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STATE OF WASHINGTON

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IN THE COURT OF APPEALS DIVISION II
STATE OF WASHINGTON

In re the Marriage of:

KELLY WEHR

Appellant

vs.

GUY WEHR

Respondent.

No. 40307-2-II

BRIEF OF APPELLANT

On Appeal from the Clallam County Superior Court, State of Washington.

Honorable S. Brooke Taylor.

By: Steve Robins
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2 McCormick on Evid. Sec. 339 (6th ed.)39

INTRODUCTION

Ms. Wehr has been the primary caregiver of Garrett and Emily since her divorce in 2005. In 2009 Ms. Wehr was stuck in a minimum wage job and wanted to relocate to Vancouver Washington. Ms. Wehr's mother lives in Vancouver and has a large residence suitable to house Ms. Wehr and her children. Ms. Wehr had a job offer, she scouted out the school district, and she found doctors and dentists for the children and inquired into after school activities. She proposed a new parenting plan that included a week end visit every month for the father, an additional soft weekend every month, split holidays and had eight uninterrupted weeks in the summer for visitation.

This proposal was not acceptable to Mr. Wehr or the trial court. Any change in the current parenting plan was deemed to be so detrimental to the children that it outweighed the obvious benefits of paying no rent, a job offer and a nice place to live. The trial court erred in denying the relocation.

ASSIGNMENTS OF ERROR

1. The trial court erred in finding that the statutory presumption allowing relocation pursuant to RCW. 26.09.520 was rebutted by the objecting party.
2. The trial court erred in using a preponderance of the evidence standard in determining whether the objecting party had successfully rebutted the statutory presumption allowing relocation.
3. The trial court erred in not using a clear, cogent and convincing standard of proof to determine if the objecting parent had proven that the detrimental effects of the relocation outweighed the benefits.
4. The trial court failed to give proper deference to the decision of a presumptively fit parent.
5. The trial court erred in finding that any significant disruption in contact between the children and their father would have a damaging impact on the children. (Trial Decision p. 3; hereafter Dec. p.))
6. The trial court erred in finding that the relocation was ill conceived and not thought through carefully. (Dec. p. 3)
7. The trial court erred in determining that the relocation would have a negative impact on the children. (Dec. p. 4)
8. The trial court erred in assigning any weight to the testimony of Michael Aldrich without him being qualified as an expert witness. (Dec. p. 4)
9. The trial court erred in relying on the relocation study admitted at Rp. 56

Ex. 5.

10. The trial court erred in finding that the children's current situation would be no better the situation allowing relocation. (Dec. p. 5)
11. The trial court erred in determining that relocating parent's current income would be sufficient to support her and the children if she stayed in Clallam County. (Dec. p.5)
12. The trial court erred in determining that if the relocation was allowed the father would lose all ability to enjoy the children's school activities or sports. (Dec. p.5)
13. The trial court erred in determining that the objecting party had good faith objections to the relocation.(Dec. p .4)
14. The trial court erred in finding that the relocation would have a negative impact on the children based on Mr. Aldrich's testimony and a single study. (Dec. p. 4)
15. The trial court erred in determining that the proposed parenting plan with a soft weekend and eight uninterrupted weeks in the summer was inherently harmful to the children's relationship with their father. (Dec. p. 6)
16. The trail court erred in determining that the proposed parenting plan substituted quantity for quality. (Dec p. 7)
17. The trial court erred in determining that the job prospects for the relocating parent were speculative and that the relocating parent was not

wanted in the new place.(Dec. p. 7)

18. The trial court incorrectly relied on the Grigsby case.(Dec. p. 8)

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR I

Ms. Wehr, the residential parent and guardian, wanted to relocate from Sequim Washington to Vancouver Washington. She proposed a liberal parenting plan and took considerable steps to facilitate the relocation for her children. The trial court denied the relocation. Did the trial court abuse its discretion by finding that the objecting party had proven that the detrimental effects of the relocation outweighed the presumed benefits by a preponderance of the evidence?

(Assignment of Errors 5 to 18)

Standard of review: The trial court's findings of fact will not be overturned if they are supported by substantial evidence. Thorndike v Hesperian Orchards, Inc., 54 Wn. 2d 570, 343 P. 2d 183 (1959)

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR II

Ms. Wehr, as the presumptively fit parent, filed a notice of intent to relocate. The trial court ruled that the objecting party had proved that the detrimental effects of the relocation outweighed the benefits by a preponderance of the evidence. Is the correct evidentiary standard for vitiating a fit parent's desire to relocate by a preponderance of the evidence or is the correct standard clear, cogent and convincing evidence? (Assignment of Errors 1 to 4)

Standard of Review: Issues of law are decided de novo, the function of the appellate court is to determine the law. Union Local 1296, Int'l Assn of Firefighters v. Kennewick, 86 Wn.2d 156, 542 P.2d 1252 (1978).

STATEMENT OF CASE

PROCEDURAL HISTORY

On April 29, 2005 a final parenting plan was approved in the Clallam County Superior Court, cause number 04-3-00274-1 and Ms. Kelly Wehr was designated as the residential parent and guardian of the parties' two minor children then aged 3 and 5. On August 4, 2009, Ms. Wehr sent a notice of intended relocation to Mr. Guy Wehr and on August 18, 2009 she filed a notice of intended relocation in the Clallam County Superior Court.

Mr. Wehr objected to the relocation on August 25, 2009 and at a temporary hearing held on August 28th, the relocation was temporarily denied. Northwest Justice Project filed a Notice of Appearance on September 4, 2009 and filed for priority trial setting. Mr. Wehr objected to the priority trial setting however Judge Ken Williams overruled the objection and a priority trial was ordered.

Trial began on December 8, 2009 before the Honorable Judge S. Brooke Taylor. After trial, the request to relocate was denied in an opinion dated January 7, 2010 and Notice of Appeal was filed on February 1, 2010.

STATEMENT OF FACTS

Trial began on December 8, 2009 before the Honorable S. Brooke Taylor in the Clallam County Superior Court upon Ms. Wehr's motion to relocate. Judge Taylor allowed Mr. Wehr to present his case first,

"Well, we do start with the statutory presumption that the relocation is—should be permitted and so I guess that puts the burden on the non-relocating party to prove otherwise." RP p. 10

First to testify was Ms. Linda Wehr, the sister of Mr. Wehr. She lives in Seattle and comes to Port Angeles once a month to visit her family. She sees the children when she visits and the children also visit her in Seattle. They ski together and do activities in Seattle together. RP p. 12/13. The children love their grandmother and the grandmother "...is very in tune with being a supportive grandparent for them." RP p. 14. Ms Wehr and the children go to Hurricane Ridge, play baseball and do lots of outdoor activities together. She testified that the children enjoyed visiting with her and that her brother was a "very involved" father. RP p. 19. Once a year they all ski at Crystal Mountain and when asked why Mr. Wehr is opposing the relocation, she replied,

"Well, it's put more distance between both parties...They need to have parents that they can go to and have, you know, closer..." RP p. 20.

When asked how the relocation would impact her brother and his relationship with the children,

"Well, it definitely won't give him the opportunity—he won't have the opportunity to have the kids as much. You are going to be—you know, there's a four—six hour drive that is going to take up quality time of being with the kids...he will not be able to

experience as many probably events in their life first hand..." RP p. 22/23.

Upon cross-examination she testified that the parties had been divorced for six years, that Kelly Wehr is the primary caregiver, that the children were 7 and 9 years old, that the children were doing "ok" in school, that they were healthy and when asked about any special needs,

"Besides wanting to have two parents, no." RP p. 24.

She stated that the relocation would affect her contact with the children,

"It—there might be, yes. There might be ways where we can't coordinate as well and you know, the—there is a—a drive time issue being farther away." RP p. 25.

Mr. Michael Aldrich testified as Mr. Wehr's expert witness. He has a bachelor's degree in psychology, a master's degree in psychology, has a license as a child mental health specialist, several advanced certificates in children's psychotherapy and is currently a contracted social worker for the Office of Public Defense. RP pgs. 31/32. Mr. Wehr's attorney asked that Mr. Aldrich be certified as an expert witness, the Court stated,

"Well, I'm not going to do a certification, but I will listen to his expert opinions." RP p. 35.

Mr. Aldrich was asked to

"...meet with Mr. Wehr and look at his capacity for parenting his two children, and also to do some one-on-one parenting education as needed and appropriate...my bias is always looking at best interest of the child." RP p. 36.

Mr. Wehr desired to have his children live with him, he had an affectionate relationship with them and was capable of raising the children. RP pgs. 36/37.

Mr. Aldrich spent a total of 12 hours with Mr. Wehr and that Mr. Wehr was

“...prepared to take on the role of full time parent if that were indeed to be the case...” RP p. 39.

Mr. Aldrich did not talk to mother, the children or any other collateral contacts. RP p. 40. His focus was on Mr. Wehr being the primary residential parent and when asked the impact upon the children if the mother relocated, he replied,

“...seems unreasonable to believe that these children were just going to waltz through that without any sort of, um, emotional, collateral issues. They just do come.” RP p. 43.

Asked about the children’s stability,

“...if these children were to move to Vancouver they have a limited amount of time with the relative they might be living with...they are moving in an area where they know no their peers...moving into a new school system.” RP p. 46.

He worried about the financial impact on the children,

“...then again it would be also how does it impact on the mother’s capacity to be in the primary care-giving role.” RP p. 48

He testified about a 2003 study found in the Journal of Family Psychology,

(Ex. # 5 RP p. 56)

“looking at college students who had divorce in their background...[and] their parents had moved over an hour away...they certainly found there was greater dissatisfaction as young adults for those who had divorce in their background and the parent had moved over an hour away. Um, is that the most compelling piece of literature out there of scientific study, um, at this particular time there’s not much more out there.” RP p. 50.

This study showed that the students had concerns about paying for college and that

“...other research will show that it often is more negatively impactful on the children when it’s a single mom because she has a less capacity to – a lesser capacity for earnings. And sometimes unfortunately, um, when father’s loss their desire to start continuing to pay child support.” RP p. 52.

He stated that there are “absolutely huge amounts of research” that show children of divorce are twice as likely to have emotional disruptions, academic failures, greater hostility and aggression, they are twice as likely to be involved with drugs and sexual activity and twice as likely to have the inability to formulate intimate relationships. RP pgs. 54/55. This study,

“...demonstrates that through this self report that children who indeed have had divorce in their background and their parents moved over an hour away had long-term standing effects in their ability to formulate relationships, their general satisfaction in life, their—their anxiety or distress over financial security and their issue of their global health...” RP p. 56

Mr. Aldrich was asked about poverty and the effect on the children,

“Poverty has huge impacts on the capacity of children’s emotional, psychological well-being.”

and if Ms Wehr did not get a good paying job the children would be put at risk.

RP p. 69. He stated that multiple moves would be harmful to the children,

“...multiple moves are the number one negative issue when it comes to children that we’ve had to place with CPS, that absolutely is devastating the continued moving.” RP p. 71.

Mr. Aldrich was asked about the effect on the children if Ms. Wehr did not have “any other partner to support her”,

“...I think that, you know, this mom is going to be having to work really hard at being able to balance all those things and/or put that reliance back on—and I don’t know if it’s an elderly parent or if she’s frail...” RP p. 74.

As to travel,

“But the travel issue that you bring up, um, the continuity issue, it certainly is going to be very difficult for any child that’s three weeks at one home and then suddenly has to pack up enough to just go off on a, you know, journey for the weekend.” RP p. 77

He ended his direct examination,

“Um, again, my opinion simply is that these children are already in a consistent and stable environment with all of those domains pretty well locked in place. Mom may have a lot of potential, but at this particular point it’s all speculative. And I’m not certain that this necessitates the—in this case where’s the—where’s the greater negative going to happen?” RP p. 86

Upon cross examination he stated that he had participated in four previous relocation cases, that the *Horner* decision

“...stimulates in my thought process is that the psychological best interest is not necessarily the legal best interest of the child.” RP p. 88.

When asked if there was a significant issue if there was only 10 to 15 days difference between the current plan and the proposed plan,

“Um, by shared numbers it doesn’t sound like it.” RP p. 91,

and that if the father had 8 consecutive weeks in the summer,

“ I think that extended period of time would be beneficial for the children.” RP p. 92

The next inquiry dealt with proactive efforts made by Ms. Wehr.

- Q. If Ms. Wehr is moving to Vancouver to live with her mother and stepfather who the children have a long-term relationship with, is that a proactive factor?
- A. I think it's—I think it's a proactive factor that's already in place, yes.
- Q. If Ms. Wehr has already made contact—her stepfather has a position with the City of Vancouver and she has an uncle who has also offered her a job. Does that deal with the proactive, protective factor of financial issues?
- A. I think that's definitely a first step, yes.
- Q. Would it be a proactive factor that Ms Wehr has already been to Pioneer Elementary School in Vancouver and talked to the principal?
- A. Absolutely.
- Q. Okay. That she's already located a gymnastics program that the children can be involved in.
- A. Another good piece for the children.
- Q. That she's already contacted the YMCA which is within threes blocks form her mother's house.
- A. Again positive, active stuff. RP pgs. 93/95

He further agreed that is beneficial for the children that they had already met future classmates, that is was beneficial that Ms. Wehr had found about summer playground events, that was absolutely a protective factor that Ms. Wehr had already contacted local doctors and dentists and that

"As you present it she's done everything that she knows how to do it sounds like and she's covered all the bases." RP p. 96.

However he still believe that relocation was wrong,

" I believe that children are going to be negatively impacted to be uprooted from their community they've been in since birth." RP p. 97.

Next Mr. Aldrich was asked about direct quotes from the study he relied upon to buttress his testimony.

Quote-

" Although a variety of poor outcomes are associated with parental moves they cannot establish with anything near certainty that the moves are a contributing cause"

- A. Right, they say that without certainty. But if you look at the statistical conclusions of those 14 domains that they looked at, 11 of them had clinical significance.

Quote-

"Our data cannot establish with certainty that moves cause children substantial harm."

- A. Right. No, and they said in the very beginning that there was no empirical research that they could demonstrate there was direct correlation. RP pgs. 103/104

The study was taken at a

"large southwestern state university of freshman who were involved in introductory psychology"

and Mr. Aldrich was asked if the response of a very limited survey population of college freshman enrolled in an introductory psychology class was relevant,

"Because they're human beings who have long-term effects based on the fact that they were victims of divorce and their parents moved over an hour away and that was the basis of the study." RP p. 105.

Mr. Eric Wheatley is Mr. Wehr's supervisor and described Mr. Wehr as a very good worker, this

"his kids definitely come first...they are very well mannered." RP p. 130 and p. 134.

Last to testify was Mr. Wehr. He was asked about how he felt about the relocation, he replied "It's not in my best interest." RP p. 136. He stated that he had three or four weekends from Friday to Monday with the children, that they

alternated spring break, they split winter vacation and alternated Thanksgiving and that they followed the same schedule in the summer. RP pgs. 136/144. He testified as to a photo montage that showed him and the children fishing, skiing and being together. RP pgs. 161/179.

Trial was resumed the next day and Mr. Wehr continued to testify. He discussed an incident with his son three years ago when he was throwing bark at school and that he was told late about an in school suspension. RP pgs. 9/10 Vol II. He stated that he often took the children so that Ms. Wehr could vacation and that if Ms. Wehr moved to Vancouver he was worried that there would be problems with scheduling. RP pgs. 15/16. Vol. II. His son's best friend is Hunter with whom Ms. Wehr was currently living at his family's house. He believed that finances were the motivation for Ms. Wehr to move to Vancouver. RP p. 34 Vol. II. When the children visit in Vancouver they mainly play video games. RP p. 36 When asked if the children moved to Vancouver requiring a change in the current parenting plan, he requested that he would like the option of a "soft" weekend that allow him more time with the children. RP p. 37 Vol. II and would like to exchange the children in McDonald's in Shelton and not Olympia. RP pgs. 39/41 Vol. II.

If the children were allowed to relocate,

"So I would look at it as a disgrace to the fact to the fact that, um, they would view me more as a Disneyland dad than the dad that I've been to them for so many years..." RP p. 43 Vol. II.

He detailed that it would cost \$100 in gas to visit for a weekend. RP p. 48, Vol II.

On cross examination Mr. Wehr stated that the proposed parenting plan,

"It alienates me as a father....Because my restriction—well, my visitation is restricted so much heavily." RP p. 53 Vol II.

He said the eight weeks in summer was not a major increase in quality time with the children,

"Not when you ski in the winter. You don't ski in June....Now that doesn't mean snow is going to fall that weekend. So you know, you could lose a season just because mother nature is nature. And so therefore, I guess, you know, it is a restriction in that regards." RP p. 54 Vol II.

He did not contest custody in the dissolution,

"I was advised through counsel that I couldn't fight that battle because of her status being a stay-at-home mother and me being a breadwinner so I chose to not fight that battle at that time." RP p. 55, Vol II.

He believes that it is in the children's best interests that Ms. Wehr be the primary caregiver as long as they stay in Clallam County. RP p. 56. Vol II.

He does not object to Ms. Wehr moving to Vancouver to get a higher paying job, but rather,

" No, I am objecting to the fact that I have heard nothing of what type of job she has...If it's [job offer] just going to be maybe, no. But if somebody says here's what I'm going to pay her, here's her W-2, here's what she's going to get a year, yeah. If you want to bring those facts to this table, then I can look at these numbers and rethink things." RP pgs. 61/62 Vol II.

He was able to identify one incident since the divorce when Ms. Wehr was not acting the children's best interests-she allegedly allowed her children to travel in

a 1967 Camero without shoulder lap restraints. RP p. 63 Vol. II. He objected to the expanded summer visitation,

“I guess my viewpoint is summer is summer. That doesn’t mean it’s God’s gift to this earth. Just because it’s summer doesn’t mean you can change the world. So I guess what I look at is you’re right, you’re condensing time and saying time is time. But there’s a big difference in fall, spring, summer and the activities you do with one person, so.” RP p. 65 Vol II.

Mr. Wehr testified that the children were healthy, happy, well adjusted and that was due to both parents. RP p. 68 Vol II. He was asked how Ms Wehr’s expanded proposed parenting plan that included a “soft” weekend changed things,

“...Um, I see a soft weekend as beneficial. I don’t see it as the cure.”

The only cure is for Ms. Wehr not to move. RP p. 69 Vol II. When the children visited Vancouver for Thanksgiving they stayed inside for four days watching movies and videos,

“That’s what my son said.” RP p. 73 Vol II.

Although his recent communication with Ms. Wehr was

“...the most had since the divorce of five years ago”

he did not think it would last,

“Because right now she is stuck living at a friend’s house. She doesn’t have all the abilities of a house and a home and a job. She literally has more time to be focused on calling me, telling me what’s going on, because she’s not working full time. She is literally in a stagnant position because of her actions three months ago and it unfortunately has benefited to our communication. But prior to this when she had a house and a boyfriend and all this stuff, it—no.” RP p. 74 Vol. II

Mr. Wehr was asked what was the most detrimental effect upon the children if they moved to Vancouver,

"Well, I'm just saying I know that Kelly smoked when we were married. And I—from what I've heard, I can't witness, I've never seen her smoke since, but she still smokes according to what the kids tell me. Her grandmother smokes, her grandmother's husband smokes, her uncle smokes. All these people get together every Friday for poker night." RP p. 77 Vol. II.

He stated that

"The biggest thing I hear them say is we'd like mom and dad to be back together again." RP p. 78 Vol. II.

Another detrimental effect is

"Their current lifestyle, what they know from day one is going to be blown out of the water and put it in a who knows what." RP p. 78 Vol. II.

"The detriment effect is it's a whole nother change to those kids. Their life, their world, not dad's, their world will change from everything from friends, to structures, to directions. Everything." RP p. 80 Vol. II.

Mr. Wehr stated that was concerned about repeated moves but admitted that she had only once in the last five years. RP p. 83 Vol. II. He was asked whether Ms Wehr had provided all the possible information about relocation in the last five months,

"Yes. Since I slowed the ball down she has been able to provide that. But did she provide it of her own accord as an adult, no....No, I'm objecting to as an adult to an adult as in a situation of information being processed between a adult to adult there is no information. It's—it's again, dad at the last minute, you know. I'm finding out about the move two weeks before the move." RP p. 87 Vol. II.

He was asked to detail problems that he had with Ms. Wehr in the last five years:

- Q. You stated that the two problems that have happened is that at times you have had to wait for 15 minutes?
- A. No, that's the two I've told you about. Like I said, I could go on. I have computer—I have stuff on my computer that were just—I—I've been around divorced guys before and they've said, you know, you just need to document everything because if you don't—
- Q. So in the last five years you've been divorce there's been issues—
- A. Un-huh
- Q. —as to minutes as to when pickup and drop off, and you've resolved it by one parent or the other going to the non-custodial parent's house, right?
- A. Of late. . .
- Q. You said one time she took [their son] to a practice and you allege that she had her daughter ask you why you couldn't go?
- A. My daughter did ask me that. I'm not alleging, my daughter asked me that point blank....
- Q. And you're saying one time two weeks ago, whatever it was, that you son asked when you are going to sign the papers?
- A. He did. Yes he did....That's the only time he's brought up the signing of the orders. RP pgs. 99/101 Vol. II.

Mr. Wehr rested his case and Ms. Wehr testified next.

She divorced in 2005 and was named the residential parent and guardian of the parties' two minor children. She described the children as healthy, that she usually took them to their doctor's appointments and that they had no special needs. She contacted Mr. Wehr on August 4, 2009 about her intention to relocate. RP p. 104 Vol. II. Her primary reason for moving was

"...my family. My immediate family lives down there. I would have their support... [her mother] been living down there for seven years now. My uncle Jack...has been down there over 20 years and has—I've seen them grow and prosper by moving to Vancouver. They have good jobs and have done well for themselves economically and have found partners that they have been with for years." RP pgs. 104/105 Vol. II.

Ms. Wehr worked as a waitress at minimum wage, gave notice to her employer based upon her desire to move to Vancouver but due to her failure to give proper relocation notice, she failed to obtain a temporary order allowing the move. RP pgs. 105/106 Vol. II. She intended to move in with her mother in Vancouver in a four bedroom, three bath, triple wide manufactured home,

“The truth is there is a playground in the area. It’s a cul-de-sac so the kids do have their scooters and bikes they can ride down there. It is residential, you know, neighborhood with the kids that live in the area. Garrett and Emily do—both have made friends down there. There’s a little boy, Dillon, that’s, um, Garrett’s same age that lives right next door to grandma and they have—became friends and they would actually reside at the same school and take the bus together.” RP p. 107 Vol. II.

In the last year the children had been to Vancouver at least eight times and were very familiar with the area. The school they would attend is within three miles of her mother’s house and the school bus stop is right in front of her home. RP p. 108 Vol. II.

As to smoking in front of the children,

“...if they smoke it’s outside, it’s not in the home. It’s not around, you know, right there where the kids are.” RP p. 109 Vol. II.

Pioneer Elementary is the school they would attend, she and the children have visited the school and the children,

“No, they’re really excited. They would really like to move.” RP p. 109 Vol. II.

She looked into daycare,

“Yes I have. There’s a YMCA three blocks from my mom’s home. The school has an after school facility in there so they really work with the kids on their homework. But there’s also, you know,

different activities, anything from learning games and the playground and different sporting events and things right there at the school until 6:00 in the evening.” RP p. 110 Vol. II.

Her mother is a stay at home wife and able to help with child care. Ms. Wehr contacted a pediatrician and a dentist office and determined that new patients were being accepted. RP p. 110 Vol. II.

She was asked about activities in the area,

“Yeah. I was just recently looking into basketball for Garrett, because he used to play for the last couple years and really enjoyed it. Unfortunately the season had already started and it’s full. But they do have ice hockey right there at the YMCA. Emily—there’s an amazing gymnastics group down there. There’s a few other things that aren’t available in this particular—we don’t have ice hockey or ice skating or the gymnastic that they could have down there. ” RP pgs.11/112 Vol. II.

Her primary reason for moving was employment,

“I do given the fact that I have been recently laid off due to lack of hours at the Cedars at Dungeness. Um, so right now I’m currently unemployed. I feel I have a lot of job experience in different fields and can gain long-term employment down there and especially with the contacts and the family that I have down there [her stepfather]. He’s the superintendent for the City of Vancouver.”

and “absolutely” believes he can get her a job. RP pgs. 112/113 Vol. II. Her

Uncle Jack

“...has his own mobile diesel mechanic business. So he said he could always use a secretary.” RP p. 113 Vol. II.

She offered a revised parenting plan and agreed with Mr. Wehr’s suggestion of adding a “soft” weekend to the plan RP p. 136 Vol. II .

Q. And you think that would be—so when you’re saying an extra weekend here and there, what do you mean? Are you saying three weekends a month?

A. No, not three weekends a month.

Q. Well then what are you saying?

A. Well, one weekend—

THE COURT: Mr. Baumann, wait a minute. She's trying to be flexible, which is something we all encourage and you're trying to pin her down on a schedule when we are talking about soft weekends. So where are we going with this? I mean, I'm not buying what you're selling right now, okay. RP p. 143 Vol. II

Q. Right. Once we were out of court we discussed that [soft weekend]?

A. Uh-huh.

Q. How—what are your feelings about a soft weekend?

A. I am flexible with our—you know, our parenting plan and our schedule. I believe, you know, aunt Linda had brought up the fact that they like to ski once a year. If that—if that doesn't work out with the weekend he has them for a particular winter month, I am totally flexible that if he wants to make other arrangements during that month that works out for the whole family to be able to do that." RP p. 116 Vol. II.

She suggested meeting in Olympia instead of Shelton to exchange the children,

"Uh, the reason for Olympia you can get there two ways. " RP p. 117 Vol. II.

She detailed the current plan and the proposed plan, both plans continued joint decision making and both contained no parental restrictions,

"Um, they absolutely need time with their father. They need time with their other relatives. I —you know, they have great relationships with their grandma, grandma Wehr, Aunt Linda. I encourage those relationships. I feel that it's very important for the kids to have those relationships. Grandma teaches them about culture and birds, Aunt Linda plays baseball. Those are things the kids love and enjoy and I absolutely do not want to, you know, break up those bonds or have—I just encourage, you know. I want this to work out in everybody's best interest. I want them to have the same amount of time with everybody and try to do what works for everyone." RP p. 120 Vol. II.

When asked if the children were placed with Mr. Wehr, she replied,

"Um, I am the mom that has them for 90 percent of the time Monday through Friday. I get them up, get them ready for school, involved in their schooling. I go to their school even to this day at least once a month, have lunch with the kids, play with them at recess, try to find out who their friends are. Um, I'm involved with all their sporting activities and signing them up and taking them to and from. The night routines, the homework routines, it's all been the same for their whole lives." RP pgs. 120/121 Vol. II.

She is currently living with a family friend rent free.

She was asked about problems with Garrett's school behavior,

"No. It's just been him acting out in different ways to get attention. I did take him to a counselor after these incidents occurred. I took him and she sat down with Garrett and said basically he feels like he doesn't have a lot of friends and doesn't know how to make and have good friends. So he's acting out in a way to get their attention, whether it's throwing a bark chip or giving them a hug, which at school is inappropriate...And so we did have to sit down and have long talks about appropriate space and school behavior. And we—I—we haven't had any of these issues occur since then." RP pgs. 122/123 Vol. II.

She identified a photo montage. RP pgs. 123/125 Vol. II.

Upon cross examination she was asked what would happen if she could not find a job,

"My mother is willing to take the children and I in and help us out without having to pay rent so that we can establish a home down there." RP p. 136 Vol. II.

She specifically agreed that Mr. Wehr would have a second weekend each month to use at his discretion. RP p. 137 Vol. II. She said the children would continue to fish with their Uncle Jack in Sekiu if they moved to Vancouver and that she would take them to Mount Hood to ski;

Q. How much is a ski ticket at Mount Hood?

A. I don't know. I haven't been there for years.

- Q. Would you be able to afford that if you're unemployed?
- A. Not if I'm unemployed. But looking to the future that's not going to –I'm not going not be unemployed very long.
- Q. So your idea about maintaining continuity with the children's outdoor experiences with their father is to replace the father with Uncle Jack?
- A. Absolutely not. RP pgs. 145/146 Vol. II.

She was asked further about the proposed parenting plan;

- Q. And if Veteran's Day fell on a Friday that would be okay, or Monday? And if it fell on a Tuesday or Thursday that would be, in your opinion, appropriate to do for a four day kind of weekend?
- A. I would believe, yes, that I could be flexible with that because it's different over a single year. And I do feel that the kids have that family thing that they love to do with their grandma and I would be flexible to work with that. RP p. 146 Vol. II.

On redirect examination, Mr. Wehr stated that Ms. Wehr smoked in front of the children,

"The kids have voiced that to me...So coming from a 9 year old and a 7 year old kind of agreeing, I mean they have no reason to lie to me as to what they feel is uncomfortable to them." RP p. 150 Vol. II.

Finally he was asked,

- Q. I just want to ask you one question. Maybe this is already obvious, but just to clarify. Um, Kelly's testified that she went to find doctors and daycare and YMCA and that kind of stuff?
- A. Uh-huh.
- Q. Are you aware that she did any of that prior to the end of August.
- A. Everything I've read on that is through her paperwork through the court. I've never been verbally told of any of these steps.
- Q. Okay. Were you told—were you ever—did she ever speak to you and tell you, we've got this setup, the kids have these friends or any of that kind of stuff?
- A. No, I've never—the names that she talks about down in Vancouver I've never heard from my kids or anyone. That's the first time I've heard of the names or that there are other children around grandma's.
- Q. Okay. And the last thing, I don't want to spend just a ton of time on this. But is there an issue with mom sort of bribing the kids with gifts for moving down?

- A. The kids have talked about a dog. And they've asked me to get a dog and I've had to allude to them that, no. I mean, we have the yard but I'm not here a lot of the week with my work. You guys are only here on the weekends. It's not fair to a dog." RP p. 151 Vol. II.

Closing argument was presented to the trial court.

ARGUMENT

ISSUE NUMBER I

Did the trial court abuse its discretion by finding that the objecting party had proven that the detrimental effects of the relocation outweighed the presumed benefits by a preponderance of the evidence?

The marriage between Kelly Wehr and Guy Wehr ended in 2005 and a parenting plan was entered in the Clallam County Superior Court in April 2005. Ms Wehr was designated as the residential parent and guardian of Garrett (now age 10) and Emily (now age 8). Under the plan Mr. Wehr had no parental restrictions, joint decision making was agreed to and he had very significant contact with the children. In the summer of 2009 Ms. Wehr wanted to move to Vancouver, Washington where her immediate family lived and she gave notice of the intended relocation to Mr. Wehr in August 2009. Mr. Wehr objected and at trial the Honorable Judge S. Brooke Taylor of the Clallam County Superior Court in a decision dated January 7, 2010 denied the request to relocate. Ms. Wehr now appeals that decision.

In 2009 Ms Wehr was working as a waitress at minimum wage and was living with family friends. RP p.105/106 Vol. II. She wanted to move to Vancouver where her mother and stepfather live in a four bedroom, three bath, triple-wide manufactured home. RP p. 107 Vol. II. Her mother would not charge any rent and, as a stay at home wife, would be available to provide child care. Her stepfather is a supervisor for the City of Vancouver and her Uncle Jack has a business in the area and offered her a secretarial job. RP p.112/113 Vol. II Ms.

Wehr and the children often visited her family in Vancouver and she began preparing to move to the area. Ms. Wehr went to Pioneer Elementary School both by herself and with the children, she talked to school staff, she arranged for the children to have a pediatrician and dentist in the area, she found sport facilities for the children that included ice hockey and gymnastics, she inquired about after school activities for the children and she encouraged her children to make friends in the area. RP p 111/112 Vol. II Mr. Wehr objected to the relocation, "It's not in my best interest." RP. p. 136

The Washington Supreme Court has discussed the various issues that surround relocation cases. *In re the Marriage of Pape*, 139 Wash. 2d 694, 989 P. 2d. 1120 (2000). Although this case was subsequently legislatively superseded much of the court's discussion about relocation issues is relevant. Dissolution of marriage inevitably involves change and children of divorce will experience changes within the family unit.

"It is unrealistic to expect that any family in contemporary American society, whether intact or divorced, will remain in one geographic location for an extended period of time...the high incidence of remarriage and the high incidence of second divorces, repeated, separate moves by each parent are coming to represent the norm." *Pape* at 707 quoting *The Relocation of Children and Custodial Parents*, 30 Fam. L.Q. 245, 246-47 (1996).

Further, in a study commissioned by Washington State Gender and Justice Commission to review RCW chapter 26.09, found

"Children of divorce do better when the well-being of the primary residential parent is high. Primary residential parents who are experiencing psychological, emotional, social, economic, or health difficulties may transfer these difficulties to their children and are

often less able to parent effectively." *Pape* at p.709 quoting *Washington State Parenting Plan Study* (June 1999).

Finally,

"In their attempts to justify changes in custody in relocation cases, judges have sometimes applied a seemingly irrebuttable presumption that frequent and continuing access to both parents lies at the core of the child's best interests. Therefore, it is important to state very clearly that the cumulative body of social science on custody *does not* support this presumption. While the psychological adjustment of the *custodial* parent has consistently been found to be related to the child's adjustment, that of the *noncustodial* has not. Neither is the amount of visiting of the noncustodial parent consistently related to the child's adjustment." *Pape* at 709 quoting *To Move or Not to Move*, 30 Fam. L.Q. 305, (1996) (emphasis in original)

Subsequent to the *Pape* decision, the Washington State legislature enacted the Child Relocation Act (hereafter CRA) in West's RCWA 26.09.405 et seq. which established eleven equally weighed statutory factors to guide the trial court in making relocation decisions. The court is directed to focus on whether the detrimental effect of the relocation outweighs the presumed benefits of the change to the child and the relocating parent. The act does away with the presumption that preservation of primary placement is the most important consideration and creates a rebuttable presumption that relocation will be allowed. West's RCWA 26.09.520

The CRA has been reviewed by this court and the state has a *parens patriae* right to protect children when parental actions or decisions seriously conflict with the physical or mental health of a child. *In re the Parentage of RFR*, 122 Wash App. 324, 93 p. 3rd 951 (2004)

“Thus, the relocation act requires proof that the decision of a presumptively fit parent to relocate with the child (thereby interfering with residential time of a parent or third party that a court has previously determined to serve the best interests of the child) will in fact be so harmful to a child as to outweigh the presumed benefits of relocation to the child and relocating parent.”
RFR at 332/333

Review of the trial judge’s decision reveals a fundamental flaw; the court premised its decision upon the belief that any disruption of the current parenting plan would be detrimental to the children. If accepted, the lower court’s decision would effectively vitiate any relocation request since a relocation request inevitably involves modification of the existing parenting plan. The lower court lost focus on the need to have articulated and rational reasons promulgated by the objecting party that would allow the court to overrule the decision of a presumptively fit parent.

A trial court’s decision is properly afforded deference and Ms. Wehr must show an abuse of discretion. Abuse occurs when the trial court’s decision is

“manifestly unreasonable or exercised on untenable grounds, or for untenable reasons.” Marriage of Kovacs, 121 Wash. 2d 795,801, 854 P. 2d 629 (1993); In re Marriage of Ricketts, 111 Wash. App 171, 43 P.3rd 1258 (2002)

A trial courts decision is “manifestly unreasonable” if it is outside the range of acceptable choices given the facts and applicable legal standards. In re the Marriage of Littlefield, 133 Wash. 2d 39, 47, 940 P. 2d 1362 (1997). When findings of fact are challenged the review encompasses a review of the record for substantial evidence.

"Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the findings." *State v Hill*, 123 Wn. 2d 641, 644, 870 P, 2d 313 (1994)

"A court necessarily abuses its discretion if its decision is based on an erroneous view of the law." *In re the Marriage of Scanlon*, 109 Wn App. 167, 174/75, 34 P.3d 877 (2001)

The trial court properly followed judicial mandate and made its decision with a specific recitation of each statutory factor. *In the Marriage of Horner*, 151 Wash. 2d 884, 896, 93 P. 3rd 124 (2004). The lower court lost its way when it subjectively judged the wisdom the relocation, when it focused on the supposed effect upon the father and when it ignored the reality that any post dissolution relocation creates change. The trial court's decision should be reversed.

In discussing the first statutory factor (Strength of Relationships), the court found that both parents are "very good parents who love them very much, and want the best for them." CP 20 Factor number two (Prior Agreements) was not a dispositive factor. It is in the court's discussion of factor number three (Relative Disruption) that the court starts to lose its way. While stating that this factor favors Ms Wehr, the court wrote, "...any significant disruption in contact with their father would have damaging impact on the children." CP 20 The court began to focus solely on preserving the current parenting plan and assumed that any change in the current plan would damage the relationship between the children and their father. There is no factual basis for this assumption in the record.

In factor number 5 (Reasons for Seeking or Opposing Relocation) the court misplaces its reliance on the testimony of Mr. Aldrich. He was never determined to be an expert witness but the court stated, " Well, I'm not going to do a certification, but I will listen to his expert opinions." RP p. 35. Mr. Aldrich only talked to Mr. Wehr, no other collateral contacts were made. RP p. 40. Mr. Aldrich's opinions were not based upon the facts of the case since he hadn't spoken to either the mother or the children and were simply speculation. Indeed, Mr. Aldrich was only hired to assess Mr. Wehr's parental fitness in case the trial court made him the residential parent and guardian. RP p. 36. The court wrote that Mr. Wehr's "...stated reasons for this opposition show good faith on his part." CP 20 The record reveals the following "good faith" objections by Mr.

Wehr:

1. When asked about the relocation, he replied, "It's not in my best interest" RP p. 136;
2. If relocation were allowed he would become a "Disneyland dad". RP p.43 Vol. II;
3. He would have increased gas expenses. RP p. 48 Vol. II.;
4. He objected because "it alienates me as a father...my visitation is restricted so much heavily." RP p. 53 Vol. II;
5. Eight uninterrupted in the summer was unacceptable, "Not when you ski in the winter. You don't ski in June." RP p. 54 Vol. II and "I guess my viewpoint is summer is summer. That doesn't mean it's God's gift to this earth." RP p. 65 Vol. II;
6. A "soft" floating weekend in addition to every month visitation is not a "cure". RP p.69 Vol. II;

7. He stated that the most detrimental effect would be exposing the children to second hand smoke if relocation was allowed. RP p.77 Vol. II;
8. Another detrimental effect is "their current lifestyle, what they know from day one is going to be blown out of the water..." RP p. 78 Vol. II;
9. He does not object to Ms Wehr wanting a better paying job but on his terms, "No, I am objecting to the fact that I have heard nothing of what type of job she has...If it's [the job offer]just going to be maybe, no. But if somebody says here's what I 'm going to pay her, here's her W-2, here's what she's going to get a year, yeah. If you want to bring those facts to this table, then I can look at these numbers and rethink things." RP pgs. 61/62 Vol. II; and
10. Finally he objected as to how he was provided the relocation information, "Yes. Since I slowed the ball down she has been able to provide that [relocation information]. But did she provide it of her own accord as an adult, no...No, I'm objecting to as an adult to an adult as in a situation of information being processed between a adult to adult there is no information." RP p. 87 Vol. II.

These are not "good faith" objections, they are objections simply because Mr. Wehr does not want anything to change.

In factor #6 (Needs of Child and Impact of Relocation) the court relies on a single 2003 study (Ex #5 RP p. 56) and the testimony of Mr. Aldrich for its conclusion,

"...the disruption caused by the proposed relocation would necessarily have a negative impact on them [the children]". CP 20

The studies authors wrote,

"Although a variety of poor outcomes are associated with parental moves they cannot establish with anything near certainty that the moves are a contributing cause." RP pgs.103/104

Further they wrote,

"Our data cannot establish with certainty that moves cause children substantial harm." RP pgs. 103/104.

When contrasted with the persuasive studies cited in the *Pape* case, this study is a very weak reed upon which to support the court's conclusions. Mr. Aldrich characterized children as "victims of divorce (Rp. P.105) and that children from divorce are twice as likely to be involved with drugs and sex and twice as likely to be unable to form intimate relationships (Rp. Pgs. 54/55) but knew nothing about Garrett and Emily or the relocation. When Mr. Aldrich was apprised of the efforts Ms. Wehr had done for the relocation, he stated

"As you present it she's done everything that she knows how to do it sounds like and she's covered all the bases." RP p. 96

However, like the trial court, he opposed any change in the parenting plan,

"I believe that children are going to be negatively impacted to be uprooted from their community they've been in since birth" RP p. 97

It is in factor #7 (Needs of Child and Impact of Relocation) that the court clearly veers from the objective evidence and engages in conjecture. While acknowledging the "excellent job" Ms. Wehr had done in laying a foundation for the relocation, the court goes on to find that

"...this new situation is [not] in any way better than the children's current situation." CP 20

Ms Wehr testified that she was currently unemployed and living with a friend.

Vancouver offered a place to live, a family caregiver, employment through family, and increased opportunities for the children. The CRA does not direct the

court to seriously consider allowing the relocation only when the relocating parent proves that she is required to move, rather the burden is on the objecting party to prove the detrimental effects outweigh the benefits. West's RCWA 26.09.520, *In re the Marriage of Momb*, 132 Wash. App 70, 78, 130 P.2d 406 (2006)

The court goes on to further conjecture; had she decided not to relocate, "...she would still have her own residence to live in with the children and would still be employed and earning an income, which, when supplemented by \$785 per month in child support, would be sufficient to support the children." CP 20.

This particular decision of where to live should be made by the custodial parent who may no longer desire to work at minimum wage and would prefer living with her immediate family and who would prefer greater job opportunities as she sees it.

The court further writes,

"No amount of additional summer visitation can take the place of this loss. The children would lose the ability to ski every weekend when Hurricane Ridge is open, fish with their father on those few days when the season is open and conditions are good." CP

The trial court improperly shifts the burden from the objecting party to Ms. Wehr to show the wisdom and the need for the relocation. In other words, to preserve the ability to spontaneously enjoy outdoor activities with their father, the lower court eviscerates Ms. Wehr's previous four years of being the primary caretaker for the children and effectively ignores the presumption that she is acting in the children's best interests.

In factor #8 (Alternative Arrangements) the full misapplication of the CRA is found. Ms Wehr proposed a parenting plan which gave the father extended weekend visitation virtually every month, split winter, spring and Thanksgiving holidays, added a 'soft' weekend every month and added eight uninterrupted weeks in the summer. RP p. 116 Vol. II. Both the current plan and the proposed plan have virtually the same amount of total time allocated to the father. This was not good enough for the father or the trial court. First, for the trial court the eight weeks "looks good on paper" but since the father only has two weeks yearly vacation this means

"...he would have to work during more than six weeks of the summer visitation." CP 20

Second, the court objected to the amount of "dead time" and gas expenses that father would consume while traveling to pick the children up in Olympia. Third, the court concludes that the proposed parenting plan would result in, "... a significantly diminished relationship with his children." CP 20. No evidence or testimony was adduced to support this conclusion.

In factor #9 (Alternatives to Relocation) the court believes that

"...the most obvious alternative to relocation is for the mother to stay in Clallam County." CP 20

Mr. Wehr agrees, when asked if he believed it was in the children's best interests that Ms. Wehr remain the residential parent and guardian, he replied, "Well, in Clallam County, yes." RP p. 56 Vol. II

Finally in factor #10 (Financial Impact) the court dismisses the belief that Ms. Wehr could gain employment in Vancouver through the job offer from her Uncle or the connections her step father has with the City of Vancouver as pure speculation. Further the court even doubts that she "...is as welcome in this new environment as she indicates." CP 20 The court ignores Ms. Wehr's clear and uncontroverted testimony and engages in the very speculation it accuses of Ms. Wehr. There is no testimony to support the court's conclusions. Indeed, the court used Mr. Wehr's general opposition to the move and failed to consider the obvious benefits to the family; no rent, a job and the children living with their grandmother.

The court cited *In re the Marriage of Grigsby*, 112 Wn. App. 1, 57 P. 3rd 1166 (2002) for support and wrote,

"The facts in Grigsby were very similar to the facts in this case..."

CP p. 8

In Grigsby:

1. The mother wanted to relocate from Washington to Dallas Texas (herein Ms. Wehr wants to move from Sequim to Vancouver Washington);
2. The children spent equal time with both parents (here the children spend the most time with mother);
3. Father was more involved in children's school and activities (here the mother is more involved);
4. The children had never been to Dallas and had no ties to Dallas (here the children will live with their grandmother in a city they have often visited);

5. The parties had an "equal residential agreement" (here there is only the parenting plan);
6. The children were "inconsolable when away from their father" (no such evidence herein).

Thus, other than the conclusion that relocation was not allowed, it is difficult to understand the lower court's reliance on this decision.

The trial court's decision, while afforded deference, must be premised on tenable grounds. Mr. Wehr must present evidence to overcome the presumption of allowing the relocation and show that the detrimental effects so outweigh the benefits that the State will negate the decision of a presumptively fit parent. Mr. Wehr presented evidence that he didn't want anything to change, that he wanted to be able to ski or fish with the children when the conditions were favorable, that any change would harm his relationship with the children and finally he stated his real objection-control,

"Because right now she is stuck living at a friend's house. She doesn't have all the abilities of a house and a home and a job. She literally has more time to be focused on calling me, telling me what's going on, because she's not working full time. She is literally in a stagnant position because of her actions three months ago and it unfortunately has benefited to our communication. But prior to this when she had a house and a boyfriend and all this stuff, it-no."
RP p. 74 Vol. II

The trial court solely focused on preserving the current parenting plan and characterized any change in the plan as seriously damaging the relationship between Mr. Wehr and his children. Ms. Wehr proposed a new parenting plan that was flexible, gave Mr. Wehr significant time with the children, split the travel expenses, and had the children with their father for eight uninterrupted weeks in

the summer. Further, she sought to relocate to Vancouver to lower her expenses, to increase her earnings ability and to be closer to her family. She contacted the school the children would attend, encouraged her children to make school friends in the Vancouver area and looked into sport activities. Other than simple preservation of the current plan, Mr. Wehr could offer no other objections to the move, only that he did not want it to happen.

While the trial court's decision is necessarily subjective and it is not the task of this court to reweigh evidence, the trial court must be able to specifically state the facts that demonstrate the detrimental effects of the move which outweigh the presumed benefits. *In Re: the Marriage of Kovacs*, 121 W.2d 795, 810, 854 P.2d 629 (1993). Other than general testimony that any change in the existing parenting plan would necessarily be detrimental to Mr. Wehr's relationship with his children, there was no other basis for the decision. A decision based upon such a tenuous fact pattern and stilted view of the CRA is not supported by substantial evidence.

ISSUE NUMBER II

Is the correct evidentiary standard for vitiating a fit parent's desire to relocate by a preponderance of the evidence or is the correct standard clear, cogent and convincing evidence?

Ms. Wehr has been Garrett's and Emily's residential parent and guardian since the parties divorced in 2005. While Mr. Wehr has significant weekend visitation with the children, Ms. Wehr is their primary caregiver. RP pgs. 120/121 Vol. II. The CRA creates a rebuttable presumption that a relocation request will be approved premised upon the determination that a presumptively fit parent acts in the best interests of their children. The lower court based its decision that a mere preponderance of evidence was sufficient to overcome the presumption. In light of the plain statutory language of the CRA and in considering recent Washington State Supreme Court rulings and other Washington case law, the standard to overcome the presumption is clear, cogent and convincing evidence.

"Rather than contravening the traditional presumption that a fit parent will act in the best interests of the child, as did the statutes at issue in *Troxel* and *Smith*, the relocation statute *establishes* a rebuttable presumption that the relocation of a child will be allowed. Thus, the Act both incorporates and gives substantial weight to the traditional presumption that a fit parent will act in the best interests of her child. The burden of overcoming that presumption is on the objecting party, who can only prevail by demonstrating that the detrimental effect of the relocation upon the child outweighs the benefit of the change to the child and the relocating parent."

In re the Custody of Osborne, 119 Wash. App. 133, 144, 79 P.3d 465 (2003)

(emphasis in decision), see also *In re the Marriage of Momb*, 132 Wash. App. 70,

79 130 P.3d 406 (2006); In re the Parentage of R.F.R. 122 Wash. App. 324, 333, 93 P.3d 951 (2004); In the Matter of the Marriage of Horner, 151 Wash. 2d 884, 895, 93 P.3d 124 (2004).

It is the function of an appellate court to determine questions of law. Union Local 1296 v Kennewick at 161/162. The interpretation of a statute is a question of law that is reviewed de novo. Locke v City of Seattle, 162 Wash. 2d 474, 480, 172 P 3d 705, (2007) In reviewing a statute it is interpreted according to its plain language and to give effect to the intent of the legislature. W.R.P. Lake Union Ltd. P'ship v Exterior Servs. Inc. 85 Wash App. 744, 749, 934 P. 2d 722 (1997)

Proof by a preponderance of the evidence may be defined as proof that the existence of the contested fact is more probable than its nonexistence. 2 McCormick on Evid Sec. 339 (6th ed.) Clear, cogent and convincing evidence may be defined as proof that a contested fact is highly probable. State Farm Fire v Huynh, 92 Wash. App. 454, 465/6, 148 P.3d 1029 (2006) See also, In re Dependency of K.S. C., 137 Wash. 2d 918, 925, 976 P.2d 113 (1999)

The Washington Supreme Court has recently discussed the level of proof necessary to protect the property interests of litigants in analogous cases. In Nguyen v Department of Health, 144 Wash. 2d 516, 29 P.3d 689 (2001), the court reversed the revocation of a medical license because the agency revoked the license under a preponderance of evidence standard. The property interest protected in Nguyen was the physician's professional license. In Ongom v

State, 159 Wash. 2d. 132, 148 P.3d 1029 (2006), the court reversed the suspension of a nursing assistant's license where the agency relied on the preponderance of the evidence standard and ruled that the clear, cogent and convincing evidence standard applies. The decision was premised upon the license property interest in Ongom's profession of a registered nursing assistant. In a recent case, *In the Matter of the Estate of Borghi*, 167 Wash. 2d 480, 219 P.3d 932 (2010) the Supreme Court made a relevant ruling. The character of property as separate or community property is determined at the date of acquisition. Once a presumption is made as to the characterization of property as either community or separate, the burden to overcome the presumption is by clear, cogent and convincing evidence. *Borghi*, hdn. 7 and at 484/485. Here, the CRA has specifically established the presumption that a fit parent will act in their child's best interests. Certainly the fundamental interest a parent has in raising their child without state interference is more profound than the characterization of property as separate or community property.

Ms. Wehr testified that she was the primary caretaker of the children and she detailed her many efforts to make the transition smooth for the children which was characterized by the trial judge as an "excellent job." RP pgs. 104/108. Mr. Wehr presented the testimony of Mr. Aldrich who was never qualified as an expert, who never meet the children or the mother and was hired by Mr. Wehr to, "...look at his capacity for parenting his two children..." RP p. 36. Mr. Wehr presented tenuous and nebulous objections to the relocation which

centered largely on the disruption of the established parenting plan. He objected to becoming a "Disneyland" dad and objected to the expenses of having to pick the children up in Olympia.

The evidentiary rationale for the court is to make a determination that there exists sufficient detrimental facts that will outweigh the presumed benefits of the move and that the court then has the power to negate the decision of a presumptively fit parent. Assuming arguendo that the lower court had an evidentiary basis to find in Mr. Wehr's favor by a preponderance of evidence, there certainly is not the quantum of evidence to find in Mr. Wehr's favor by clear, cogent and convincing evidence.

This court has spoken on this issue.

"The due process clause of the Fourteenth Amendment "guarantees more than fair process"...The clause "includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'...Parents have a fundamental liberty interest in the care and custody of their minor children." R.F.R. at 331/332

"Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."

Troxell v Granville, 530 US 57, 68/69, 120 S. Ct. 2054, 147 L.Ed. 49 (2000) In order to avoid the constitutional issues raised in Troxell and to specifically overrule the decisions in Littlefield and Pape, the CRA was crafted to specifically incorporate the traditional presumption that a fit parent will act in her child's best interests. In order to overcome that presumption and further, to give the

presumption the due weight it deserves, Mr. Wehr must be required to provide clear, cogent and convincing evidence of the detrimental effects of the relocation on the children. With no testimony from any witnesses about specific facts documenting the detrimental effects of the relocation and with presenting a witness who knew nothing about the children or their lives and as further contrasted to the Ms. Wehr's testimony, the lower court's decision was untenable and should be reversed.

CONCLUSION

Ms. Wehr wanted to relocate to Vancouver, Washington and made an extraordinary effort to ease the transition for her children. She recognized the need to modify the existing parenting plan and proposed a very open and liberal plan that continued significant contact between the children and their father. Absent strong evidence specifically showing the individual detrimental effect of the relocation on the parties' children, the trial court erred in denying the move. Ms. Wehr respectfully requests the lower court's decision be overruled, the case remanded to establish a new parenting plan, and she and the children be allowed to move to Vancouver.

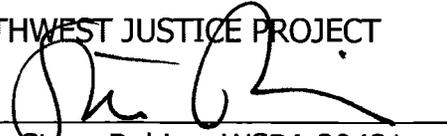
REQUEST FOR REASONABLE ATTORNEY FEES

Counsel for Ms. Wehr, pursuant to RAP 18.1, respectfully requests an award for reasonable attorney fees and appellate costs. Ms. Wehr qualified for services by the Northwest Justice Project (NJP), a state wide legal aid office that represents low income clients in civil matters. NJP is a recipient of federal funds from the Legal Services Corporation (LSC). Effective December 16, 2009, LSC suspended enforcement of 45 C.F.R. sec. 1642.3, which restricts NJP's ability to claim, or collect and retain attorney fees. Effective March 15, 2010 LSC repealed its regulatory prohibition on the claiming and collection of attorney fees pursuant to State law permitting the awarding of such fees. 45 C.F.R. parts 1609, 1610 and 1642.

RCW 26.09.140 states, "Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney fees in addition to statutory costs." NJP has incurred statutory costs, transcript costs and attorney costs in this action which are very significant for a legal services program. Thus a request for costs is respectfully submitted to this court.

RESPECTFULLY SUBMITTED this 2nd day of September, 2010.

NORTHWEST JUSTICE PROJECT

By: 

Steve Robins, WSBA 29431
Attorney for Appellant
816 East 8th Street
Port Angeles, WA 98362
360-452-9137

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

IN THE COURT OF APPEALS DIVISION II
STATE OF WASHINGTON

In re the Marriage of:

KELLY WEHR

Appellant

vs.

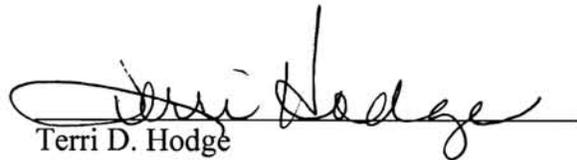
GUY WEHR

Respondent.

No. 40307-2-II

CONFIRMATION OF SERVICE

The undersigned hereby certifies that on September 2nd, 2010, a copy of Plaintiff/Appellant's Brief was personally hand delivered to Attorney for Respondent, Mark K. Baumann's office in Port Angeles, Washington 98362.


Terri D. Hodge

APPENDIX

JAN 08 2010

NJP-PA

FILED
CLALLAM COUNTY
JAN - 7 2010
2:15 p.m.
BARBARA CHRISTENSEN, Clerk

SUPERIOR COURT OF WASHINGTON
COUNTY OF JUVENILE

In re the Marriage of:)
)
KELLY WEHR,)
Petitioner,)
and)
GUY WEHR,)
Respondent.)

NO. 04-3-00274-1

FULL MEMORANDUM
OPINION AND DECISION

I. INTRODUCTION:

This Court has previously announced its decision in a Memorandum Opinion issued on December 22, 2009, so that the parties would have time to adjust and react during the Christmas school vacation period. The Court has determined, based upon a preponderance of the evidence presented at trial, that the statutory presumption that a proposed relocation will be permitted has been rebutted by the evidence presented by the Respondent/Father. Further analysis is set forth below.

II. ANALYSIS:

RCW 26.09.520 provides that,

“There is a rebuttable presumption that the intended relocation of the child will be permitted. A person entitled to object to the intended relocation of the child may rebut the presumption by demonstrating that the detrimental effect of the relocation outweighs the benefit of the change of the child and the relocating person, based upon the following factors.”

A copy of the statute is attached hereto, and incorporated by reference herein as if fully set forth. The “relocating person” in this case is Kelly Wehr, the

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Petitioner/Mother, and the children involved are GW, age 9, and EW, age 7. The Court's analysis of the statutory factors in this case is as follows:

(1) Strength of Relationships.

This is not a dispositive factor in this case. As the Court mentioned at the start of the trial, after reviewing the file, and at the conclusion of the trial, after having heard all of the evidence, these children are blessed with two very good parents who love them very much, and want the best for them. The mother has been the primary caregiver for these children since birth, and by all accounts is an excellent parent. While less involved during their early years, the father's parenting role has grown and matured. As he testified, "The children have become my life since the divorce", and there was very strong evidence to support that. By all accounts, he, too, is an excellent parent.

In addition to enjoying strong relationships with both parents, these children also have strong relationships with extended family, including their paternal grandmother in Port Angeles, their paternal aunt in Burien, who visits the children at least monthly, and their maternal grandmother and her husband in Vancouver, and their uncle, Jack Frost, in Vancouver. These are all positive relationships in the life of these children, although the extended relationships with their aunt and paternal grandmother appear to be the most influential, due to the more consistent contact and involvement in their lives.

(2) Prior Agreements of the Parties.

This is not a dispositive factor in this case. The only "prior agreement" of any significance is the current Parenting Plan, whereby the mother is the primary residential parent, and the father has liberal and extensive visitation. The father testified that he has never contested the right of the mother to be the primary residential parent, and would not do so now if the status quo is maintained.

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(3) Relative Disruption.

This factor favors the mother, although the father's attention to his children since the dissolution makes this a closer call than one would normally expect. Clearly, disrupting the contact between these children and their mother, who has been their primary care provider since birth, would be more detrimental to these children than disrupting the contact between the children and their father, who is the party objecting to the relocation. This is a father who has never missed a support payment, has never missed an hour of visitation available to him, and has built a home in Sequim designed around the needs of his children. While he cannot possibly enjoy the same bond with these children that their mother enjoys and has earned, any significant disruption in contact with their father would have a damaging impact on the children.

(4) Statutory Limitations.

Does not apply to this case.

(5) Reasons for Seeking or Opposing Relocation.

The Court cannot find that the proposed relocation is made in bad faith, even though it appears to be somewhat ill-conceived and not thought through carefully. The good faith of the mother is demonstrated by the extensive groundwork which she has done in Clark County in preparing the way for her and the children to move, and her honest belief that she can build a better life for herself and the children in that area, particularly from a financial standpoint. Although the primary motivation seems to be the mother's desire to "start a new life" in a new community, after the breakup of a long-term romantic relationship, which may be a positive thing for her, the Court is mindful of the testimony of Michael Aldrich that what is good for the parent does not necessarily translate into something good for the children. What in fact is being proposed is substituting one case of housing uncertainty and unemployment for another.

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Although the father expresses great concern about how the proposed move would impact him personally, he also honestly believes that the move would not be in the best interests of his children, and his stated reasons for this opposition definitely show good faith on his part.

(6) Needs of Child and Impact of Relocation or its Prevention.

The children are ages 9 and 7, have lived in Clallam County all of their lives, and are both enrolled at Greywolf Elementary School in Sequim. The testimony indicates that they are age-appropriate in their physical, emotional and educational development, and enjoy a stable and secure life under the current Parenting Plan. The children do not have any “special needs” which would be a factor in this case. They are doing very well under the status quo, and the disruption caused by the proposed relocation would necessarily have a negative impact on them, at least for the short term. The mother’s plan to move in with her mother and stepfather in a four bedroom mobile home means that inevitably there would be a second, disruptive move for the children in the future as well. The finding that these moves will have a negative impact on the children is supported by the testimony of Mr. Aldrich, who has a master’s in psychology, with an emphasis on children and adolescents and was employed as a CPS worker for six years prior to going into private practice. His opinions are bolstered by the article entitled “Relocation of Children After Divorce and Children’s Best Interests: New Evidence and Legal Considerations” published in the Journal of Family Psychology in 2003.

(7) Relative Quality of Life, Resources and Opportunities for the Children.

As previously mentioned, the mother has done an excellent job in laying a foundation for moving the children to Clark County, and it appears that there are many resources available to them in that area, including a residence where they can each have their own bedroom, a good school nearby, a pediatrician taking the new patient’s, good

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after-school programs and supportive adults. While it appears that this planning occurred only after the decision to move had been made, the mother is to be applauded for her extensive efforts in this regard, demonstrating a real concern for the well-being of her children.

Unfortunately, it cannot be said that this new situation is in any way better than the children's current situation. The mother and children currently reside with a friend and her family in Sequim, and will be residing with her mother and stepfather in Vancouver. The mother is currently unemployed in Sequim, and will be unemployed in Vancouver. Although she insists there are more job opportunity to her in Clark County, or across the river in Portland, there is no evidence to support this opinion, and the research done by the father shows that the unemployment rate in Clallam County is 9%, as opposed to 13% in Clark County. The mother has elected to be without a job and without a home in this county, by prematurely giving notice to both her employer and her landlord. Presumably, had she not done so, she would still have her own residence to live in with the children, and would still be employed, and earning an income, which, when supplemented by \$785 per month in child support, would be sufficient to support her and the children.

While the proposed relocation plan seems to substitute one challenging situation for another, the current situation and Parenting Plan at least provide consistent and positive contact with the father who is completely devoted to providing a quality life for the children in Sequim. To this end, he has taken a lower-paying job with the City of Port Angeles, in order to be home every day, and have consistent hours and benefits. He lived in a trailer for three years in order to save enough money to build a home designed around the needs of the children when they are with him, and he is heavily involved in their school and activities.

If the relocation were approved, the father's ability to enjoy any school activities, sports or other weekday activities would be completely lost, to the great detriment of both him and the children. The only way he could attend a weekday

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function in Vancouver would be to take a day of vacation day and make an eight-hour roundtrip, as opposed to the current situation where, with a very understanding supervisor at work, he can attend everything the children are involved in locally. No amount of additional summer visitation can take the place of this loss. The children would also lose the ability to ski every weekend when Hurricane Ridge is open, fish with their father on those few days when the season is open and conditions are good, not to mention the consistent contact with their paternal grandmother and aunt which they have enjoyed since birth.

(8) Alternative Arrangements Available for Father.

The mother proposes a modified Parenting Plan in what the Court finds is a good faith attempt to minimize the negative impact on the children and their father, the primary features of which are adding a “soft weekend” each month, at the discretion of the father, and eight weeks of visitation in the summer. Even with these changes, the net effect is to reduce the visitation days available to the father, in addition to the negative impacts noted in section (7) above. This analysis starts with the finding that the father’s contact with the children is positive and beneficial, which does not seem to be contested. Two factors are important. First, while eight weeks of visitation during the summer vacation period looks good on paper, the reality is that the father has only two weeks of paid vacation, some of which would probably have to be used for him to attend important events involving the children in Vancouver, with the net result that he would have to work during more than six weeks of the summer visitation, placing the children either with their grandmother or some kind of childcare facility. Second, each visitation would involve a five hour roundtrip to Olympia at the start, and a five hour roundtrip at the end, during half of which time the father would be driving an empty car and incurring travel expenses which are not currently part of his budget. The same would apply to any trip to Vancouver, for which the expense and the “dead time” would be doubled.

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While the mother's good faith proposal for a modified Parenting Plan would partially ameliorate the impacts of the relocation, it has the unfortunate characteristic of substituting quantity for quality, leaving the father with a significantly diminished relationship with his children.

(9) Available Alternatives to Relocation.

The most obvious alternative to relocation is for the mother to stay in Clallam County and use her local contacts and years of work experience to obtain a suitable job and housing for her and the children. Having the father follow the children to Vancouver and relocate there makes no sense whatsoever, in light of the fact that he has an excellent job with benefits here in this county, and has built a home for himself and the children in Sequim.

(10) Financial Impact and Logistics.

The proposed relocation substitutes one situation of financial insecurity for another, with the hope that the mother can find a job with good pay and benefits in Clark County, which would eventually allow her to move out of her mother's home into one of her own, all of which is purely speculative. Other than the mother's own testimony, no evidence whatsoever was presented to indicate that these hopes are realistic or even that she is as welcome in this new environment as she indicates. From the father's point of view, the relocation would increase his expenses for exercising visitation, while diminishing his contact with his children.

(11) Timing After a Temporary Order.

Does not apply to this case.

To these findings should be added and incorporated herein, the more general "findings" set forth on pages 2 and 3 of the Summary of Decision previously filed in

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this matter. As the Court of Appeals stated in In re Marriage of Grigsby, 112 Wn. App. 1, 14, 57 P.3d 1166 (2002), "The decision of whether the proposed relocation would be detrimental to the children is inherently a subjective one, given the statutory scheme." The facts in Grigsby were very similar to the facts in this case, and the Court of Appeals upheld the trial court's decision to disapprove the proposed relocation by the mother. As in Grigsby, this Court hereby finds that the detrimental effects of the relocation would outweigh the benefits of change to the children and their father, and it is the opinion of this Court that the findings made herein are all supported by substantial evidence in the record.

DATED this 7th day of JAN., 2010.

Respectfully submitted,



S. BROOKE TAYLOR
JUDGE

26.09.520

Title 26 DOMESTIC RELATIONS

Chapter 26.09 DISSOLUTION OF MARRIAGE -- LEGAL SEPARATION

26.09.520 Basis for determination.

The person proposing to relocate with the child shall provide his or her reasons for the intended relocation. There is a rebuttable presumption that the intended relocation of the child will be permitted. A person entitled to object to the intended relocation of the child may rebut the presumption by demonstrating that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person, based upon the following factors. The factors listed in this section are not weighted. No inference is to be drawn from the order in which the following factors are listed:

- (1) The relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent, siblings, and other significant persons in the child's life;
- (2) Prior agreements of the parties;
- (3) Whether disrupting the contact between the child and the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation;
- (4) Whether either parent or a person entitled to residential time with the child is subject to limitations under RCW 26.09.191;
- (5) The reasons of each person for seeking or opposing the relocation and the good faith of each of the parties in requesting or opposing the relocation;
- (6) The age, developmental stage, and needs of the child, and the likely impact the relocation or its prevention will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child;
- (7) The quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations;
- (8) The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent;
- (9) The alternatives to relocation and whether it is feasible and desirable for the other party to relocate also;
- (10) The financial impact and logistics of the relocation or its prevention; and
- (11) For a temporary order, the amount of time before a final decision can be made at trial.

[2000 c 21 § 14.]

NOTES:

Intent -- Captions not law -- 2000 c 21: See notes following RCW 26.09.405.

COPY RECEIVED

JAN 08 2010

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FILED
CLALLAM COUNTY
JAN - 7 2010
2:15 P.M. MF
BARBARA CHRISTENSEN, Clerk

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

| | | | |
|----|------------------------|---|------------------------|
| 6 | In re the Marriage of: |) | |
| 7 | KELLY WEHR, |) | |
| 8 | |) | NO. 04-3-00274-1 |
| 9 | and |) | DECLARATION OF MAILING |
| 10 | GUY WEHR, |) | |
| 11 | |) | DCLRM |
| | Respondent. |) | |

I, the undersigned, do certify the following:

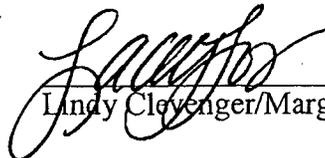
I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled proceeding and competent to be a witness therein.

This day I placed in the U.S. Mail copies of the **FULL MEMORANDUM OPINION AND DECISION, TITLE 26 DOMESTIC RELATIONS RCW 26.09.520, and DECLARATION OF MAILING**, 1st Class Postage affixed, and addressed to:

Steve Robins
Northwest Justice Project
816 E. 8th Street
Port Angeles, WA 98362

Mark K. Baumann
Attorney at Law
PO Box 2088
Port Angeles, WA 98362

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Signed and dated this 7th day of January, 2010, at Port Angeles, Washington.


Lindy Clayenger/Margaret Strohmeyer/Lacey Fors

DECLARATION OF MAILING
JAUSERS\BTAYLOR\2010\MEMO OPIN\WEHR5.DOC

A-10

S. BROOKE TAYLOR
JUDGE

Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

SCANNED-1

C

West's Revised Code of Washington Annotated Currentness

Title 26. Domestic Relations (Refs & Annos)

Chapter 26.09. Dissolution of Marriage--Legal Separation (Refs & Annos)

Notice Requirements and Standards for Parental Relocation

→ 26.09.520. Basis for determination

The person proposing to relocate with the child shall provide his or her reasons for the intended relocation. There is a rebuttable presumption that the intended relocation of the child will be permitted. A person entitled to object to the intended relocation of the child may rebut the presumption by demonstrating that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person, based upon the following factors. The factors listed in this section are not weighted. No inference is to be drawn from the order in which the following factors are listed:

- (1) The relative strength, nature, quality, extent of involvement, and stability of the child's relationship with each parent, siblings, and other significant persons in the child's life;
- (2) Prior agreements of the parties;
- (3) Whether disrupting the contact between the child and the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation;
- (4) Whether either parent or a person entitled to residential time with the child is subject to limitations under RCW 26.09.191;
- (5) The reasons of each person for seeking or opposing the relocation and the good faith of each of the parties in requesting or opposing the relocation;
- (6) The age, developmental stage, and needs of the child, and the likely impact the relocation or its prevention will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child;
- (7) The quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations;
- (8) The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent;
- (9) The alternatives to relocation and whether it is feasible and desirable for the other party to relocate also;
- (10) The financial impact and logistics of the relocation or its prevention; and
- (11) For a temporary order, the amount of time before a final decision can be made at trial.

McCormick on Evidence
Current through the 2009 Update

Kenneth S. Broun[a0]

Title
12. Burden of Proof and Presumptions
Chapter
36. The Burdens of Proof and Presumptions[1]**§ 339. Satisfying the burden of persuasion: (a) the measure of persuasion in civil cases generally[1]**

According to the customary formulas a party who has the burden of persuasion of a fact must prove it in criminal prosecutions “beyond a reasonable doubt,”[2] in certain exceptional controversies in civil cases, “by clear, strong and convincing evidence,”[3] but on the general run of issues in civil cases “by a preponderance of evidence.”[4] The “reasonable doubt” formula points to what we are really concerned with, the state of the jury’s mind, whereas the other two divert attention to the evidence, which is a step removed, being the instrument by which the jury’s mind is influenced.[5] These latter phrases, consequently, are awkward vehicles for expressing the degree of the jury’s belief.[6]

What is the most acceptable meaning of the phrase, proof by a preponderance, or greater weight, of the evidence? Certainly the phrase does not mean simple volume of evidence or number of witnesses.[7] One definition is that evidence preponderates when it is more convincing to the trier than the opposing evidence. This is a simple commonsense explanation which will be understood by jurors and could hardly be misleading in the ordinary case. It may be objected, however, that it is misleading in a situation where, though one side’s evidence is more convincing than the other’s, the jury is still left in doubt as to the truth of the matter.[8] Compelling a decision in favor of a party who has introduced evidence that is simply better than that of his adversary would not be objectionable if we hypothesize jurors who bring none of their own experience to the trial and who thus view the evidence in a vacuum. Of course, no such case could exist.[9] We expect and encourage jurors to use their own experience to help them reach a decision, particularly in judging the credibility of witnesses.[10] That experience may tell them, for example, that although the plaintiff has introduced evidence and the defendant has offered nothing in opposition, it is still unlikely that the events occurred as contended by the plaintiff. Thus, it is entirely consistent for a court to hold that a party’s evidence is sufficient to withstand a motion for directed verdict and yet to uphold a verdict for its adversary.[11]

The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence.[12] Thus the preponderance of evidence becomes the trier’s belief in the preponderance of probability. Some courts have boldly accepted this view.[13]

Other courts have been shocked at the suggestion that a verdict, a truth-finding, should be based on nothing stronger than an estimate of probabilities. They require that the trier must have an “actual belief” in, or be “convinced of” the truth of the fact by this “preponderance of evidence.”[14] Does this mean that they must believe that it is certainly true? Hardly, since it is apparent that an investigation by fallible people based upon the testimony of other people, with all their defects of veracity, memory, and communication, cannot yield certainty. Does it mean a kind of mystical “hunch” that the fact must be true? This would hardly be a rational requirement. What it would

EPA APPROVED ALBUQUERQUE/BERNALILLO COUNTY, NM REGULATIONS

| State citation | Title/subject | State approval/ effective date | EPA approval date | Explanation |
|--|------------------------|--------------------------------|-------------------|--|
| New Mexico Administrative Code (NMAC) Title 20—Environment Protection, Chapter 11—Albuquerque/Bernalillo County Air Quality Control Board | | | | |
| Part 102 (20.11.102 NMAC) | Oxygenated Fuels | 12/11/2005 | 2/11/2010 | [Insert FR page number where document begins]. |

[FR Doc. 2010-2792 Filed 2-10-10; 8:45 am]
BILLING CODE 6560-50-P

LEGAL SERVICES CORPORATION

45 CFR Parts 1609, 1610, and 1642

Attorneys' Fees; Fee-Generating Cases; Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity

AGENCY: Legal Services Corporation.

ACTION: Interim final rule and request for comments.

SUMMARY: LSC is repealing its regulatory prohibition on the claiming of, and the collection and retention of attorneys' fees pursuant to Federal and State law permitting or requiring the awarding of such fees. This action is taken in accordance with the elimination on the statutory prohibition on attorneys' fees in LSC's FY 2010 appropriation legislation. LSC is also moving provisions on accounting for and use of attorneys' fees and acceptance of reimbursements from clients from Part 1642 (which is being eliminated) to Part 1609 of LSC's regulations. LSC is also making technical changes to Part 1609 and Part 1610 of its regulations to remove cross references to the obsolete statutory and regulatory citations.

DATES: This Interim Final Rule is effective March 15, 2010. Comments on this Interim Final Rule are due on March 15, 2010.

ADDRESSES: Written comments may be submitted by mail, fax or e-mail to Mattie Cohan, Senior Assistant General Counsel, Office of Legal Affairs, Legal Services Corporation, 3333 K Street, NW., Washington, DC 20007; 202-295-1624 (ph); 202-337-6519 (fax); mcohan@lsc.gov.

FOR FURTHER INFORMATION CONTACT: Mattie Cohan, Senior Assistant General Counsel, 202-295-1624 (ph); mcohan@lsc.gov.

SUPPLEMENTARY INFORMATION:

Background

LSC's FY 1996 appropriation legislation provided that none of the funds appropriated in that Act could be used to provide financial assistance to any person or entity (which may be referred to in this section as a recipient) that claims (or whose employee claims), or collects and retains, attorneys' fees pursuant to any Federal or State law permitting or requiring the awarding of such fees. Section 504(a)(13), Public Law 104-134, 110 Stat. 1321 (April 26, 1996). Since appropriations legislation expires with the end of the Fiscal Year to which it applies, for the statutory restriction on attorneys' fees to remain in place by statute, it needed to be, and was, carried forth in each subsequent appropriation law by reference. See, e.g., Consolidated Appropriations Act, 2009, Public Law 111-8, 123 Stat. 524 (March 11, 2009).

LSC adopted regulations found in 1996 and 1997 which implemented the statutory attorneys' fees restriction. 45 CFR part 1642; 61 FR 45762 (August 29, 1996); 62 FR 25862 (May 12, 1997). The attorneys' fees regulation restates the basic prohibition on claiming or collecting and retaining attorneys' fees, providing that except as permitted by § 1642.4 (providing exceptions cases filed prior to the prohibition and for cases undertaken by private attorneys providing pro bono services in connection with a recipient's private attorney involvement program), no recipient or employee of a recipient may claim, or collect and retain attorneys' fees in any case undertaken on behalf of a client of the recipient. 46 CFR 1642.3. The regulation provides further

guidance to recipients by, among other things, providing a regulatory definition of attorneys' fees; setting forth rules for the applicability of the restriction to private attorneys providing legal assistance to a recipient's private attorney involvement program; and providing express authority to recipients to accept reimbursements of costs from a client. The regulation also sets forth rules for the accounting for and use of those attorneys' fees which recipients are not prohibited from claiming, collecting or retaining.

On December 16, 2009 President Obama signed the Consolidated Appropriations Act of 2010 into law. Public Law 111-117. This act provides LSC's appropriation for FY 2010. Like its predecessors, this law incorporates the various restrictions first imposed by the FY 1996 legislation by reference. However, section 533 of that same law also provides that Section 504(a) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1996 (as contained in Pub. L. 104-134) is amended by striking paragraph (13). Taken together, these provisions serve to incorporate by reference all of the restrictions in section 504 of the FY 1996 law, except for paragraph (a)(13), which contained the restriction on attorneys' fees. As such, there is no current statutory restriction on LSC providing the money FY 2010 appropriated to it to any recipient which claims, or collects and retains attorneys' fees.

The current law lifts the statutory restriction, but does not affirmatively provide recipients the right to claim or collect and retain attorneys' fees, nor does it prohibit LSC from restricting a recipient's ability to claim or collect and retain attorneys' fees. As such, in accordance with LSC inherent regulatory authority, the regulation

remains in place notwithstanding the lifting of the statutory restriction unless and until repealed.

Repeal of Part 1642

At its Board Meeting on January 30, 2010, the LSC Board of Director's determined that retaining the regulatory restriction is no longer either necessary or appropriate. LSC's determination reflects a number of considerations. First, LSC notes that the lifting of the restriction indicates that Congress itself has had a change of heart regarding this restriction. Although Congress did not prohibit LSC from retaining the restriction, the fact that Congress chose not to reimpose this particular restriction (and no others) does indicate that support for this restriction has waned and that the policy arguments in support of the original restriction are no longer reflective of the will of Congress. Rather, the legislative history suggests that Congress chose not to reimpose the attorneys' fees restriction in express recognition of the fact that the restriction imposes several significant burdens on recipient. *See*, H. Rpt. 111-149 at p. 163; Transcript of Hearing of the Subcommittee on Commerce, Justice and Science of the House Committee of Appropriations of April 1, 2009 at pp. 220-223. As such, LSC believes that repealing the regulatory restriction is consistent with the expectations of Congress.

Moreover, LSC agrees that the restriction imposes unnecessary burdens on recipients and places clients at a disadvantage with respect to other litigants. Specifically, the ability to make a claim for attorneys' fees is often a strategic tool in the lawyers' arsenal to obtain a favorable settlement from the opposing side. Restricting a recipient's ability to avail itself of this strategic tool puts clients at a disadvantage and undermines clients' ability to obtain equal access to justice. The attorneys' fees restriction can also be said to undermine one of the primary purposes of fee-shifting statutes, namely to punish those who have violated the rights of persons protected under such statutes. In addition, in a time of extremely tight funding, the inability of a recipient to obtain otherwise legally available attorneys' fees places an unnecessary financial strain on the recipient. If a recipient could collect and retain attorneys' fees, it would free up other funding of the recipient to provide services to additional clients and help close the justice gap.¹ More

¹ It should be noted that the LSC Act's restriction on recipients taking fee-generating cases (and the implementing regulatory restriction on fee-

fundamental, the restriction results in clients of grantees being treated differently and less advantageously than all other private litigants, which LSC believes is unwarranted and fundamentally at odds with the Corporation's Equal Justice mission.

This action lifts the regulatory prohibition on claiming, or collecting and retaining attorneys' fees available under Federal or State law permitting or requiring the awarding of such fees. Accordingly as of the effective date of the regulation, recipients will be permitted make claims for attorneys' fees in any case in which they are otherwise legally permitted to make such a claim.² Recipients will also be permitted to collect and retain attorneys' fees whenever such fees are awarded to them.

With the repeal of the restriction, recipients will be permitted to claim and collect and retain attorneys' fees with respect to any work they have performed for which fees are available to them, without regard to when the legal work for which fees are claimed or awarded was performed. LSC considered whether recipients should be limited seek or obtain attorneys fees related to "new" work; that is, work done only as of the date of the statutory change or the effective date of this Interim Final Rule. LSC rejected that position because the attorneys' fees prohibition applies to the particular activity of seeking and receiving attorneys' fees, but is irrelevant to the permissibility of the underlying legal work. Limiting the ability of recipients to seek and receive attorneys' fees on only future case work would create a distinction between some work and other work performed by a recipient, *all of which was permissible when performed*. LSC finds such a distinction to be artificial and not necessary to effectuate Congress' intention.

LSC also believes that not limiting the work for which recipients may now seek or obtain attorneys' fees will best afford recipients the benefits of the lifting of the restriction. There may well be a number of ongoing cases where the

generating cases) are not affected by the lifting of the statutory ban on the claiming and collecting and retention of attorneys' fees and would not be affected by any regulatory amendment to part 1642. Accordingly, amendment of part 1642 would not have an adverse impact on the private bar nor provide any incentive for recipients to seek out fee-generating cases at the expense of the needs of other clients.

² Until this Interim Final Rule becomes effective, LSC has adopted a policy under which it will exercise its enforcement discretion and not take enforcement action against any recipient that filed a claim for or collected and retained attorneys' fees between the period of December 16, 2009 and the effective date of the regulation.

newly available option of the potentiality of attorneys' fees will still be effective to level the playing field and afford recipients additional leverage with respect to opposing counsel in those cases. Likewise, being able to obtain attorneys' fees in cases in which prior work has been performed would likely help relieve more financial pressure on recipients than a "new work only" implementation choice would because it would increase sources and amount of work for which fees might potentially be awarded.

Amendment of Part 1609 and Part 1610

As noted above, part 1642 contains two provisions not directly related to the restriction on claiming and collecting attorneys' fees. These provisions address the accounting for and use of attorneys' fees and the acceptance of reimbursement from a client. 45 CFR 1642.5 and 1642.6. These provisions used to be incorporated into LSC's regulation on fee-generating cases at 45 CFR part 1609, but were separated out and included in the new part 1642 regulation when it was adopted. Amending these provisions is not necessary to effectuate the lifting of the attorneys' fees restriction and they provide useful guidance to recipients. In fact, with recipients likely collecting and retaining fees more often than they have since 1996, the provision on accounting for and use of attorneys' fees will be of greater importance than it has been. Retaining these provisions would continue to provide clear guidance to the benefit of both recipients and LSC. Accordingly, LSC is moving these provisions back into part 1609 as §§ 1609.4 and 1609.5, with only technical amendment to the regulatory text to remove references to part 1642. The current § 1609.4 will be renumbered as 1609.6.

LSC is also making technical conforming amendments to delete references to part 1642 and the attorneys' fees statutory prohibition that are now obsolete. Having obsolete and meaningless regulatory provisions is not good regulatory practice and can at the very least lead to unnecessary confusion. Accordingly, LSC is deleting paragraph (c) of section 1609.3, General requirements, to eliminate that paragraph's reference to the attorneys' fees restriction in part 1642. Similarly, LSC is making a technical conforming amendment to its regulation at part 1610. Part 1610 sets forth in regulation the application of the appropriations law restrictions to a recipient's non-LSC funds. Section 1610.2 sets forth the list of the restrictions as contained in section 504 of the FY 1996

appropriations act, and the implementing LSC regulations which are applicable to a recipient's non-LSC funds. Subsection (b)(9) is the provision that references the attorneys' fees restriction (504(a)(13) and part 1642) and is now obsolete.

Request for Comments

LSC is implementing these changes as an Interim Final Rule with a Request for Comments. LSC believes this action is authorized and appropriate because LSC is removing (and not imposing any additional) prohibitions or requirements on recipients and is doing so in response to a specific statutory change removing a similar prohibition. LSC believes that this course of action will provide necessary clarity to recipients and will permit recipients and their clients to benefit from the statutory and regulatory changes at the earliest possible date. However, LSC is seeking comment on the changes being made herein and anticipates issuing a Final Rule discussing any comments. Interested parties may submit comments as provided herein. Comments are due to LSC no later than March 15, 2010.

List of Subjects

45 CFR Parts 1609 and 1610

Grant programs—Law, Legal services.

45 CFR Part 1642

Grant programs—Law, Lawyers, Legal services.

■ For reasons set forth above, and under the authority of 42 U.S.C. 2996g(e), LSC hereby amends 45 CFR chapter XVI as follows:

PART 1609—FEE-GENERATING CASES

■ 1. The authority citation for part 1609 continues to read as follows:

Authority: 42 U.S.C. 2996f(b)(1) and 2996e(c)(6).

§ 1609.3 [Amended]

■ 2. Paragraph (c) of § 1609.3, is removed.

§ 1609.4 [Redesignated as § 1609.6]

■ 3. Section 1609.4 is redesignated as § 1609.6.

■ 4. A new § 1609.4 is added to read as follows:

§ 1609.4 Accounting for and use of attorneys' fees.

(a) Attorneys' fees received by a recipient for representation supported in whole or in part with funds provided by the Corporation shall be allocated to the fund in which the recipient's LSC grant is recorded in the same proportion

that the amount of Corporation funds expended bears to the total amount expended by the recipient to support the representation.

(b) Attorneys' fees received shall be recorded during the accounting period in which the money from the fee award is actually received by the recipient and may be expended for any purpose permitted by the LSC Act, regulations and other law applicable at the time the money is received.

■ 5. A new § 1609.5 is added to read as follows:

§ 1609.5 Acceptance of reimbursement from a client.

(a) When a case results in recovery of damages or statutory benefits, a recipient may accept reimbursement from the client for out-of-pocket costs and expenses incurred in connection with the case, if the client has agreed in writing to reimburse the recipient for such costs and expenses out of any such recovery.

(b) A recipient may require a client to pay court costs when the client does not qualify to proceed *in forma pauperis* under the rules of the jurisdiction.

PART 1610—USE OF NON-LSC FUNDS, TRANSFERS OF LSC FUNDS, PROGRAM INTEGRITY

■ 6. The authority citation for part 1610 is revised to read as follows:

Authority: 42 U.S.C. 2996i; Pub. L. 104–208, 110 Stat. 3009; Pub. L. 104–134, 110 Stat. 1321; Pub. L. 111–117; 123 Stat. 3034.

§ 1610.2 [Amended]

■ 7. Section 1610.2 is amended by removing paragraph (b)(9) and redesignating paragraphs (b)(10) through (b)(14) as paragraphs (b)(9) through (b)(13) respectively.

PART 1642—[REMOVED AND RESERVED]

■ 8. Part 1642 is removed and reserved.

Victor M. Fortuno,
Interim President.

[FR Doc. 2010–2895 Filed 2–10–10; 8:45 am]

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DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

47 CFR Part 300

[Docket Number 100125044–0044–01]

RIN 0660–AA10

Revision to the Manual of Regulations and Procedures for Federal Radio Frequency Management

AGENCY: National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Final Rule.

SUMMARY: The National Telecommunications and Information Administration (NTIA) hereby makes certain changes to its regulations, which relate to the public availability of the Manual of Regulations and Procedures for Federal Radio Frequency Management (NTIA Manual). Specifically, the NTIA updates the version of the Manual of Regulations and Procedures for Federal Radio Frequency Management with which Federal agencies must comply when requesting use of the radio frequency spectrum.

EFFECTIVE DATE: This regulation is effective on February 11, 2010. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of February 11, 2010.

ADDRESSES: A reference copy of the NTIA Manual, including all revisions in effect, is available in the Office of Spectrum Management, 1401 Constitution Avenue, NW, Room 1087, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: William Mitchell, Office of Spectrum Management at (202) 482–8124 or wmitchell@ntia.doc.gov.

SUPPLEMENTARY INFORMATION:

Background

NTIA authorizes the U.S. Government's use of the radio frequency spectrum. 47 U.S.C. § 902(b)(2)(A). As part of this authority, NTIA developed the NTIA Manual to provide further guidance to applicable Federal agencies. The NTIA Manual is the compilation of policies and procedures that govern the use of the radio frequency spectrum by the U.S. Government. Federal government agencies are required to follow these policies and procedures in their use of the spectrum.

Part 300 of title 47 of the Code of Federal Regulations provides