

IN THE COURT OF APPEALS DIVISION II
STATE OF WASHINGTON

In re the Marraige of : KELLY WEHR, Appellant and GUY WEHR, Respondent	No 40307-2-II BRIEF OF RESPONDENT
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On Appeal from the Clallam County Superior Court, State of
Washington.

Honorable S. Brooke Taylor

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DIVISION II
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INTRODUCTION

Kelly Wehr made a rash and poorly conceived decision to move to Vancouver, Washington. At trial she tried to come up with justifications, but they amounted to poorly argued rationalizations. She had no job and no means of support in Vancouver, other than some alleged temporary support from her mother. The children have been well served by a very involved father.

The trial court used the correct law, look at facts under the 11 factors of RCW 26.09.520, and correctly applied the facts to the law. The trial court's Full Memorandum and Opinion and Decision (Decision) is thorough and well thought out. The Decision makes subjective conclusions about the facts to which Kelly Wehr seems to strongly object to. However, subjectivity is necessarily the name of the game in relocation cases. *In re Marriage of Grigsby*, 112 Wn. App. 1, 57 P.3d 1166 (2002).

Kelly argues there was insufficient evidence to meet the preponderance standard. However the Report of Proceedings (RP) are replete with significant testimony to support the court's findings.

Kelly's constitutional challenge to the standard of proof is not supported by any authority. In fact, the same arguments were made and denied in *In re Marriage of Momb*, 132 Wn. App. 70, 130 P.3d 406 (2006).

Kelly's first issue is arguably poorly constructed. Based on the statement of the issue and the various challenges she makes in her trial brief, this respondent's brief will de-construct her arguments to better address the individual challenges to the trial court's Decision.

The trial court did not abuse its discretion, and to the contrary made a thoughtful and careful analysis of the facts under the law.

ASSIGNMENTS OF ERROR

Kelly's assignments of error numbers 1-4 relate to her second issue which is the appropriate standard of proof. All 4 alleged errors are denied.

1. The trial court properly followed the statutory presumptions. It properly acknowledged that there was presumption that Kelly could move, and found that Guy rebutted that statutory presumption.
2. The preponderance of evidence standard is the correct standard and the court did correctly apply it to conclude that the statutory presumption was rebutted.
3. Clear, cogent and convincing is a high scrutiny standard required in due process cases. Relocation does not raise due process issues. The court was correct not to apply this standard, and would have been in error if he had done so.
4. The trial court followed the statutory procedures.

Kelly's assignments of error numbers 5-18 relate to her first issue which is essentially a sufficiency of the evidence argument.

Assignments of error 5-18 are all denied.

STATEMENT OF THE CASE

PROCEDURAL POSTURE

The only Parenting Plan since the parties divorced is the April 29, 2005, Parenting Plan. All references to the Parenting Plan herein are to this Order, unless noted otherwise.

Kelly Wehr gave written notice of her intent to relocate to Guy Wehr on August 18, 2009. Guy filed an objection/petition and a hearing on temporary orders was specially set for Tuesday, August 25, 2009. The Court Commissioner denied her request to immediately relocate. A Temporary Order was entered on August 28, 2009.

Judge Taylor denied her request to relocate after a trial in December, 2009. He entered initially a Summary Decision (Opinion to Follow), and then a Full Memorandum Opinion and Decision on January 7, 2010.

STATEMENT OF FACTS

Much of Kelly Wehr's statement of the case is correct. There are a few things that are missing or are not correct.

Basically, Kelly was very disorganized in her move and rash. Her boyfriend left her in the summer of 2009 and she decided to bolt. She filed her notice of intent to relocate on August 18, 2009, and within a few days she quit her job and moved out of her house

in Clallam County, before she had permission from the court to move.

Her stated reasons were to improve her financial situation, however, she has never proved she could improve her financial situation by moving. In fact, it appeared that her financial position would worsen, certainly in the short run but also for the long run. It appeared she would be a single mom with a low income in a big city.

At the same time, the evidence was replete with evidence to show that Guy Wehr was a very dedicated and highly involved parent. He took full advantage of the many wonderful opportunities the olympic peninsula has to offer by taking his children hiking, boating, fishing, crabbing, swimming, skiing, etc. He was involved in their schooling. His sister, mother (and father before he passed) were extremely involved and close to the kids in their Clallam County community. (This was not true of Kelly's family who were distantly involved.) Guy had previously changed jobs and took a pay cut so that he could have more consistent time with his children.

Although there is much more to the story, basically, the court seemed to feel that the mother's situation in Vancouver would be no better or worse, and that the loss of what the father brought to

the kids life was significant and would be completely lost.

She felt she could live rent free with her mother. In her brief, she alleges she would live her rent free forever. However, her testimony was that she would live with her mother until she could afford her own place. RP day two at 136.

It is not true that she was voluntarily unemployed. Kelly had been employed at the restaurant/catering division of the Seven Cedars golf course for 1 year. At the end of August, 2009 she simply up and quit. She told her boss "this is my last day, I'm moving." RP day one at 106.

Kelly argues in her brief that she had a job in Vancouver. Appellants brief at 35. However, she testified that she never got a job in Vancouver, only that she had job interviews (in September). RP day two at 133. There was never any testimony that she had a job offer in Vancouver.

ARGUMENT: ISSUE #1

Appellant's stated issue:

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?

This issue statement seems a bit unclear. On page 29 of her brief Kelly seems to be fairly clear that she is challenging the sufficiency of the evidence. Also on page 29 of her brief she seems to identify four aspects of what she believes constitutes the court's abuse of discretion which are:

1. "The trial court subjectively judged the wisdom of the relocation";
2. "When it focused on the supposed effect upon the father"; and,
3. "When it ignored the reality that any post dissolution relocation creates change.
4. "The court began to focus solely on preserving the current parenting plan"

Kelly also references the "manifestly unreasonable" standard, brief at 28, and the need for substantial evidence, brief at 29.

Abuse of discretion defined

The trial court is specifically required to address all of the 11 statutory factors in RCW 26.09.520 and if it does not do so, it has abused its discretion. *In re Marriage of Horner*, 151 Wn.2d 884, 894, 93 P.3d 124 (2004). Kelly agrees that Judge Taylor did

address all 11 factors. Appellants brief at 29.

“A court abuses its discretion where the court applies an incorrect legal standard, the record does not support the court's findings, or the facts do not meet the requirements of the correct standard.” *Horner* at 894. “This means the court must base its decision on the correct standard and correctly apply that standard to facts, which in turn must be supported by the record.” *In re Marriage of Pennamen*, 135 Wn. App. 790, 797, 146 P.3d 466 (2006). The relocation cases seem to mostly use the preceding language.

Some courts describe the abuse of discretion standard, with the language Kelly cites, as “manifestly unreasonable or exercised on untenable grounds, or for untenable reasons.”¹ *Marriage of Kovacs*, 121 Wn. 2d 795, 801, 854 P. 2d 629 (1993).

Since the trial court addressed the 11 factors, it properly followed the law. Therefore, Kelly must be arguing 1) that court incorrectly applied the legal standard to facts, and/or 2) that the record does not support the court's findings.

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In this brief, I use the *Horner* language. “Manifestly unreasonable” seems to me like a harder or unhelpful standard in a relocation case since application of the legal standard—the 11 factors—necessarily involves a subjective application. See *Grigsby* below. Also, the trial court has denied relocation which cannot be manifestly unreasonable since it is an anticipated outcome of the CRA. On the other hand, *Parentage of R.F.R.*, 122 Wn. App. 324, 329-330 93 P.3d 951 (2004). upheld the trial court's allowance of a relocation under the manifestly reasonable standard since it was within the scope of the CRA.

“Findings of fact will be upheld if they are supported by substantial evidence. As the party challenging the findings of fact, [appellant] bears the burden of demonstrating that substantial evidence does not exist. *In re Marriage of Grigsby*, 112 Wn. App. 1, 3, 57 P.3d 1166 (2002).

“The factors are equally important because they are neither weighted nor listed in any particular order. RCW 26.09.520. Finally, consideration of all the factors is logical because they serve as a balancing test between many important and competing interests and circumstances involved in relocation matters.” *Horner* at 894.

Findings of fact on each factor is strongly encouraged so the appeal court can determine what questions the trial considered and how it decided them. *Horner* at 895-96. the standards of the CRA.

1. Did the court incorrectly apply the legal standard to facts?

Is this one of Kelly’s questions?

This question is implied in Kelly’s issue statement when she references the court’s finding in relation to the preponderance of evidence standard. However, Kelly challenges the preponderance standard in issue #2. Kelly’s Issue #1 is clarified on page 28-29 of her brief where she argues the court made the following four mistakes:

1. "The trial court subjectively judged the wisdom of the relocation";
2. "When it focused on the supposed effect upon the father"; and,
3. "When it ignored the reality that any post dissolution relocation creates change.
4. "The court began to focus solely on preserving the current parenting plan"

For respondent's brief, I am treating the above challenges to the court as arguing that the court failed to correctly apply the legal standards to the facts.

Subjectivity and the wisdom of the relocation

Kelly is correct to point out the court made subjective decisions. However, she is incorrect in claiming this is a legal problem. Subjectiveness is obviously an inherent problem in totaling up and assessing the 11 factors. "The decision of whether the proposed relocation would be detrimental to the children is inherently a subjective one, given the statutory scheme." *In re Marriage of Grigsby*, 112 Wn. App. 1, 14, 57 P.3d 1166 (2002).

Relocation cases will always include subjective choices. For example, in *In re Marriage of Momb*, 132 Wn. App. 70, 130 P.3d 406 (2006), the trial court was upheld in finding that living in a remote town in South Dakota was not beneficial to the child. *Grigsby* on the other hand, found great value to the children in the

small rural community on Whidbey Island, including the availability of outdoor activities and the father's budding yoga studio.

Kelly suggests that the court improperly relied on the *Grigsby* case. (This would seem to be as good a place as any to discuss this challenge.) She correctly cites a number of differences between her case and the facts in *Grigsby*.

However, there are similarities the trial court found compelling. Decision at 8. While the trial court did not specifically identify the compelling facts, they would seem to particularly include the numerous factors around factor 7, which relates to the quality of life resources and opportunities for the children. Port Angeles and North Olympic Peninsula offer abundant and unique opportunities for a high quality of life, such as easy access to the Seattle area, easy access to three bodies of salt water, lakes, unique wilderness/alpine areas in Olympic National Park, pristine forests, hunting, fishing, crabbing, hiking, camping, boating etc. The bounties of nature that the *Grigsby* children were able to take advantage of paled in comparison to how Guy has leveraged the bounties of the Olympic Peninsula for his children.²

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Apparently the picture board filled with photographs of the children in their many activities with their father was not identified as a clerk's paper. Guy testified that these photographs were on the

Grigsby also shares other significant similarities which the trial court found in the *Wehr* case, including a strong relationship with the father (factor 1), detrimental disruption from separation of the father (factor 3), developmental needs of the children gravitating against moving (problems in school and the need for the father remain actively involved in their schooling), a particular attachment to the paternal grandmother in Port Angeles, and tenuous relationship between the maternal grandmother and Kelly and the children (she is a recovering alcoholic with little to no prior involvement in the children's lives in Port Angeles (factor 4), (factor 7 is noted above), alternative arrangements were a poor substitute at best (factor 8), an unlikelihood the father could relocate (factor 9), and a lack of financial benefits to the mother together with increased financial costs to the father (factor 10).

Kelly distinguishes the two cases, but it seems apparent that no two cases will ever be alike. The more important question, at least for Judge Taylor, is the similarities. The variety and subjectivity of relocation cases is why the CRA encompasses so many factors and does not weight any of them.

Kelly raises "wisdom" in another context, which may be

walls in house and spanned years of activities. They seemed to carry a lot of weight to the trial court.

appropriate to address here. She claims the court improperly shifted the burden to her to prove the need and wisdom of the relocation. Appellants' brief at 33. She claims the court did this by his comment that her proposed extended summer visitation for Guy substituted quantity for quality. Decision at 6.

She is not quite correct. The court has found the facts –the father is very involved, works all but a maximum of 2 weeks in the summer, etc.– and did indeed subjectively assess those facts. Under *Grigsby* and the CRA, that is exactly what he is supposed to do.

Kelly goes on to argue, under her analysis of factor 8, alternative arrangements, that the summer issue demonstrates the court's "full misapplication of the CRA." Appellant's brief at 34. She offered Guy 8 weeks of summer. In the Parenting Plan Guy had no visitation in the summer other than "same as school year," or every other weekend. Kelly seems to think that her offer is the best offer and the court's conclusion to the contrary demonstrates.....? I am guessing she is arguing that it demonstrates the court's misapplication of the legal standard to facts. The court, and Guy, simply disagreed with her. There was no error by the trial court.

In conclusion of this section, Kelly has not met her burden of proof that the court failed to correctly apply the legal standard to

facts.

Focusing on the supposed affect on the father

Kelly suggests in several places in her brief that Guy's objection was all about him and not the children. She cites his statement that the relocation is "not in my best interest." RP day one p. 136. She identifies a list of Guy's self interest type statements. Appellant's brief at 30³. She then argues the trial court somehow inappropriately focused on Guy's self interest.

It is not clear what the basis for this claim is, other than that she lost. The court was very aware of Guy's phrasing and acknowledged this issue in factor 5. Decision at 4. The court found that while he did exhibit some focus on himself, he also "honestly believes that the move would not be in the best interest of his children, and his stated reasons for this opposition definitely show good faith on his part." Decision at 4.

Kelly's sniping on this point would seem to be quite unfair. Guy is a road crew manager. He is intelligent and hard working and has risen to a position of responsibility, but he is not a professional witness. I don't believe he has ever testified before nor that there is any evidence suggesting this. I also would submit that any father

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Kelly inserts this list into the section where she talks about Guy's expert Michael Aldrich. These two issues do not seem to be related.

who has demonstrated a commitment to providing a wonderful upbringing for his children is fairly entitled to fear the loss of what he has worked hard for. Judge Taylor clearly understood the difference and specifically commented on it.

The trial court did make numerous findings about the strength of the father's involvement with the children, and noted many facts showing the things they did together. This was part of the court's proper application of the law.

Kelly should more specifically point to detailed language by the trial court to support the allegation that the trial court focused inappropriately on the father. Without doing so she has not met her burden of proof to support the allegation, whether it relates to the court's correct application of the legal standard to facts or to some other issue.

The court ignored the reality that any post dissolution relocation creates change

Perhaps I miss this point, but again it is a very broad allegation and Kelly should more specifically identify detailed language by the court to support this allegation.

"The court began to focus solely on preserving the current parenting plan"

Again, another broad allegation. Kelly argues that this is first

seen in the court's handling of factor 3, relative disruption, because judge Taylor commented that a disruption in the relationship between the children and the father would have a damaging impact on the children. Decision at 3.

However, this comment by the court is taken out of context⁴. The court found that factor 3 "favors the mother." In making his comment, the trial court was simply acknowledging that this is not a case where the father has had no involvement. The court found it would be damaging to disrupt the children's relationship with the mother, and also found the "fact" that it would be damaging to the children to disrupt their contact with the father too.

Kelly doesn't seem to point to any other findings or conclusions, or make any other argument to support her claim that the court focused solely on preserving the current parenting plan.

Contrary to Kelly's allegation, the court considered carefully her testimony about what the new situation would be. The trial court acknowledged the benefits that Kelly claimed, but repeatedly found the relocation would create a situation for the children and her that would be no better or possibly even worse:

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Also, it may be that the observation of the trial court that the father was very involved is better put in a different factor, such as strength of relationships, or needs of the children. I frankly find it often difficult to determine which category a fact best fits in, and sometimes the facts seem to fit in multiple categories.

Factor 3, Decision at 3: “* * * any significant disruption in contact with the children with their father would have a damaging impact on the children”

Factor 5, Decision at 3: “what is good for the parent does not necessarily translate into something good for the children * * * [and that w]hat in fact is being proposed is substituting one case of housing uncertainty and unemployment for another.” In the court’s Summary Decision (Opinion to Follow), at 3, “[t]he relocation seems to be motivated as much by the recent loss of a long term romantic relationship as by any other factor * * * there is very little evidence that either the mother’s social or employment situation will be improved, or that she and the children are as welcome as she contends in her mother’s home * * *”

Factor 6, Decision at 4: “* * * there would be a second, disruptive move [when the children move out of the grandmothers house] * * * these moves will have a negative impact on the children is supported by the testimony of Mr. Aldrich * * * [and] bolstered by the [relocation article].”

Factor 7, Decision at 5: “Unfortunately, it cannot be said that this new [proposed] situation is in any way better than the children’s current situation * * * [and w]hile 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 * * *”

Factor 8, Decision at 6: The mother’s plan substitutes “quantify for quality.”

Factor 10, Decision at 7: “The proposed relocation substitutes on situation of financial insecurity for another, with the hope that the mother can find a job * * * move out on her own, all of which is purely speculative * * * [and] no evidence whatsoever was presented to indicate that these hopes are realistic * * *”

Conclusion to : Is there a question that the court abused its discretion by not applying a correct standard?

Kelly has not met her burden to prove the trial court 1, was inappropriately subjective, 2, focused inappropriately on the effect on the father, 3, ignored the reality of change, or 4, focused solely on preserving the current parenting plan.

2. Does the record support the findings and conclusions?

Kelly argues there are no facts to support the trial court's decision to deny the relocation. The standard is not that high as she only needs to show there was not substantial evidence (*Grigsby*) to show that Guy met his burden to "rebut the presumption [that the mother could relocate] by demonstrating that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person." RCW 26.09.520

On one hand, I simply want to rely on intelligence of the appeal court to discover for itself the ample reasons when it reads the transcript of proceedings. And I would note that many of Kelly's claims in her brief actually point out the facts that the court found –she simply didn't like the facts or the findings.

On the assumption my brief on this point cannot be that easy, I will below highlight some of the facts that support the court's findings in its Decision.

First I would mention that Kelly had only herself as a witness. Her mother, a central figure in this case did not testify nor did Kelly request that she be allowed to testify by telephone. Guy's sister took day off from work and drove over to Port Angeles to testify. RP day one at 30. Guy's mother did not testify because the trial date was set during her previously scheduled trip to the antarctic⁵. RP day one at 14. Guy's boss testified. Guy of course also had Michael Aldrich testify about parenting and relocation problems.

Factor 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.

Judge Taylor found the children had strong relationships with both parents. Guy concedes this is true for the mother. The trial court's Decision reference numerous facts to support the conclusion. The types of evidence to support the trial court's Decision are as follows.

The evidence showed the childrens relationships with Guy's mother (paternal grandmother) and sister (paternal aunt) were the

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As Kelly points out, Guy failed in his effort to resist Kelly's motion for a priority setting. Appellant's brief at 6.

most influential. There is no evidence to contrary. Kelly agrees with this. RP day two at 140.

The children did know Kelly's mother, but she testified they primarily saw her only in the year before the trial. Appellants brief at 19. Guy testified they saw her very infrequently prior to Kelly's interest in moving. RP day two at 151. He also testified he had never heard of the other relatives or friends Kelly said were in Vancouver, nor had the children ever mentioned their names. RP day two at 151. Guy's sister Linda testified she saw the kids frequently. RP day one at 12,13,

Linda testified about the strong relationship with her and Guy's mother, the paternal grandmother, RP day one at 13, and detailed the many things the children did with their grandmother. RP day one beginning at 14. She took them to the nutcracker in Seattle (RP day one at 15), took them to plays and took them out for walks around the peninsula (RP day one at 16), played games and read them books, and did school work with them (RP day one at 16-17).

Linda took them birding, played games, took them to the zoo, the Science Center, (RP day one at 17-18). She testified about how Guy is a very involved father, and justified that statement with numerous examples of the many things he did with the children, including crabbing and fishing. RP day one at 19-20. She testified

about his responsible disciplining, RP day one at 21, and his involvement in their schooling, RP day one at 22. She testified about the potential impact of the relocation and his not being able to pop over for a baseball game. RP day one at 23.

On her cross exam, Mr. Robins asked Linda about the value of having 8 weeks of summer visit. She did not seem to think it was of much value. RP day one at 26-28. On redirect, she testified that the family does not just do things in the summer, but year around. RP day one 29.

Judge Taylor asked her is she had any children, which did not, and then she testified that Guy and Kelly's children were like her own. RP day one at 30.

Guy's boss testified that Guy took a pay cut in order to have a more predictable schedule for the benefit of being more regularly involved with his children. RP day one at 130-131. He testified about behavior that indicated to him that Guy was involved with his kids. RP day one at 131.

Michael Aldrich, a child mental health specialist (RP day one at 32), testified that his initial task was to assess Guy's desire to have his children, whether he had a continuous and affectionate relationship with them, and was he capable of raising children, and the answer to all three questions was yes. RP day one at 37. He

went on throughout his testimony to offer detailed explanations about his observations.

Guy of course testified and confirmed all of the above. He confirmed his sister visits monthly (RP day one at 12) and his mother saw the kids weekly (RP day one at 151-152).

Factor 2. Prior agreements of the parties.

The trial court simply found that the only “prior agreement” of any significance was current parenting plan, whereby the mother is the primary residential parent and the father has liberal and extensive visitation. The court made no findings beyond this.

The Parenting Plan is a little unusual and provides Guy with more than the normal visitation. Guy is road crew worker and when he was entered his schedule was heavy in the summer and light in the winter, so from November 1st through April 30th, he had visitation every weekend from Friday at 6:00 p.m. through Monday morning. In addition, he had visitation the first full week of every month. See the one and only Parenting Plan since the divorce was finalized on April 29, 2005.

Factor 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.

The trial court found this factor favored the mother, but also

acknowledged the obvious fact that this was not a case where the father had little to no involvement with the children, but rather had significant involvement with them. The court concluded that while the disruption of the bond with mother would be more detrimental, it also concluded that “disruption in contact with their father would have a damaging impact on the children.

The court went on to praise the father’s great attention to the children, pointing out he never missed one hour of visitation, built a home designed around the needs of the children, etc. Full Memorandum Opinion and Decision at 3.

Kelly considers this last statement demonstrates the court’s beginning “to focus solely on preserving the current parenting plan and assumed that any change in that any change in the current plan would damage the relationship between the children and their father. Appellants brief at 29.

There was more than ample evidence to support the court’s finding. Kelly does not know try to argue that the father was not a very involved father who was active with the children. She assigns no error to the courts finding that Guy was an involved parent.

Factor 4 relating drug or violent type restrictions was not relevant

Factor 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.

Kelly has cherry picked the facts to build an argument that Guy's objection to her moving was made in bad faith. There was ample evidence to the contrary, including Mr. Aldrich's testimony below. The combination of all the other factors are consistent with an involved father who was looking out for his child's best interests. Not the least of these was the potential that Kelly's rash decision put her and kids at risk of living in poverty.

Factor 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

There were no special needs of the children.

Part of Kelly's claim that there was not substantial evidence to support the trial court's findings and conclusions is based on a challenge to Mr. Aldrich's testimony, which is discussed below.

Kelly makes a logically false connection when she argues the court "opposed any change in the parenting plan" when it found the children would be "negatively impacted" from being "uprooted from their community they've been in since birth." Appellant's brief at 32. Her first premise does not necessarily follow from the fact.

There was ample evidence to support the court's finding,

such as the deep involvement the children in their life activities on the Olympic Peninsula., their lifelong friends, stable living environment, etc.

Part of Kelly's argument on this point relates to her perceived financial opportunities in Vancouver. However, it is crocodile tears to argue she had no job. She quit her job in an effort to force Guy into accepting the move. She claimed there were more job opportunities in Vancouver, but in the 5 months between when she decided to move and the trial, she never got a job offer. The court was well justified to have concerns about her financial stability moving to a place where she would be at the financial mercy of her mother, a woman who refused to testify in person or by phone.

Kelly clearly makes an argument contrary to the CRA. Appellants brief at 33. She says the decision of where she should live is hers and hers alone. The constitutional arguments below make it clear that the state has a *parens partea* right to be involved in the decision making when children are involved. *In re Custody of Osborne*, 79 P. 3d 465, 473, 119 Wash.App. 133 (2003).

Factor 7. The quality of life, resources, and opportunities available to the child and to the relocating party in the current and proposed geographic locations;

The record and this brief are replete with references to the

phenomenal quality of life the children have in Port Angeles. Kelly's brief is unclear that it actually challenges this finding. To the extent she challenges the "wisdom" of the trial court, that is addressed above.

Factor 8. The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent.

Again, there was significant testimony about the current and proposed arrangements, and Kelly's main challenge is the both Guy and the trial court failed to see the wisdom of her proposal. That issue is addressed above. Mr. Aldrich also addressed that issue, below.

Additionally, and to the extent it is relevant, she is incorrect to argue that her proposal provides little loss of visitation for Guy. He has almost 40% of the visitation now, and would have about 25% under her plan. RP day two at 24. This is nearly a 50% loss of time for him, not counting the lost time traveling each month.

Factor 9. The alternatives to relocation and whether it is feasible and desirable for the other party to relocate also.

Kelly does not make any challenge to the sufficiency of evidence on this issue, nor apparently does she challenge the court's finding and conclusion.

The court noted that an alternative to relocation is for Kelly to

stay in Clallam County. Kelly complained she had no residence, however, that was of her own choosing because she moved out of her prior home at the end of August, 2009, knowing she needed a court order to move. RP day two at 134.

Factor 10. The financial impact and logistics of the relocation or its prevention.

Kelly's position is that the trial court was in error to "dismiss her belief that [she] could gain employment in Vancouver * * *," and alleges "there is no testimony to support the court's conclusions." Appellants brief at 35. The court found "[t]he proposed relocation substitutes on situation of financial insecurity for another * * *"

Kelly intentionally quit her job with no notice to her employer in August, 2009. She told her boss "this is my last day, I'm moving" and she quit. RP day two at 105-106, and at 112-113. (Kelly suggests she was going to be laid off from her job because of the winter slow months, however she testified that she had worked there one year and started the previous September. RP day two at 129.

Kelly suggests in her brief that she would be living with mother rent free forever. Appellants brief at 35. At trial she testified it was a temporary situation. RP day two at 127

This issue has been raised in several other parts of this brief.

Kelly simply did not have a job in Vancouver (RP day two at 133), even after 5 months of desperately trying. The court heard her say she had an inside track from her father in law who worked at the city, but did not hear her say she got such a job. The court was left with only an ability to speculate, and that speculation could have been she could get a job, she could get a job working in the evenings, she could get a part time job, she could get no job, and/or she would move back to Port Angeles where she could get a job.⁶

Did the court inappropriately consider the testimony of Michael Aldrich?

Kelly appears to challenge Michael Aldrich's testimony is several regards. First, that the court relied on "single study * * * and [his] testimony" in relation to factor 6 (the needs of the child and the impact of relocation.) Appellants brief at 31. Second, she challenges the study he testified about as being contrary to *In re the Marriage of Pape*, 139 Wn.2d 694, 989 P.2d 1120 (2000). Appellants brief at 32.

Initially, *Pape* was overruled and the foundation for a challenge based on *Pape* is not properly laid by Kelly. But more

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Kelly is and has been working at least part time at her old job in Port Angeles (Rp day 2 at 135) since the trial. I don't believe the full story is in the record, but at the same time there is nothing in the record to explain how she would be supporting herself otherwise.

importantly, despite her allegations to the contrary, the concerns she highlights in *Pape* and the Washington State Gender and Justice Commission's *Washington State Parenting Plan Study* (June 1999) are the same as the concerns raised by Mr. Aldrich's experience and in the studies he cited. Kelly suggests that "Children of divorce do better * * * [with] primary residential parents who are [not] experiencing psychological, emotional, social, economic or health difficulties * * *." These were all a major part of Mr. Aldrich's testimony, and he described them as creating risk factors, which needed to be balanced against protective factors. (See more detail about Mr. Aldrich's testimony below.)

Likewise, Kelly's quote from *To move or Not to Move*, 30 Fam. L.Q. 305 (1996), is completely consistent with Mr. Aldrich's testimony. The relevant parts of the article states "* * * the psychological adjustment of the custodial parent has consistently been found to be related to the child's adjustment * * *. Neither is the amount of visiting of the noncustodial parent consistently related to the child's adjustment". Mr. Aldrich says exactly the same thing.

(Inconsistently, Kelly tries to argue that more summer visitation will be better for Guy and the children.)

Mr. Aldrich provided a rich amount of information that the court found useful. Kelly never objected to his testimony in general,

and never offered any rebuttal testimony. She is now asking the court to view Mr. Aldrich's testimony differently than the trial court did.

Mr. Robins made only two objections to Mr. Aldrich's testimony. RP day one at 42, he objected to a "what if" question about Guy's ability to parent if Kelly moved without the kids. The objection was properly overruled. In part of the response, Mr. Aldrich testified that from his 19 years of experience as a child and adolescent psychotherapist, he would be more likely to see kids who have moved rather than kids who stayed and one of their parents moved.

RP day one at 44, Mr. Robins objected on conjecture to a question about what kind of impact he might see on the children if Kelly moved given that Guy had the children 40% of the time. The court overruled the objection because "I think based on his background and expertise he can answer the question." Mr. Aldrich went to answer, RP day one at 45, that the kids have a good safety net in Port Angeles because of the consistency and stability of their current environment. He then discussed the problems associated with Kelly's move, which included exposing the children to problems associated with unemployment, housing issues, and financial issues. He explained why financial stability is "one of the most

important pieces of a child's emotional well being * * * and moving into any sense of lack of financial stability is – is truly impactable.”

The next question for Mr. Aldrich was to discuss the difference between stability and resilience. No objection was made. RP day one at 46-47. That led to a discussion, not objected to, about “what if” Kelly could get a good paying job, and Mr. Aldrich explained that it could be a positive financial benefit for the children, but it could impact other concerns, for example if she got an evening job (Kelly is a waitress). He noted that a mother working from 11:00 a.m. to 7:00 p.m. would create a whole different dynamic and would implicate who the primary caregiver really is, and emphasized the critical bedtime hours from the children's perspective.

RP day one at 50, Mr. Aldrich begins to talk about a 2003 study from the Journal of Family Psychology that addressed problems children may have when their parents relocate. No objections were made. It was marked as an exhibit without objection. RP day one at 53. Mr. Aldrich testified about the report, concluding that out of the 14 domains of life, children who relocate tend to have significant problems in 11 of the domains, and that these were long term affects. RP day one at 53-56.

At the end of his testimony about the study, Guy's counsel

sought to admit the study as an exhibit, and it was admitted without objection by Mr. Robins.

Mr. Aldrich next testified about risk factors and protective factors, and why those were significant to the Wehr children. Mr. Aldrich testified that relocating implicated numerous risk factors, or things that could potentially be harmful to the Wehr children, and he also testified that counterbalancing protective factors would be very important. For example, strong family bonds between the children and Kelly's family would be protective factor which the court should know about. (Ultimately, there was little to no evidence about this issue.) Kelly's availability for the children would be another protective factor. (Again, there was no testimony about this because the mother had no job nor any job offers so the court would have to speculate about her availability for the children.)

Mr. Aldrich went on to talk about the needs of the children in a relocation and how parents can address those needs. RP day one at 60-63.

Mr. Aldrich was then asked a hypothetical, what might we see if Kelly were allowed to move. No objection was made. He testified that from his training and experience there would be "fallout." RP day one at 65. Then he testified about the significance of Kelly not having a job and her own home, saying he was concerned that the

mother had not taken adequate “prophylactic” protective measures to address the many risk factors she would be exposing both herself and the children to, and he related how the current situation did offer a good environment for the children. RP day one at 66.

Mr. Aldrich discussed the study some more and the higher incidence rates of problems in children who have relocated with one parent. RP day one at 67. No objection was made. He was asked “what if” the mom could not get a job or could only get a part time job and referenced the obvious problems. RP day one at 68. Then he referenced another study from the Journal of American Academy of Psychiatric Law by Dr. Glen H. Miller, which again pointed out that “financial stability is one of the most important factors in establishing the psychological well being of a child.” RP day one at 68. No Objection was made.

Mr. Aldrich testified about the ravages of poverty. PR at 68-69. No objections were made.

He was asked “what if” mom finds that Vancouver is not the rosy place she envisioned and had to move back, to which he responded “again, [in] my experience 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 * * *” RP day one at 71-72. No objection was made.

Mr. Aldrich testified about the potential consequences to the children from leaving Port Angeles, where they had lived all their lives and had many long term relationships, and he discussed the negative consequences research would suggest. RP day one at 71-72. No objection was made. He testified about the potential impact of Kelly remaining as a single mom, and the increased difficulties that would impose. RP day one at 74. No objections were made. Mr. Aldrich testified how important it was the benefits and significance of having spent a lot of quality time with their father, and how these things established strong protective factors. RP day one at 74-75. No objections were made.

Mr. Aldrich testified about continuity, stability, the emotional cost of travel, and how it gets harder for kids as they get older because their lives get more rooted in their primary hometown. RP day one at 76-78.

Mr. Aldrich commented about his impression that Guy's main concern was not about blocking Kelly's move but about the emotional, psychological and financial stability of his children. RP day one at 79.

Under the current Parenting Plan, Guy has about 40% of the visitation time. Under Kelly's proposed plan he would only have 25% of the visitation time. Mr. Aldrich testified how that might impact the

Wehr children. RP day one at 81.

Mr. Aldrich testified that if Guy and Kelly are “parallel parenting”, in other words having little communication or sharing about the children (there was evidence this is the pattern), then the relocation would raise more risk factors for their children. RP day one at 83.

Finally, Mr. Aldrich commented about the statutory factor 3, relative disruption.

No objections were made to any of the above testimony, except as to the one question about Guy’s ability to parent (which was overruled).

Mr. Robins began cross examining Mr. Aldrich on the 2003 Study at RP day one 102. Mr. Aldrich agreed that there are no studies that prove that relocation is harmful. RP day one at 103. Mr. Aldrich testified that the study, like all studies, has strength in showing trends (RP day one day one at 107) and then explained that further in redirect, drawing an analogy to second hand smoke, where there is no proof it causes harm, but meta-analysis draws very compelling conclusions.

ARGUMENT: ISSUES #2

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?

Answer: The court must find facts by a preponderance in order to overcome the statutory presumption that a relocation is in the best interests of the child and mother. This standard is set out in the plain language of the statute. A higher standard under the due process loss of liberty or property rules is not supported by case law. The due process arguments are relevant in aspects of dependency and third party custody cases, but not in parent-parent custody/relocation cases.

Procedural problem

This issue was not raised in the trial court. It should be denied under RAP 2.5 (a).

Plain language

Kelly is correct that Judge Taylor used a preponderance standard to determine if Guy overcame the presumption against him.

The plain language of the statute seems to clearly support Judge Taylor. RCW 26.09.520, "Basis for determination," sets out the standards. The first paragraph of that statute states in full (emphasis added):

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:

Outweighs implies a preponderance standard. Outweighs means “to weigh more than.” Webster’s New World Dictionary, Second College Edition (1976).

Guy agrees with Kelly’s definition of the standards of preponderance, “to weigh more than,” and clear, cogent and convincing which a level of proof that is “highly probably.”

Due process concerns

If the relocation statute implicates the loss of liberty or life then constitutional due process concerns are implicated and Judge Taylor would have needed to apply a strict scrutiny standard: the higher clear, cogent and convincing standard proposed by Kelly. *Nguyen v Department of Health*, 144 Wn.2d 516, 29 P.3d 689 (2001).

However, she cites no authority for application of this standard in a parent vs. parent custody or relocation case. Indeed, this argument has been made and lost in several cases, and is

nicely summarized in *In re Marriage of Momb*, 132 Wn. App. 70, 82, 130 P.3d 406 (2006). No cases have applied a strict scrutiny standard in cases involving custody or relocation disputes between two parents. *Momb* at 77.

The *Momb* case is particularly interesting because Mr. Momb was the custodial parent who wanted to move with the child and the trial court denied his request. Mr. Momb then made numerous challenges to the constitutionality of the CRA, all of which were denied.

Mr. Momb appears to have made the same argument Kelly is making now. He argued the CRA violates “a fit custodial parent's fundamental right to autonomy in child-rearing decisions.” *Momb* at 409.

The reason due process is not implicated, basically, is because Kelly has the right to move and losing her parental rights is not an issue. *Her* right to travel and relocate is not in question. Her ability to relocate the child when she travels is the question. “And the constitutional rights of children may be treated differently than those of adults because of the peculiar vulnerability of children; their inability to make informed, mature, and critical decisions; and the importance of the parental role in child rearing.” *Momb* at 82.

Kelly's Analogy to property rights cases

Kelly nevertheless argues that her right to relocate with the children is a “fundamental interest” (petitioner’s brief at 40) which implicates due process concerns. Again she cites no case to support this argument in the context of relocation. Instead she analogizes to several property right cases.

“A medical license is a constitutionally protected property interest which must be afforded due process” (and the higher standard of proof. *Nguyen v Department of Health*, 144 Wn.2d 516, 523, 29 P.3d 689 (2001). See also *Ongom v. Dep’t of Health*, 159 Wn.2d 132, 151, 148 P.3d 1029 (2006), involving the same issue as *Nguyen*⁷. Therefore, she argues, her right to relocate must be at least as “profound.” (petitioner’s brief at 40). But she provides no authority, and *Momb* is contrary and clearly so.

Kelly argues that *In re Estate of Borghi*, 167 Wn.2d 480, 484-485, 219 P.3d 932 (2010) is relevant. This is incorrect for three reasons. First, *Borghi* does not use the phrase “clear, cogent and convincing,” but rather a more unusual and esoteric “clear and convincing,” which implicates a much more complex analogy, even if relevant. Second, the case is talking about rules relating to

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Nguyen is a difficult case because it was strongly challenged and nearly reversed by a split court in the *Ongom* case.

community and separate property, not custody.

Third, and presumably, the higher standard applies because the issue relates essentially to a taking problem. *Borghi* did discuss presumptions of what is and is not community or separate, and the rules around rebutting them. But ultimately, the presumptions may result in one person “losing” their separate property to their spouse.

Analogy to dependency cases

The standards of proof in dependency cases helps clarify the issue because there are *two* standards of proof when the state seeks to terminate a parents rights: both the preponderance and clear, cogent and convincing standards. *In re Welfare of L.N.B.-L.*, 157 Wn. App. 215, 255-256 237 P.3d 944 (2010); and see *In re Dependency of D.A.*, 124 Wn. App. 644, 102 P.3d 847 (2004). What is the difference?

In a parental rights termination case, the state must first prove by the higher clear, cogent and convincing standard that a parent is unfit. *Then*, the state must prove that terminating the parents rights is in the best interest of the child, and that proof is only by the lower preponderance standard. Here, a long quote from *In re Welfare of L.N.B.-L.*, at 255-256, is instructive:

“* * * RCW 13.34.190(2) authorizes the juvenile court to enter an order terminating all parental rights only if the court finds that termination is in the child's

best interests.

A “best interests of the child” finding depends on the facts and circumstances of each case and a preponderance of the evidence must support it. [Citations omitted]. We place “very strong reliance” on the juvenile court’s determination of what would be in the child’s best interests. [Citations omitted.]

* * * JB-L argues that the juvenile court’s “best interests” finding must be supported by clear, cogent, and convincing evidence, rather than by a preponderance of the evidence. We exercise our discretion to address this issue even though JB-L did not raise this error in the juvenile court. RAP 2.5(a).

In *Santosky v. Kramer*, the United States Supreme Court held that the due process clause of the Fourteenth Amendment requires states to support allegations of parental unfitness by “at least clear and convincing evidence” before terminating parental rights. 455 U.S. 745, 747-48, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Notably, the Santosky Court did not mandate that states use a particular standard of proof when applying a “best interests” test to the issue of termination after the State has proven parental unfitness. Because the Department must support its allegations of parental unfitness by proving each of the six elements of RCW 13.34.180 by clear, cogent, and convincing evidence—just as Santosky required—Washington’s termination statute passes constitutional scrutiny.”

In a relocation case, unfitness is not an issue. The issue is a hybrid of the best interest of the child and the best interest of the parent. *In re Marriage of Horner*, 151 Wn.2d 884, 93 P.3d 124 (2004). Neither of these issues implicate constitutional issues.

Momb. In Horner, at 887:

“The CRA shifts the analysis away from only the best interests of the child to an analysis that focuses on both the child and the relocating person. RCW 26.09.520. The CRA creates a rebuttable presumption that relocation will be permitted.

Id. To rebut this presumption, an objecting party must demonstrate "that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person, based upon the following [child relocation] factors."

Analogy to third party custody cases

In third party custody cases, under RCW 26.10, due process is implicated for the same reason as in the dependency situation: the issue is parental unfitness and such a finding can result in a parent losing their parental rights.

Addressing a third party (nonparent) case, *In re Custody of Shields*, 157 Wn.2d 126, 129, 136 P.3d 117 (2006), used the same analysis as the court in *In re Welfare of L.N.B.-L* above:

"We also hold that under chapter 26.10 RCW, nonparental actions for child custody, a court may award custody to a nonparent in an action against a parent only if the parent is unfit or if placement with an otherwise fit parent would cause actual detriment to the child's growth and development. The "best interests of the child" standard is not appropriate in these circumstances and the nonparent bears the burden of proof under the heightened standard."

Conclusion on Issue #2

Judge Taylor applied the correct preponderance standard in weighing the evidence. There is no authority to suggest he should have done otherwise, nor is there any common law analogy to suggest application of a high scrutiny standard.

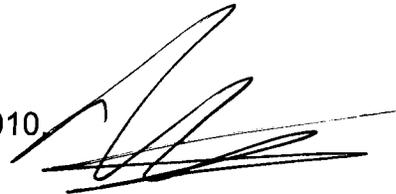
Attorney fees

Kelly has had a pro bono attorney all throughout. Guy has had to pay out of his own blue collar income. This appeal is frivolous or near frivolous. The constitutional arguments alone took days of time to understand and address, and ultimately the issue is extremely poor. The argument that there is not substantial evidence to support the findings and conclusions is totally lacking. Kelly and/or her attorney should pay for Guy's attorney fees.

Conclusion

The court of appeals should deny the appeal and award attorney fees to Guy Wehr.

Respectfully submitted October 27, 2010



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DIVISION II

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STATE OF WASHINGTON
BY E
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLALLAM

In re the marriage of:

KELLY WEHR,

Petitioner (Appellant),

and

GUY WEHR,

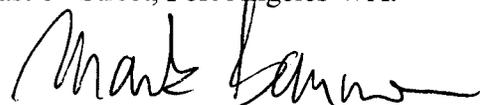
Respondent.

Court of Appeals No 40307-2-II

CONFIRMATION OF SERVICE

The undersigned hereby certifies that on October 27, 2010 a copy of respondent's brief was personally hand delivered to attorney Steve Robins, at 816 East 8th Street, Port Angeles WA.

Respectfully submitted this October 27, 2010.



~~Amber Reeves~~

Mark Bauman