*.

Moreover, and also contrary to the majority at 38 n.7, there are no findings of "repeated threats" to abduct and *none* of the court's findings support its conclusions. This is not a case where the evidence cumulatively supports the trial court's order although separately the findings do not. This is a case where *none* of the findings support the trial court's conclusions.

¶76 Because of the lack of factual support for the trial court's determination that Mr. Katare poses a serious risk of abduction of his children, this court should reverse the Court of Appeals and remand this case to the trial court for deletion of the travel restrictions from the parenting plan. This should end this case.

Available Remedies If Abduction Occurs

¶77 In the interest of a full assessment, I turn now to the question whether there are adequate remedies if Mr. Katare should, in fact, abduct his children and take them to India to permanently relocate.

¶78 At the outset, I note the trial court's primary focus in these proceedings has been on the difficulty it believed exists in returning the children to the United States if they are abducted. Indeed, the trial court's focus on the consequences of abduction as opposed to the likelihood of abduction can be identified at every stage of the proceedings. The court's 2003 and 2005 assessments of likelihood of abduction highlight the inappropriate consideration given to the consequences of abduction instead of the determinative question of whether Mr. Katare is likely to abduct. In 2003, the trial court was

> not persuaded, based on all the evidence presented, including that of the expert witnesses who were called to testify, that Mr. Katare presents a serious threat of abducting the children. Nonetheless, if I'm wrong on this the consequences are incredibly serious . . . . I'm going to impose some restrictions . . . designed to address this issue . . . everything that has been brought to this Court . . . I think indicates that, there is not a serious risk of abduction.

Verbatim Report of Proceedings (VRP) (July 7, 2003) at 10; *see also* CP at 168 (findings & conclusions, paragraph 2.20.2, to the same effect). *«11»*

«11» The court inserted in the parenting plan the following:

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

CP at 168.

¶79 In 2005, following the second hearing (after the first remand), the court amended paragraph 2.2 of the parenting plan as follows:

> "OTHER FACTORS (RCW 26.09.191(3)). Based on the evidence, including the testimony of expert witnesses, the husband appears to present no serious threat of abducting the children. Nonetheless, under the circumstances of this case, given the ages of the children, the parties' backgrounds, ties to

> their families and communities, and history of parenting, and the fact that India is not a signator to the Hague Convention on International Child Abduction, the consequences of such an abduction are so irreversible as to warrant limitations on the husband's residential time with the children. The risk of abduction is a factor justifying limitations under RCW 26.09.191(3)(g)."

In re Marriage of Katare, noted at 140 Wn. App. 1041, 2007 WL 2823311, at *2, 2007 Wash. App. LEXIS 2755, at *9.

¶80 As with its earlier findings, the trial court's evidentiary hearing on the final remand from the Court of Appeals also exhibits the disproportionate consideration of the consequences of abduction. For example, upon Mr. Katare's motion to exclude the expert testimony of Michael Berry, the trial judge denied the motion specifically to "allow him to talk about the difficulty in retrieving abducted children [from India]." VRP (Jan. 14, 2009) at 5. Mr. Berry's testimony concerning the difficulty of retrieving children from India constituted a substantial portion of the court's evidentiary hearing on remand as well as the court's findings of fact.

¶81 In its findings following the last of the hearings on the matter, the court entered numerous findings on the availability of adequate remedies, including (1) that "Exhibit 11, at 6.11(3) . . . show[s] the legal impediments to obtaining the return of [a] child . . . in India"; (2) that "Exhibit 25 at p.113 show[s] the . . . impediments to . . . the return of an improperly retained child through the court in India"; (3) that "Exhibit 32, p.8, shows that child abduction is not a crime in India"; (4) that "India is not a signator to the Hague Convention"; (5) that "India has its own laws giving it broad authority to rewrite parenting orders"; (6) that "there is no guarantee of enforcing a U.S. parenting order in India"; (7) that "proceedings in India do not include summary proceedings"; (8) that "proceedings [in India] can take from six months to a year"; and (9) that "the custody order of a foreign state is only one of the factors which will be taken into consideration by a court . . . in India." CP at 155-56.

¶82 Questions regarding foreign law are issues of law that are reviewed de novo on appeal and any trial court finding concerning foreign law must be supported by substantial evidence. *State v. Rivera*, 95 Wn. App. 961, 966, 977 P.2d 1247 (1999); *Byrne v. Cooper*, 11 Wn. App. 549, 555, 523 P.2d 1216 (1974) (citing *State v. Jackovick*, 56 Wn.2d 915, 355 P.2d 976) (1960)).

¶83 The trial court's finding that "proceedings in India do not include summary proceedings" cites exhibit 25. CP at 156. Exhibit 25, however, explicitly states that Indian courts may "'exercise summary jurisdiction in the interests of the child.'" Ex. 25 (quoting *Dhanwanti Joshi v. Madhave Unde* (1997) 1 S.C.C. 112, at *11 (India), *available at* http://judis.nic.in/supremecourt/helddis.aspx). It also explains alternative measures for timely return of children to their home country:

> [A] parent from whom a child has been abducted can petition one of the "State" High Courts to issue a writ of habeas corpus against the abductor ordering the production of the minor in court. This instigates a legal mechanism, similar to the [Hague] Convention, for returning an abducted child to his[/her] country of residence . . . . [I]t . . . allows the petitioner to take advantage of the relative speed and superior authority of the High Court [and] [o]nly circumstances, of which the court is satisfied beyond reasonable doubt, indicating that a return order would inflict serious harm on the child, would merit refusal of an order.

Ex. 25. Unfortunately, exhibit 25 also inaccurately states that summary proceedings are not available in India, citing the Supreme Court of India's decision in *Dhanwanti*. But *Dhanwanti* explains that Indian courts must initially determine whether to "conduct (a) a summary inquiry or (b) an elaborate inquiry on the question of custody." *Dhanwanti*, 1 S.C.C. 112, at *9.

¶84 The trial court also found that "Exhibit 11, [section] 6.11(4) . . . shows that India has its own laws giving it broad authority to rewrite parenting orders of other states." CP at 156. However, section 6.11(4) of exhibit 11 does not include a single reference to the authority of Indian courts to "rewrite parenting orders" and instead outlines the ways in which Indian courts are actually obligated to follow the parenting orders of other states:

> Sections 13 and 14 of the Code of Civil Procedure obliges the courts to give conclusive weight to foreign judgments, . . . on the following conditions:

- the originating court had jurisdiction;

- the merits of the case were considered . . . ;

- international law was correctly applied; and

- the order was not contrary to Indian law.

[T]he Supreme Court of India [has also] elucidated in detail . . . the validity and enforcement of foreign court orders sought to be enforced in India.

Ex. 11.

¶85 The trial court found that abduction proceedings in India can take 6 to 12 months. For this finding, the trial court cites only section 6.11(3) of exhibit 11. CP at 156. Exhibit 11, section 6.11(3), however, describes only the experience of the authors of the text without citation to any authority. CP at 156. This anecdotal and unsubstantiated finding is insufficient to justify the trial court's restrictions. An analysis of recent Indian case law shows that courts of India may return children abducted from the United States in a very short period of time. *See V. Ravi Chandron v. Union of India & Ors.*, Writ Pet. No. 112/2007 (Supreme Court of India Nov. 17, 2009).

¶86 In short, India's laws provide a summary procedure. Whether to utilize it may involve more discretion than we are accustomed to in Washington, but it was an error on the trial court's part to say that it does not exist. From this, the conclusion can only be drawn that the trial court's findings on the law of India are inaccurate.

¶87 Next, the trial court correctly found that India is not a signatory to the Hague Convention on the Civil Aspects of International Child Abductions. CP at 156. However, the mere fact that a country is not a signatory to this agreement is not in and of itself sufficient to justify travel restrictions absent a contemporaneous showing of a parent's intention to abduct the child and relocate to that country. "[T]he difficulty of obtaining the return of a child in the event of an abduction (because the other country is not a signatory to the Hague Convention or for other reasons) is [only] one factor courts have considered in imposing restrictions [but] in no case . . . is this the only factor." *Long*, 241 Wis. 2d at 527 (citation omitted). Other jurisdictions have specifically rejected such an argument. *See, e.g.*, *Al-Zouhayli*, 486 N.W.2d 10 (decision whether to order supervised visitation depends on the facts and circumstances in the case and the unwillingness of a noncustodial parent's country of national origin to enforce a trial court's order is not controlling).

¶88 Further, because India has established mechanisms outside the Hague Convention that allow for summary proceedings for return of abducted children to their home country, the importance of this finding is lessened. In any event, absent indication of a contemporaneous showing that a parent intends to abduct his children and relocate to another country, the fact that a country is not a signatory to the Hague Convention is simply irrelevant. Here, no such showing has ever been made.

Profiling Evidence

¶89 Lastly, I turn to the issue of whether the profile evidence should have been allowed in this case. The trial court entered a number of findings about "red flags" in relation to risk factors submitted as part of the profile evidence. The court found that Mr. Katare's behavior in 2002 and his e-mails, his bitterness toward Ms. Katare, and the lack of resolution of difficulties between the parties "show that he meets the criteria for several Profiles and 'red flags' which indicate a risk of abduction by the father, which is against the best interests of the children." CP at 156.

¶90 The profile evidence was presented through the testimony of Mrs. Katare's expert, Mr. Berry, and several publications admitted into evidence during his testimony. Among other things, the various risk factors, or psychological profiles to which Berry testified, included such things as the existence of strong emotional or cultural ties to the country of origin, friends or family living in that country, a history of instability in marriage, and a lack of strong ties to the child's home state.

¶91 The Court of Appeals decided that the trial court abused its discretion by admitting this profile evidence because there was no foundation for the testimony and Ms. Katare did not establish that it met the *Frye* standard for admissibility for novel scientific evidence. *In re Marriage of Katare*, noted at 159 Wn. App. 1017, 2011 WL 61847, at *11, 2011 Wash. App. LEXIS 65, at *31-32 (Jan 10, 2011) (unpublished); *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923). The Court of Appeals said the evidence is analogous to profile evidence that is inadmissible in a criminal case because its probative value is outweighed by prejudicial effect. *Katare*, 2011 WL 61847, at *11, 2011 Wash. App. LEXIS 65, at *31-32. Such evidence identifies a group of people as being more likely to commit a crime and is inadmissible when it is used to show that a person committed a crime because he shares characteristics with known offenders. 2011 WL 61847, at *12, 2011 Wash. App. LEXIS 65, at *35.

¶92 The majority concludes, however, that such evidence is admissible, analogizing to the "risk assessments [used] to predict the future dangerousness of sexually violent predators." Majority at 39-40. The analogy is inapt, however.

¶93 Our precedent concerning the use of profile evidence limits its admissibility to instances in which it is used to create an individualized assessment of risk. Here, the trial court's findings do not constitute an individualized assessment of risk. Rather, as explained, at the time the profile evidence was admitted in the third hearing, the trial court examined Mr. Katare's behavior in 2002, finding that Mr. Katare meets the profile of an abductor based upon "his behavior in 2002 as shown in Exhibits 39 and 40 and his emails in Exhibit 15, his bitterness . . . and the lack of resolution . . . between the parties." CP at 156. However, the trial court had already reviewed each of these pieces of evidence in the 2003 trial, and at that time concluded that they did not indicate that Mr. Katare posed any risk of abducting his children. *«12»*

«12» The majority believes that the trial court properly individualized the risk factor evidence to Mr. Katare and believes I must show what proper individualization would entail. Majority at 40 n.8. The majority misses my point. The trial court applied profile factors to specific evidence that it had already considered and from which it had already concluded that Mr. Katare did not pose a serious risk of abducting his children. Once the profile evidence was admitted (and it took up the vast part of the third hearing), the court reached the opposite conclusion. Under these circumstances, I do not see how the court could possibly have engaged in a proper individualization of the profile evidence to Mr. Katare.

¶94 Accordingly, the trial court's current finding from the 2009 findings and conclusions can be described only as her inappropriate recognition of Mr. Katare's similarity to "a group more likely to commit [a] crime" and, therefore, is an impermissible use of profile evidence. *State v. Braham*, 67 Wn. App. 930, 936, 841 P.2d 785 (1992).

¶95 That the court relied on this evidence is apparent as well. First, contrary to the Court of Appeals' belief that the trial court appropriately based its decision on its finding that Mr. Katare's testimony and conduct alone justified the travel restrictions, as explained above the trial court instead indicated it relied on all the findings, including the findings based on the profile evidence. Moreover, Mr. Katare's testimony and conduct do *not* support the travel restrictions, as also explained. Finally, since the trial court applied the profiles to evidence that had previously been considered and found to be insufficient to show that Mr. Katare presented a risk of abduction, the only conclusion that can be drawn is that the trial court in fact considered the profile evidence and this is what made it possible for the trial court to enter its contrary finding on this factual question in 2009.

¶96 Finally, much of the briefing from the parties and amici in this court concerns the propriety of racial profiling in child abduction cases. The claims of Mr. Katare and amici weighing in on his side are not without merit. Many of the risk factors identified in the profiling evidence that was admitted in this case will invariably exist with parents from specific racial or ethnic backgrounds. For example, in any culture where family ties are important, the risk factor based on strong emotional or cultural ties to family living in that the country of origin will exist. Rather than condemn parents for strong cultural ties and familial ties to their countries of origin, we should, and do, generally speaking, celebrate these qualities rather than use them to restrict a parent's interactions with his children. It is especially important to avoid basing decisions on such factors when the fact is

that we are a nation of many racial and ethnic backgrounds, and we have the good fortune to have many children of mixed race and cultural heritage.

¶97 And finally on this subject, although I believe that the profile evidence was improperly considered in this case for the reasons explained, I also believe that courts must absolutely refrain from engaging in any racial or ethnic profiling that involves conclusions based on race or ethnicity or country of origin. I have previously spoken strongly on this point, and I continue to believe there is no place in our judicial system for such discrimination. *See State v. Monday*, 171 Wn.2d 667, 682-85, 257 P.3d 551 (2011) (Madsen, C.J., concurring).

¶98 In summary, the profile evidence that was in fact relied on by the trial court should not have been admitted in this case because there was no individualization of the risk factors to Mr. Katare. Instead, the trial court superimposed the risk factors over the evidence previously considered and reached a different result based to a significant degree on the profile evidence. Although the Court of Appeals seems to have established a nearly per se rule of inadmissibility, I would leave the door open for risk factor evidence that is individualized to a parent in proceedings involving conditions and restrictions in a parenting plan. In no event should profile evidence that is racial profiling be permitted.

Conclusion

¶99 The fact that the Court of Appeals did not simply reverse the trial court's imposition of travel restrictions is distressing in this case, when it was obvious after the second hearing on the matter that Mr. Katare did not pose a serious risk of abducting his children, as the evidence showed and as the trial court held. I am positive, however, that Mr. Katare finds it more distressing to be condemned as a potential abductor without sufficient evidence and even more distressing that he cannot take his children to India, where, among other things, their paternal grandparents live. Mr. Katare has demonstrated that he will comply with all court orders and this is backed up by the record, which shows that he has never failed to comply with any court imposed conditions in the years since this litigation began. He has been an attentive father who has fully and compliantly implemented his visitation rights, even traveling from India during a temporary assignment there to visit with his children. He is not an "occasional" parent, but a father with a rich Indian heritage and family in India that he seeks to share with his children.

¶100 I would reverse the Court of Appeals and remand this case to the trial court with directions that it remove the restriction in the parenting plan that presently prevents him from international travel with his children. I dissent.

C. JOHNSON and WIGGINS, JJ., concur with MADSEN, C.J.

Joint parenting plan cannot be modified for Relocation

NOTICE: SLIP OPINION
(not the court's final written decision)

The opinion that begins on the next page is a slip opinion. Slip opinions are the written opinions that are originally filed by the court.

A slip opinion is not necessarily the court's final written decision. Slip opinions can be changed by subsequent court orders. For example, a court may issue an order making substantive changes to a slip opinion or publishing for precedential purposes a previously "unpublished" opinion. Additionally, nonsubstantive edits (for style, grammar, citation, format, punctuation, etc.) are made before the opinions that have precedential value are published in the official reports of court decisions: the Washington Reports 2d and the Washington Appellate Reports. An opinion in the official reports replaces the slip opinion as the official opinion of the court.

The slip opinion that begins on the next page is for a published opinion, and it has since been revised for publication in the printed official reports. The official text of the court's opinion is found in the advance sheets and the bound volumes of the official reports. Also, an electronic version (intended to mirror the language found in the official reports) of the revised opinion can be found, free of charge, at this website: https://www.lexisnexis.com/clients/wareports.

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Filed
Washington State
Court of Appeals
Division Two

March 28, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Matter of the Marriage of: GRETCHEN RUFF, FKA WORTHLEY, Petitioner, and WILLIAM WORTHLEY, Respondent.	No. 48462-5-II PUBLISHED OPINION

JOHANSON, J. — We are asked to determine whether the "Child Relocation Act" (CRA)[1] applies to joint parenting plans when parents share equal residential time and have equal decision-making authority.[2] Joint parenting plans that provide for equal residential time and equal decision-making create an important and serious commitment by parents to work closely together to raise their children. A proposed relocation that would modify a joint parenting plan's equal residential time to something less than equal residential time is in effect a change in residential placement. Such a change in residential placement requires an adequate cause finding under the modification

[1] RCW 26.09.405-.560.

[2] We granted Gretchen Ruff's motion for discretionary review under RAP 2.3(b)(4).

statute.[3] We therefore conclude that the CRA does not apply to a proposed relocation that would modify the joint parenting plan's joint and equal residential time to something other than joint and equal residential time. Accordingly, we dismiss the relocation action.

FACTS

In September 2009, William Worthley and Gretchen Ruff (formerly Gretchen Worthley) divorced. Their parenting plan allowed for their minor children to "reside equally or substantially equally with both parents" on an alternating weekly schedule (a "joint parenting plan"). Clerk's Papers (CP) at 4. The parties are designated joint legal and physical custodians of their minor children and have equal decision-making authority.

In June 2014, Worthley filed a notice of intended relocation seeking to relocate their remaining minor child to Missouri. Two different superior court judges made rulings on this case. In September, in response to Ruff's dismissal motion, the first superior court judge temporarily restrained Worthley from relocating the minor child. The first superior court judge concluded that because Worthley and Ruff had a joint parenting plan, Worthley must file a modification petition and meet the adequate cause burden before pursuing his relocation request.

Worthley then petitioned for modification, arguing adequate cause based on the child's integration into his home and Ruff's detrimental home environment. Ruff opposed the petition and argued that adequate cause did not exist to support a parenting plan modification.[4] The second

[3] RCW 26.09.260.

[4] At the adequate cause hearing, a superior court commissioner held that there was adequate cause for modification based solely on Worthley's proposed relocation. Ruff successfully moved to revise the commissioner's adequate cause determination.

superior court judge concluded that Worthley failed to show adequate cause and denied Worthley's modification petition. Turning to the relocation action, the second superior court judge further concluded that "[t]he [CRA] presumes that one parent is the primary residential parent. The court will set an evidentiary hearing to determine which parent is the primary residential parent. Thereafter, the court will decide whether the child should be allowed to relocate under the [CRA]."[5] CP at 245.

We granted Ruff's discretionary review petition on the sole issue of "whether the [CRA] applies to parenting plans that provide for children to reside equally with both parents." Ruling Granting Review, *In re Marriage of Worthley*, No. 48462-5-II, at 6 (Wash. Ct. App. Apr. 4, 2016).

ANALYSIS

I. THE CRA IS INAPPLICABLE TO A MODIFICATION OF THE JOINT PARENTING PLAN

Ruff makes several arguments that the CRA does not apply to joint parenting plans.[6] We hold that the CRA does not apply when the child's residential time is designated equal or substantially equal in the parenting plan and when the proposed relocation would result in a modification of this designation.[7]

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[5] The second superior court judge certified this ruling under RAP 2.3(b)(4).

[6] Ruff makes additional arguments that fall outside the order granting discretionary review. Because discretionary review was not granted on additional issues, we do not reach them. RAP 2.3(e); *Johnson v. Recreational Equip., Inc.*, 159 Wn. App. 939, 959 n.7, 247 P.3d 18 (2011) (holding that the appellate court may specify the issue or issues as to which discretionary review is granted).

[7] The parties concede that the superior court erred when it set an evidentiary hearing to determine who the primary parent is under the CRA when the parenting plan clearly does not designate a primary custodial parent. Because we conclude that the CRA does not apply and we dismiss the relocation action, we need not decide this issue.

A. PRINCIPLES OF LAW

This case involves an issue of statutory interpretation. We review questions of statutory construction de novo. *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 57, 109 P.3d 405 (2005). Our fundamental objective when interpreting a statute is "to discern and implement the intent of the legislature." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). "Statutory interpretation begins with the statute's plain meaning." *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). We discern plain meaning from the "'ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" *Lake*, 169 Wn.2d at 526 (quoting *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009)). "If a statute is clear on its face, its meaning is to be derived from the plain language of the statute alone." *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 1 (2002). And in the absence of a statutory definition, we "will give the term its plain and ordinary meaning ascertained from a standard dictionary." *Watson*, 146 Wn.2d at 954.

If the statute is unambiguous after a review of the plain meaning, our inquiry is at an end. *Lake*, 169 Wn.2d at 526. When the words in a statute are clear and unequivocal, we are "'required to assume the Legislature meant exactly what it said and apply the statute as written.'" *In re Custody of Smith*, 137 Wn.2d 1, 8, 969 P.2d 21 (1998) (quoting *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997)), *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

"Whenever possible, statutes are to be construed so 'no clause, sentence or word shall be superfluous, void, or insignificant.'" *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009) (internal quotation marks omitted) (quoting *Kasper v. City of Edmonds*, 69

Wn.2d 799, 804, 420 P.2d 346 (1966)). We cannot read into a statute that which we may believe "'the legislature has omitted, be it an intentional or inadvertent omission.'" *Smith*, 137 Wn.2d at 12 (quoting *Auto. Drivers & Demonstrators Union Local 882 v. Dep't of Ret. Sys.*, 92 Wn.2d 415, 421, 598 P.2d 379 (1979)). Courts cannot amend statutes by judicial construction or rewrite statutes to avoid difficulty in construing and applying them. *C.A.M.A.*, 154 Wn.2d at 69.

"If the statute is 'susceptible to two or more reasonable interpretations,' it is ambiguous." *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011) (quoting *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005)). But the "fact that two or more interpretations are conceivable does not render a statute ambiguous." *Five Corners Family Farmers*, 173 Wn.2d at 305. If a statute is ambiguous, we may look to relevant case law, the legislative history of the statute, and the circumstances surrounding its enactment to determine legislative intent. *Anthis v. Copland*, 173 Wn.2d 752, 756, 270 P.3d 574 (2012).

B. CRA'S PLAIN MEANING

Ruff argues that the CRA's plain language and its statutory scheme illustrate that the CRA does not apply to joint parenting plans. We agree.

1. PLAIN LANGUAGE

Ruff argues that the CRA's definition, notice, and reason for relocation provisions show that the CRA does not apply to evaluate proposed relocations in the context of joint parenting plans where the child's residential time is spent equally with both parents. Ruff further argues that applying the CRA to a proposed relocation where there is a joint parenting plan would require the court to improperly read language into the statute that is not there. We agree.

Relocation is defined as "a change in *principal residence*." RCW 26.09.410(2) (emphasis added). And "a person with whom the child resides *a majority of the time*" must provide notification of the proposed relocation (change in principal residence). RCW 26.09.430 (emphasis added). Finally, there is "a rebuttable presumption that the intended relocation of the child will be permitted." RCW 26.09.520.

Under the plain language of the CRA's relocation definition and its notice provision, a relocation is a change in principal residence, and the person with whom the child resides the majority of time shall give notice of any intended change in principal residence. The CRA does not define "principal residence" or "majority." *See* RCW 26.09.410. In the absence of statutory definitions, we give these terms their "plain and ordinary meaning ascertained from a standard dictionary." *Watson*, 146 Wn.2d at 954. The ordinary meaning of "principal" is "most important" or "influential," and the ordinary meaning of "majority" is "a number greater than half of a total." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1802, 1363 (2002).

These definitions necessarily exclude joint parenting plans because there is no "most important or influential" or "principal" residence and there is no person with whom the child resides "greater than half" or the "majority of the time." RCW 26.09.410, .430, .520. To conclude otherwise would be to impermissibly render this language superfluous, void, or insignificant. And we avoid such results. *HomeStreet, Inc.*, 166 Wn.2d at 452.

Worthley argues that the definition statute could be read to mean that a child "has no principle [sic] place of residence or the child has two" and that the notice statute could be read to mean that "neither or both parents have a majority of parenting time." Br. of Resp't at 8.

Worthley's interpretation of these provisions requires reading into the CRA substantial language that the legislature has omitted. This we cannot do.

The definition of "relocate" would have to be read as "a change in principal *or equal* residence." The notice statute would need to be read as "a person with whom the child resides a majority *or an equal* time."[8] And as for the presumption it would need to be read to say, "There is a rebuttable presumption that the intended relocation of the child will be permitted, *unless the child resides equally with the parents.*" We cannot read into a statute that which "'the legislature has omitted, be it an intentional or inadvertent omission.'" *Smith*, 137 Wn.2d at 12 (quoting *Auto Drivers & Demonstrators Union Local 882*, 92 Wn.2d at 421). A plain reading of the CRA's language supports the conclusion that the CRA does not apply to proposed relocations that would modify joint and equal residential time under a joint parenting plan to something other than joint and equal residential time.

2. STATUTORY SCHEME

To further support her argument, Ruff argues that it is consistent with the CRA and its statutory scheme to require a parent to prove adequate cause under the modification statute when

[8] Worthley also argues that the word "majority" is ambiguous because "[e]ven in a pure 50/50 parenting plan . . . one parent will have the child the majority of the overnights in any given year." Br. of Resp't at 9. We disagree.

The parenting plan designation in place at the time of a proposed relocation is used to determine primary residential parenting status, and so actual residential circumstances do not negate the express intent of the residential designation set in a permanent parenting plan. *In re Marriage of Fahey*, 164 Wn. App. 42, 58-60, 262 P.3d 128 (2011); *In re Marriage of Kimpel*, 122 Wn. App. 729, 734, 94 P.3d 1022 (2004). Thus, we are to look to the parenting plan designation, not an actual number of overnights, to consider with whom the child resides a "majority" of time. In the context of that analytical framework, "majority" is not ambiguous with respect to whether the CRA applies to the joint parenting plan here because both parents are designated joint legal and physical custodians.

the proposed relocation will change the residential plan from joint residential time to one parent having less than equal residential time. We agree.

a. POLICY CONSIDERATIONS

The CRA and the modification statutes are located within chapter 29.09 RCW, which governs dissolution proceedings and legal separations. The policy section for chapter 29.09 RCW states that the best interests of the child are served by parenting arrangements that best maintain a child's emotional growth, health, stability, and physical care. RCW 26.09.002.

And the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm. RCW 26.09.002. Thus, the criteria for determining the best interests of the child in custody disputes are varied and highly dependent on the facts and circumstances, but continuity of established relationships is a key consideration. *See In re Parentage of L.B.*, 155 Wn.2d 679, 708-09, 122 P.3d 161 (2005); *see In re Parentage of C.M.F.*, 179 Wn.2d 411, 427, 314 P.3d 1109 (2013) (citing *In re Marriage of McDole,* 122 Wn.2d 604, 610, 859 P.2d 1239 (1993) (holding that custodial changes are viewed as highly disruptive to children and there is a strong presumption in favor of custodial continuity)).

b. MODIFICATION REQUIREMENTS SERVE THE BEST INTERESTS OF THE CHILD

The best interest of the child is served by requiring that adequate cause and other requirements of the modification statute are met before making a change from an equal residential time designation to something other than equal residential time. Otherwise the preservation of the existing equal parent-child interaction could be disturbed for reasons other than those necessitated

by the parent's changed circumstances or as required to protect the child from harm. Such a result would be contrary to RCW 26.09.002.

Under the modification statute,

> the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child.

RCW 26.09.260(1). The trial court must consider whether a party has shown adequate cause for a modification, which can include a showing of whether the child has been integrated into the family of the petitioner in substantial deviation from the parenting plan or whether the child's present environment is detrimental. RCW 26.09.260(2)(b), (c).

The high burden of adequate cause fulfills the policy to maintain the existing pattern of the parent-child relationship to protect the best interest of the child. The modification procedures were set up specifically to "protect stability by making it more difficult to challenge the status quo." *C.M.F.*, 179 Wn.2d at 419-20. Parents who are parties to a joint parenting arrangement have entered into a serious commitment to parent their children together. This commitment should not lightly be undone. The modification statute protects the status quo in the parent-child relationship and that protection is no less important in the joint parenting context.

c. FOCUS ON RELOCATING PARENT'S INTEREST IS INAPPROPRIATE

Ruff argues that *In re Marriage of Horner*, 151 Wn.2d 884, 93 P.3d 124 (2004), demonstrates that because the CRA focuses on the relocating parent's interests and not the best interest of the child, the CRA is not an appropriate framework for determining whether relocation should be granted in a joint parenting plan context. Ruff argues that the modification analysis

instead of the CRA analysis should be applied because the modification analysis focuses on the child's best interests. Ruff's arguments are persuasive.

The CRA focuses on the best interests of both the child and the relocating person. *Horner*, 151 Wn.2d at 887. The CRA requires analysis of 11 factors to determine if relocation should be granted. *Horner*, 151 Wn.2d at 887-88. And the factors are equally important because they are neither weighted nor listed in any particular order. RCW 26.09.520. Of these 11 factors, only 4 focus exclusively on the child's best interests. *Horner*, 151 Wn.2d at 894 n.9.

The *Horner* court reflected on the factors of the CRA:

> [C]onsideration of all the factors is logical because they serve as a balancing test between many important and competing interests and circumstances involved in relocation matters. *Particularly important in this regard are the interests and circumstances of the relocating person.* Contrary to the trial court's repeated references to the best interests of the child, the standard for relocation decisions is not only the best interests of the child.

151 Wn.2d at 894 (emphasis added; footnote omitted). The *Horner* court explained that this analysis under the CRA was due to the incorporation of and substantial weight given to "'the traditional presumption that a fit parent will act in the best interests of [the] child.'" 151 Wn.2d at 895 (quoting *In re Custody of Osborne*, 119 Wn. App. 133, 144, 79 P.3d 465 (2003)). That the CRA incorporates and relies on this traditional presumption is well established in Washington. *See Osborne*, 119 Wn. App. at 144; *In re Marriage of Kim*, 179 Wn. App. 232, 243, 317 P.3d 555 (2014); *In re Marriage of McNaught*, 189 Wn. App. 545, 553, 359 P.3d 811 (2015), *review denied*, 185 Wn.2d 1005 (2016).

Thus, the rebuttable presumption is that a fit parent entrusted with the most time with a child will act in the child's best interest, and thus the relocation must also be in the child's best interest. But here, as Ruff argues, where there is a joint parenting plan, both parents are equally

entrusted to act in the child's best interests. Thus, the presumption that the relocation must be in the child's best interest is not appropriate to apply to a proposed relocation where a joint and equal residential designation exists because in those circumstances the court presumes both parents act in the child's best interests. Unlike the CRA, the modification statute does not emphasize one parent's best interests but focuses on the child's best interest. We conclude that the focus should be on the child's best interest when a proposed relocation would result in a modification of a joint residential time designation.

d. MODIFICATION REQUIREMENTS PROTECT BOTH PARENTS

Worthley argues that if a party cannot meet the adequate cause burden under the modification statute, the party would have to relocate without their child before being able to petition for a change to a parenting plan. Worthley contends that this requirement does not make sense because it results in different treatment for parents with a joint parenting plan versus differently situated parents under the same statutory scheme. But treating differently situated parties, differently, does make sense.

Requiring a parent to meet the adequate cause burden is appropriate when a parent seeks a relocation that would necessitate a change to the parenting plan designation from joint and equal parenting to something less than equal parenting time. The best interest of the child should be the guiding standard in that instance. A relocation that results in a change from joint and equal parenting to something else is a modification that should be subject to the modification adequate cause burden. On the other hand, dispensing with the adequate cause burden for the relocation of a parent who spends a majority of the time with the child makes sense because the relocation of this parent does not change the residential status quo. We therefore reject Worthley's contention.

Worthley also argues that the CRA's statutory scheme is violated if the CRA relocation evaluation factors do not apply to a relocation involving joint parenting plans. He concludes this is so because first, a relocating party would not be required to give advanced notice or seek to modify the parenting plan before relocating with the child. Second, the relocating parent could then relocate with the child if he or she could still comply with his or her obligations under the existing plan without consideration of any financial burden of the other parents' transportation costs. Third, RCW 26.09.450 would not apply so there would be no notice requirement. And finally, the nonrelocating parent would lose the protections found in the CRA and would have to file a petition to modify the parenting plan. We disagree

Contrary, to Worthley's claims, nonrelocating parents have rights under the modification statute as well as the CRA. Under the CRA, the nonrelocating parent can pursue sanctions or contempt against the other parent for failing to give notice of intent to relocate. RCW 26.09.470. Similarly, under the modification statute, if parents with a joint parenting plan have equal decision-making for education, the nonrelocating parent can pursue sanctions or contempt if the relocating parent removed a child from their school district. *See* RCW 26.09.160(1). Under the CRA or modification statutes, the nonrelocating parent can object to the relocating parent's decision by filing a petition for modification. RCW 26.09.480, .260. And under the CRA or the modification statute, a nonrelocating parent can pursue relief under a temporary order requiring the child to return. RCW 26.09.510(1), .270. Therefore, we reject Worthley's "parade of horribles" argument.

We are mindful that our task is to determine legislative intent, to give meaning to each word in the statute, and not to read omitted words into the statute. We conclude that the ordinary meaning of the CRA's language in the context of the CRA's statutory scheme is unambiguous.

Neither the CRA's plain language nor its statutory scheme support the CRA's application to a relocation that would modify a joint and equal parenting plan to something not joint or equal.

C. AMBIGUITY

But even assuming the CRA's provisions are ambiguous, after reviewing case law and legislative history we still conclude that the CRA does not apply to a relocation that would result in a modification of a joint parenting plan to something other than joint and equal residential time.

1. *FAHEY*

Ruff argues that *In re Marriage of Fahey*, 164 Wn. App. 42, 262 P.3d 128 (2011), shows that the CRA does not apply to joint parenting plans. Worthley argues that *Fahey* does not control because its joint parenting plan comments are only dicta. Although not controlling, *Fahey* adds additional support to conclude that the CRA does not apply here.

In *Fahey*, the parenting plan designated the mother the primary parent with whom the children would reside a majority of the time. 164 Wn. App. at 46-47, 58-59. The mother sought to relocate, and the trial court applied the CRA presumption in favor of relocation to her after concluding that she was the primary residential parent. *Fahey*, 164 Wn. App. at 51. The father appealed and argued that the rebuttable presumption should not have applied to the mother because as a matter of fact, the children resided with him for the majority of the time for four years following the creation of the parenting plan. *Fahey*, 164 Wn. App. at 54-55. The father further argued that the trial court should have used the parenting plan modification statute, instead of the CRA. *Fahey*, 164 Wn. App. at 55.

We held that the father's argument was unpersuasive because the parenting plan in place at the time of a proposed relocation is used to determine primary residential parenting status, not

just the past circumstances of a parent's residential time. *Fahey*, 164 Wn. App. at 60. And there, the parenting plan explicitly designated the mother as the primary residential parent. *Fahey*, 164 Wn. App. at 58-59. We further stated that

> by the plain language of the [CRA], the notice requirements are triggered by the intended relocation of a person "with whom the child resides a majority of the time." RCW 26.09.430. *This plain language suggests that if neither parent qualifies as a parent with whom a child resides a majority of the time, for example when residential time is split 50/50, that neither parent can invoke the child relocation statute and receive the rebuttable presumption in his/her favor.* [The father's] arguments highlight the absence of statutory guidance in 50/50 residential time situations when he argues that the original parenting plan in this case intended that he and [the mother] share residential time equally. But [the father's] arguments are not persuasive because the original parenting plan designated [the mother] as the primary residential parent.

Fahey, 164 Wn. App. at 58-59 (emphasis added).

Thus, *Fahey* recognized that the CRA's plain language suggests that if neither parent qualifies as a parent with whom a child resides a majority of the time, then neither parent can invoke the child relocation statute and receive the rebuttable presumption in his/her favor. Even if dicta, our observation in *Fahey* lends support to the conclusion that the CRA does not apply to a proposed relocation that would modify a joint parenting plan to something other than joint and equal residential time.

2. LEGISLATIVE HISTORY

Worthley argues that legislative history shows that the legislature intended the CRA to apply to proposed relocations even in the context of a joint parenting plan. We disagree.

If a statute is ambiguous, we may look to the statute's legislative history and the circumstances surrounding enactment to determine legislative intent. *Anthis*, 173 Wn.2d at 756. First, when the legislature enacted the CRA, it amended the modification statute, RCW 26.09.260, to add subsection (6), which permits a parent objecting to relocation to file a petition to modify the parenting plan:

> The court may order adjustments to the residential aspects of a parenting plan pursuant to a proceeding to permit or restrain a relocation of the child. *The person objecting to the relocation* of the child or the relocating person's proposed revised residential schedule *may* file a petition to modify the parenting plan, including a change of the residence in which the child resides the majority of the time, *without a showing of adequate cause other than the proposed relocation itself. A hearing to determine adequate cause for modification shall not be required so long as the request for relocation of the child is being pursued.* In making a determination of a modification pursuant to relocation of the child, the court shall first determine whether to permit or restrain the relocation of the child using the procedures and standards provided in [the CRA]. Following that determination, the court shall determine what modification pursuant to relocation should be made, if any, to the parenting plan or custody order or visitation order.

RCW 26.09.260(6) (emphasis added).

Worthley very briefly argues that the plain language of the RCW 26.09.260(6) amendment places the onus of "filing a petition to modify the parenting plan on the party objecting to relocation," not the relocating party as Ruff advocates. Br. of Resp't at 15. And he points out that the legislature "removed" the adequate cause determination as well. Br. of Resp't at 15. But Worthley does not explain how these provisions show legislative intent to apply the CRA to joint parenting plans. We are not persuaded by these brief assertions.

Subsection (6) does not mention joint parenting plans, nor does it excuse a parent who is trying to relocate under a joint parenting plan from initiating a modification proceeding. As discussed above, there are important policy distinctions to shift the modification burden to the relocating parent when the relocation will change the existing joint and equal residential schedule to something other than joint or equal.

Next, Worthley argues that the CRA's sponsor made a clear statement of legislative intent that the CRA should apply to joint parenting plans. And Worthley emphasizes that the colloquy is the only substantive statement about the CRA clarifying the legislature's intent about the issue and that the legislature found it worth reporting in the official journal.

Worthley's argument is somewhat persuasive, but it is not determinative of the issue before us. A single legislator's remarks, even from the sponsor, are noteworthy but are not controlling of our analyses of legislative history or conclusive as to our interpretation of the plain language of a measure. *Wash. State Legislature v. Lowry*, 131 Wn.2d 309, 326-27, 931 P.2d 135 (1997).

When the legislature enacted the CRA, Representative Michael Carrell asked the bill's sponsor, Representative Dow Constantine, "[h]ow does this act apply in situations in which the child resides an equal amount of time with each parent?" 1 HOUSE JOURNAL, 56th Leg., Reg. Sess., at 551 (Wash. 2000). Representative Constantine replied, "Under such circumstances, the notice requirements apply to both parties and the presumption to neither."[9] 1 HOUSE JOURNAL, *supra*.

[9] The CRA notice statute provides that "*a person with whom the child resides a majority of the time*" must notify other persons entitled to residential time or visitation if the person intends to relocate. RCW 26.09.430 (emphasis added). And under the CRA there is a rebuttable presumption that the intended relocation of the child by a primary residential parent will be permitted. RCW 26.09.520.

But the CRA's language says the opposite. The language says the notice requirement applies to the parent who spends the majority of the time with the child and that the relocation is presumed to be permitted. RCW 26.09.430, .520. If the legislature intended the CRA's notice requirements to apply to both parents, under some circumstances, it could have easily said so. Similarly if the legislature intended the presumption to apply to neither parent, in some circumstances, it could have said so.

Representative Constantine's words reveal the bill's sponsor's intent for the CRA to apply in the joint parenting context and offers direction about *how* it could apply to joint parenting plans. But Worthley cites to no authority showing that such singularity or publication in the House Journal make the statement determinative of legislative intent. This sole remark does not persuade us to ignore legislative intent as found in the language of the statute and its statutory framework as discussed earlier.

II. CONCLUSION

We hold that the CRA does not apply to a relocation that would necessarily modify a parenting plan from an existing joint and equal residential time designation to something other than joint and equal residential time. Instead, a parent whose desired relocation would necessarily

terminate the existing joint and equal residential schedule must show adequate cause under the modification statute. We dismiss the relocation action.[10]

JOHANSON, J.

We concur:

WORSWICK, P.J.

SUTTON, J.

[10] We recognize our holding is contrary to the recommendation found in 20 Scott J. Horenstein, *Washington Practice: Family and Community Property Law* § 33:37, at 350 (2d ed. 2015).

Notice of Appeal
(Trial Court Decision)

(SUPREME COURT or COURT OF APPEALS, DIVISION 1)
OF THE STATE OF WASHINGTON

[TOLL OBUON], Plaintiff,	)	No. 13-3-13176-9SEA [75563-3-1
	)	Notice of Appeal to
v.	)	[Supreme Court or Court of Appeals]
	)	
[WAIRIMU KIAMBUTHI], Defendant.	)	

DECLARATION OF PROOF SERVICE

Notice to be served on the following in the manner indicated below:

_____ _____ _____	( ) U.S. Mail (✓) Hand Delivery ( ) _____
_____ _____ _____	( ) U.S. Mail (✓) Hand Delivery ( ) _____
_____ _____ _____	( ) U.S. Mail (✓) Hand Delivery ( ) _____

[CERTIFICATE OF SERVICE

I certify that on the 20th day of Feb, 2018, I caused a true and correct copy of this

Signature

PROSE for [Plaintiff or Defendant]

[TOLL OBUON]

7216 CALIFORNIA AVENUE # 2

PROSE

206-294-0624

Notice of Appeal
(Trial Court Decision)

(SUPREME COURT or COURT OF APPEALS, DIVISION 1)
OF THE STATE OF WASHINGTON

[TOLL OBUON], Plaintiff, v. [WAIRIMU KIAMBUTHI], Defendant.	)))))))	No. 13-3-13176-9SEA [75563-3-1 Notice of Appeal to [Supreme Court or Court of Appeals]

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[CERTIFICATE OF SERVICE

I certify that on the 6th day of JAN, 20 18, I caused a true and correct copy of this

Signature

PROSE for [Plaintiff or Defendant]

[TOLL OBUON]

7216 CALIFORNIA AVENUE # 2

PROSE

206-294-0624

Notice of Appeal
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_____ _____ _____	( ) U.S. Mail (✓) Hand Delivery ( ) _____

[CERTIFICATE OF SERVICE

I certify that on the 15 day of Feb, 20 13, I caused a true and correct copy of this

Signature _____

PROSE for [Plaintiff or Defendant]

[TOLL OBUON]

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